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THE
LAW JOURNAL REPORTS

FOR
THE YEAR 1859 :

COMPRISING
REPORTS OF CASES

In the House of Lords,

AND IN THE COURTS OF

**Chancery and in Bankruptcy,
Probate and Divorce and Matrimonial Causes,
Queen's Bench and the Bail Court,
Common Pleas, Exchequer, and Exchequer Chamber,**

FROM
MICHAELMAS TERM 1858, TO TRINITY TERM 1859,
BOTH INCLUSIVE.

The House of Lords Cases are given in the Courts of Chancery and Common Law respectively ; Decisions in Error and on Appeal in the Exchequer Chamber will be found in the respective Courts from which the Errors and Appeals come ; the Common Pleas includes the Appeals from Revising Barristers ; and the County Court Appeals are in the Queen's Bench, Common Pleas, and Exchequer respectively.

A SEPARATE ARRANGEMENT OF CASES RELATING TO THE DUTIES OF MAGISTRATES, INCLUDING CROWN CASES RESERVED.

EDITED BY
MONTAGU CHAMBERS, Esq. ONE OF HER MAJESTY'S COUNSEL,
FRANCIS TOWERS STREETEN, Esq.
AND
GEORGE STEVENS ALLNUTT, Esq. BARRISTERS-AT-LAW.

VOL. XXXVII.

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NAMES OF THE REPORTERS.

1859.

In the House of Lords,

W. WAKEFORD ATTREE, Esq. BARRISTER-AT-LAW.

Lord Chancellor's Court,

GEORGE STEVENS ALLNUTT, Esq. BARRISTER-AT-LAW.

Court of Appeal in Chancery,

SAMUEL VALLIS BONE, Esq. BARRISTER-AT-LAW.

Rolls Court,

THOMAS PARKER, JUN. Esq. BARRISTER-AT-LAW.

Court of the First Vice Chancellor,

THOMAS WYATT GUNNING, Esq. BARRISTER-AT-LAW.

Court of the Second Vice Chancellor,

FRANCIS FISHER, Esq. BARRISTER-AT-LAW.

Court of the Third Vice Chancellor,

CHARLES EDWARD HAWKINS, Esq. BARRISTER-AT-LAW.

Cases in Bankruptcy,

SAMUEL VALLIS BONE, Esq. BARRISTER-AT-LAW.

Courts of Probate and Matrimonial Causes,

GEORGE HENRY COOPER, Esq. BARRISTER-AT-LAW.

Court of Queen's Bench,

WILLIAM MILLS, Esq.

AND

ROBERT SAWYER, Esq. BARRISTERS-AT-LAW.

Bail Court, Exchequer Chamber, and Crown Cases Reserved,

FRANCIS RUSSELL, Esq. BARRISTER-AT-LAW.

Court of Common Pleas,

JAMES REDFOORD BULWER, Esq.

AND

WILLIAM PATERSON, Esq. BARRISTERS-AT-LAW.

Court of Exchequer,

JAMES EDWARD DAVIS, Esq.

AND

WILLIAM FRANCIS FINLASON, Esq. BARRISTERS-AT-LAW.

CASES RELATING TO MAGISTRATES,

REPORTED PRINCIPALLY BY

WILLIAM MILLS, Esq.,

ROBERT SAWYER, Esq. and FRANCIS RUSSELL, Esq.

BARRISTERS-AT-LAW.

JUDGES AND LAW OFFICERS.

FROM MICHAELMAS TERM 1858, TO TRINITY TERM 1859, BOTH INCLUSIVE.

IN THE COURTS OF CHANCERY.

The Right Hon. LORD CHELMSFORD, Lord High Chancellor.
The Right Hon. LORD CAMPBELL, Lord High Chancellor.
The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., Lord Justice.
The Right Hon. Sir GEORGE JAMES TURNER, Lord Justice.
The Right Hon. Sir JOHN ROMILLY, Knt., Master of the Rolls.
The Hon. Sir RICHARD TORIN KINDERSLEY, Knt., Vice Chancellor.
The Hon. Sir JOHN STUART, Knt., Vice Chancellor.
The Hon. Sir WILLIAM PAGE WOOD, Knt., Vice Chancellor.

COURT OF APPEAL IN BANKRUPTCY.

The Right Hon. Sir JAMES LEWIS KNIGHT BRUCE, Knt., }
The Right Hon. Sir GEORGE JAMES TURNER, } Lords Justices.

IN THE COURT OF PROBATE AND MATRIMONIAL CAUSES.

The Right Hon. Sir CRESSWELL CRESSWELL, Knt., Judge Ordinary.

IN THE COURT OF QUEEN'S BENCH.

The Right Hon. LORD CAMPBELL, Chief Justice.
The Hon. Sir ALEXANDER COCKBURN, Knt., Chief Justice.
The Hon. Sir WILLIAM WIGHTMAN, Knt.
The Right Hon. Sir WILLIAM ERLE, Knt.
The Hon. Sir CHARLES CROMPTON, Knt.
The Hon. Sir HUGH HILL, Knt.

IN THE COURT OF COMMON PLEAS.

The Right Hon. Sir ALEXANDER COCKBURN, Knt., Chief Justice.
The Right Hon. Sir WILLIAM ERLE, Knt., Chief Justice.
The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.
The Hon. Sir RICHARD BUDDEN CROWDER, Knt.
The Hon. Sir JAMES SHAW WILLES, Knt.
The Hon. Sir JOHN BARNARD BYLES, Knt.

IN THE COURT OF EXCHEQUER.

The Right Hon. Sir FREDERICK POLLOCK, Knt., Chief Baron.
The Hon. Sir SAMUEL MARTIN, Knt.
The Hon. Sir GEORGE WILLIAM WILSHERE BRAMWELL, Knt.
The Hon. Sir WILLIAM HENRY WATSON, Knt.
The Hon. Sir WILLIAM FRY CHANNELL, Knt.

Sir FITZROY KELLY, Knt., Attorney General.
Sir RICHARD BETHELL, Knt., Attorney General.
Sir HUGH M'CALMONT CAIRNS, Knt., Solicitor General.
Sir HENRY SINGER KEATING, Knt., Solicitor General.

PREFERMENTS AND MEMORANDA.

In the vacation after *Michaelmas Term* 1858, HUNTER RODWELL, Esq., of the Middle Temple, G. M. GIFFARD, Esq., of the Inner Temple, and HENRY HAWKINS, Esq., of the Middle Temple, were appointed Her Majesty's Counsel learned in the law.

In *Trinity Term*, J. HINDE PALMER, Esq., of Lincoln's Inn, ARCHIBALD JOHN STEPHENS, Esq., of Gray's Inn, and WILLIAM DAVID LEWIS, Esq., of Lincoln's Inn, were appointed Her Majesty's Counsel learned in the law.

In the same Term, LORD CHELMSFORD resigned the Great Seal, whereupon LORD CAMPBELL, Lord Chief Justice of the Queen's Bench, was appointed Lord High Chancellor.

SIR ALEXANDER EDMUND COCKBURN, Chief Justice of the Court of Common Pleas, was appointed Lord Chief Justice of England.

SIR WILLIAM ERLE, one of the Judges of the Court of Queen's Bench, was appointed Lord Chief Justice of the Court of Common Pleas.

In the same Term, SIR FITZROY KELLY and SIR HUGH M'CALMONT CAIRNS resigned the offices of Attorney and Solicitor General, and were succeeded by SIR RICHARD BETHELL and SIR HENRY SINGER KEATING.

In the vacation after *Trinity Term*, COLIN BLACKBURN, Esq., of the Inner Temple, was appointed one of the Judges of the Court of Queen's Bench in the room of SIR WILLIAM ERLE, and upon receiving the degree of the coif, gave rings with the motto "*Promere Jura.*" He afterwards received the honour of knighthood.

REPORTS
OF
CASES ARGUED AND DETERMINED
In the House of Lords,
BY
W. WAKEFORD ATTREE, Esq. BARRISTER-AT-LAW.

AND IN THE
Courts of Chancery,

BY
GEORGE STEVENS ALLNUTT, Esq.,
SAMUEL VALLIS BONE, Esq., THOMAS PARKER, JUN. Esq.,
THOMAS WYATT GUNNING, Esq.,
FRANCIS FISHER, Esq.
AND
CHARLES EDWARD HAWKINS, Esq.
BARRISTERS-AT-LAW.

DURING FOUR TERMS,
VIZ.
MICHAELMAS 1858, HILARY, EASTER AND TRINITY, 1859.
22 & 23 VICTORIÆ.

GENERAL ORDERS AND RULES
OF
THE HIGH COURT OF CHANCERY,
ISSUED BY THE LORD HIGH CHANCELLOR.

ORDERS OF COURT.

*Wednesday, the 30th day of March, in the 22nd Year of the Reign of Her Majesty
Queen Victoria, 1859.*

THE Right Honourable FREDERIC Lord Chelmsford, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable Sir JOHN ROMILLY, Master of the Rolls, The Right Honourable the Lord Justice Sir JAMES LEWIS KNIGHT BRUCE, The Right Honourable the Lord Justice Sir GEORGE JAMES TURNER, The Honourable the Vice Chancellor Sir RICHARD TOBIN KINDERSLEY, The Honourable the Vice Chancellor Sir JOHN STUART, and The Honourable the Vice Chancellor Sir WILLIAM PAGE WOOD, Doth hereby, in pursuance and execution of all powers and authorities enabling him in that behalf, Order and direct that all and every the Rules, Orders, and Directions hereinafter set forth, be, and for all purposes be deemed and taken to be, General Rules and Orders of the High Court of Chancery.—

1. In the following Orders, unless there be something in the subject-matter or context repugnant to such a construction, words expressed in the singular and in the plural number respectively, shall be construed as applicable respectively to several persons or things, or to one person or thing; the word "Order" shall include a Decree; words importing the masculine gender shall include females; the word party shall mean any person appearing at the hearing of the cause, or of the application

respectively, as the case may be, and shall include a body politic or corporate, and when any period is specified, the same shall be computed exclusive of vacations.

2. At the time of bespeaking an Order, the person bespeaking the same is to leave with the Registrar his counsel's briefs, and such other documents as may be required by the Registrar for the purpose of enabling him to draw up the same.

3. Every order is to be bespoken, and the briefs and such other documents as by Order 2. are required to be left with the Registrar on bespeaking the same, are to be so left within seven days after the Order is pronounced or finally disposed of by the Court.

4. In case any Order is not bespoken, and the briefs and other requisite documents left with the Registrar within the time prescribed by Order 3., the Registrar may decline to draw up the Order without the leave of the Court.

5. At the time of delivering out the draft of any Order which requires to be settled by the Registrar in the presence of the parties, the Registrar is to deliver out to the party on whose application the draft has been prepared, an appointment in writing of a time for settling the same.

6. A copy of such appointment is to be served on the opposite party one clear day at least before the time fixed thereby for settling the draft Order, and the party serving such copy, and the party so served, are to attend such appointment, and to produce to the Registrar their briefs, and such other documents, as may be necessary to enable him to settle the draft.

7. Service of such appointment is to be effected by leaving a copy thereof at the place for service of the party to be served, or by transmitting a copy thereof by the post to such party at such place for service.

8. At the time fixed for settling the draft, the original appointment, together with a memorandum indorsed thereon of the service of a copy thereof on the opposite party, and signed by the person by whom such service was effected, shall be delivered to the Registrar, in order that he may be satisfied that service has been duly effected: but the Registrar may require such service to be verified by affidavit.

9. When the draft Order has been settled by the Registrar, he is to name a time in the presence of the several parties, or else to deliver out an appointment in writing of a time for passing the order, which appointment is to be served on the opposite party in like manner, as directed by Order 7, with reference to an appointment to settle the draft Order, and similar evidence of service thereof is to be produced and received.

10. If any party fails to attend the Registrar's appointment to settle the draft of any Order, or to pass the Order, or to produce his briefs and such other documents as the Regis-

trar may require to enable him to settle such draft, or pass such Order, the Registrar may proceed to settle the draft or pass the Order in his absence.

11. In any case in which the Registrar may not think fit to proceed in the absence of the party failing to attend or to produce his briefs, and such other documents as aforesaid, the Registrar is to be at liberty to dispense with the production of counsel's briefs, and to act upon such evidence as he may think fit, of the actual appearance by counsel of the party failing to attend or to produce such documents or papers as aforesaid, or may require the matter to be mentioned to the Court.

12. The Registrar's appointment may be in the following form:—

Chancery Registrar's Office, Chancery Lane.

"A. v. B."

or, "In the matter of A."

I have appointed the day of 1859, at Eleven o'clock in the forenoon, to settle the draft of the Decree [or, "Order"], [or, "to pass the Decree or Order"], pronounced in this cause [or, "matter"] by [The Master of the Rolls] on the day of

H. E. BICKNELL,
Registrar.

13. The Registrar's appointments, with the indorsements (if any) thereon, are to be filed by the Registrar.

14. The Registrar may adjourn any appointment to settle the draft of any Order, or to pass the Order to such time as he may think fit, and the parties who attended the appointment shall be bound to attend such adjournment without further notice.

15. Notwithstanding the preceding Orders, the Registrar is to be at liberty, in any case in which he may think it expedient so to do, to settle and pass the Order without making any appointment for either purpose, and without notice to any party.

16. At the foot of every petition presented to the Lord Chancellor or the Master of the Rolls, a statement is to be made of the parties or persons, if any, intended to be served therein; and if no party or person is intended to be served with such petition, a statement to that effect is to be made at the foot of the petition.

17. Where any person is by any Order directed to pay any money or deliver up any

property to another, it shall not be necessary to make any demand of the money or other property directed to be paid or delivered; but the person directed to pay such money or deliver up such property shall be bound to pay or deliver over the same upon being duly served

with such Order without demand, and process of contempt may issue accordingly to enforce performance thereof.

18. These Orders shall take effect and come into operation on the 15th day of April, 1859.

CHELMSFORD, C.

JOHN ROMILLY, M.R.

J. L. KNIGHT BRUCE, L.J.

G. J. TURNER, L.J.

RICHD. T. KINDERSLEY, V.C.

JOHN STUART, V.C.

W. P. WOOD, V.C.

ORDER OF COURT,

Monday, the 4th day of April, in the 22nd Year of the Reign of her Majesty Queen Victoria, 1859.

THE Right Honourable FREDERIC BARON CHELMSFORD, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable SIR JOHN ROMILLY, Master of the Rolls, The Right Honourable SIR JAMES LEWIS KNIGHT BRUCE, and The Right Honourable SIR GEORGE JAMES TURNER, the Lords Justices of the Court of Appeal in Chancery, The Honourable the Vice Chancellor, SIR RICHARD TORIN KINDERSLEY, The Honourable the Vice Chancellor, SIR JOHN STUART, and The Honourable the Vice Chancellor, SIR WILLIAM PAGE WOOD, Doth hereby, in pursuance of the Act passed in the Session of Parliament holden in the 21st and 22nd years of the reign of Her present Majesty, intituled "An Act to amend the course of procedure in the High Court of Chancery, the Court of Chancery in Ireland, and the Court of Chancery in the County Palatine of Lancaster," and in pursuance and execution of all other powers enabling him in that behalf, Order and direct in manner following, that is to say :—

1. These Orders are, as to all suits now depending or hereafter to be commenced, to take effect on the day of the date hereof.

2. In these Orders the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, videlicet :—

1. Words importing the singular number include the plural number, and words importing the plural number include the singular number.
2. Words importing the masculine gender include females.
3. The word person or party includes a body politic or corporate.
4. The word plaintiff includes informant.

3. Any question of fact, or any question as to the amount of damages which shall in any suit or proceeding be directed by any order to be tried by a jury before the Court itself, or before the Court itself without a jury, shall be reduced into writing in the form set forth in the Schedule to these Orders, and the same shall be copied on parchment by the plaintiff or such party or person as the Court shall direct, or by the solicitor for such plaintiff, party or person, and shall be called the "Record for Trial," and the same shall be filed with the Clerk of Records and Writs in whose divi-

sion such suit or proceeding may be, within three days after such Order shall have been passed and entered, and within three days after such filing as aforesaid the same shall be entered for trial as hereinafter mentioned.

4. Where the Court shall order that such question or questions should be tried by a special jury, a direction to that effect shall be contained in the order directing such trial.

5. Upon production to the Registrar of a certificate of the Clerk of Records and Writs that the "Record for Trial" has been filed, the same shall be entered for trial in the Cause Book of the Judge to whose Court the suit or proceeding is attached, and shall be marked "Trial by Jury," or "Trial before the Court without a Jury," as the case may be, and either party may apply to the Court to fix a day for such trial.

6. Where such trial is to take place by a common jury before the Court itself, the plaintiff or such party or person as aforesaid, is, ten days at the least before the day fixed for such trial, to obtain, on motion or petition as of course, and serve on the Sheriff, or, if he is interested in the matter in question, then upon the Coroner, an order for such Sheriff or Coroner to summon a common jury for such trial, which Order shall be in the form set forth in the Schedule to these Orders.

7. Where the Court shall have specially directed such question or questions to be tried by a special jury, the plaintiff, or other such party or person as aforesaid, shall, ten days at the least before the day fixed for such trial, obtain on a motion a petition as of course, and serve on the Sheriff or Coroner as aforesaid, and on the opposite party an Order for a special jury, which Order shall be in the form set forth in the Schedule to these Orders, and the expense of such special jury shall in the first instance be borne and paid by the plaintiff or other such party or person as aforesaid, but shall afterwards be paid and borne as the Court shall direct.

8. Where the Court shall not have specially directed such question or questions to be tried by a special jury, either party shall be at liberty, fourteen days at the least before the day fixed for such trial, to obtain on motion or petition of course, an Order for a special jury, and shall serve the same on the opposite party twelve days at the least, and on the Sheriff or Coroner ten days at the least, before the day fixed for such trial, and the expense of such special jury shall in the first instance be borne by the party obtaining the same; but if the Court upon such trial shall be of opinion that it was proper that such trial should be had by a special jury, the Court may give such directions as to the costs thereof as it shall think fit.

9. Where an Order shall have been made for a special jury, such Sheriff or Coroner shall, in addition to the special jurors, summon twelve common jurymen for such trial, in order that, in the event of a sufficient number of special jurors not being in attendance to make a jury, a tales may be ordered by the Court or prayed for by either party, as hereinafter provided for.

10. The Order for any such common or special jury as aforesaid shall be returned by such Sheriff or Coroner to the solicitor or party or person who shall have lodged the same, together with his return and the jury panel, and such Order and jury panel shall, two days at the least before the day of trial, be left with the Clerk of Records and Writs to be annexed to the Record for trial.

11. Where the trial shall have been specially directed by the Court to be by a special jury, then in the event of there not being a sufficient number of special jurymen in attendance to make such jury, it shall be in the discretion of the Court whether or not to have such jury made up from the common jurymen in attendance.

12. Where a special jury shall have been summoned at the instance of either party, with-

out the special direction of the Court, then in the event of a sufficient number of special jurymen not being in attendance to make such jury, the same shall, unless the Court shall otherwise direct, be made up from the common jurymen in attendance, on the application of either party.

13. Either party shall be at liberty to apply by summons to a Judge at chambers for a view by the jury summoned for any trial, and on the hearing of such summons each party shall name a shower for such view, and any order to be made on such application shall be in the form set forth in the Schedule to these Orders.

14. The summons for a view, and the order to be made thereon, shall state the place at which the view is to be made, and the distance thereof from the office of the Under-Sheriff; and the sum to be deposited in the hands of the Under-Sheriff shall be 10*l*. in case of a common jury, and 16*l*. in case of a special jury, if such distance shall not exceed five miles, and 15*l*. in case of a common jury, and 21*l*. in case of a special jury, if it shall be above five miles; and if such sum shall be more than sufficient to pay the expenses of the view, the surplus shall forthwith be returned to the solicitor or party who obtained the view, and if such sum shall not be sufficient to pay such expenses the deficiency shall forthwith be paid by such solicitor or party to the Under-Sheriff, and the Under-Sheriff shall pay and account for the money so deposited according to the scale following, that is to say:—

£. s. d.

For travelling expenses to the Under-Sheriff, showers, and jurymen, expenses actually paid, if reasonable.				
Fee to the Under-Sheriff when the distance does not exceed five miles from his office.	1	1	0	
Where such distance exceeds five miles	2	2	0	
And in case he shall be necessarily absent more than one day, then for each day after the first, a further fee of	1	1	0	
Fee to each of the showers, the same as the Under-Sheriff, calculating the distance from their respective places of abode.				
Fee to common jurymen, each per diem	0	5	0	
For each special jurymen, per diem	1	1	0	
Allowance for refreshment to the Under-Sheriff, showers, and jurymen, whether common or special, each per diem		0	5	0
To the bailiff, for summoning each jurymen whose residence shall not be more than five miles distant from the office of the Under-Sheriff.	0	2	6	
And to each whose residence does exceed five miles of such distance	0	5	0	

15. The mode and practice of proceeding to nominate and reduce a special jury, and the proceedings after any order for a view shall have been made as aforesaid, shall be the same in all respects as are now or for the time being shall be in force in the superior courts of common law, when a special jury is ordered to be struck, or a view is to be had, or as near thereto as the practice of this Court will admit.

16. The notice to admit documents may be according to the form set forth in the Schedule to these Orders.

17. Where the Court shall award damages and direct a trial as to the amount of such damages before the Court itself, either with or without a jury or a writ of inquiry of damages as hereinafter provided for, or an inquiry as to the amount of damages in any other manner, the defendant or other the party or person against whom damages shall have been awarded may take out a summons before a Judge at chambers for liberty to pay into court a sum of money in respect of such damages, and in case such liberty shall be given and a sum of money shall be paid into court accordingly, then in the event of a larger sum for damages not being awarded, than the amount so paid into court, the plaintiff or party or person seeking such damages, shall pay the costs of such trial or writ of inquiry or inquiry in any such other manner as aforesaid, unless the Court shall otherwise direct.

18. On the day appointed for any trial, and previously to the commencement thereof, the record for trial with the return and jury panel (if any) annexed thereto, shall be transmitted by the Clerk of Records and Writs to the Registrar of the Court in attendance, and a copy thereof shall be left for the Judge before whom such trial is appointed to be had, by the party or person at whose instance the same may have been entered for trial.

19. The jurors shall be called by the Registrar of the Court, and the oath shall be administered to them by such Registrar, and shall be in the form set forth in the Schedule to these Orders, and the oath (or declaration as the case may be) shall also be administered by the Registrar of the Court to the witnesses, and shall be in the form set forth in the Schedule to these Orders.

20. Upon every such trial the addresses to the jury or to the Court, as the case may be, shall be regulated as follows :—The party who begins, or his counsel, shall be allowed, in the event of his opponent not announcing at the close of the case of the party who begins, his intention to adduce evidence, to address the

jury a second time at the close of such case, for the purpose of summing up such evidence, and the party on the other side, or his counsel, shall be allowed to open the case, and also to sum up the evidence (if any), and the right to reply shall be the same as at present in force in the superior courts of common law on trials at Nisi Prius.

21. Where the jury shall retire from the court to consider their verdict, they shall be taken charge of by the Usher of the Court; but previously thereto the Registrar of the Court shall administer to such Usher the oath according to the form set forth in the Schedule to these Orders.

22. The verdict or finding of the jury, or of the Court, as the case may be, shall be indorsed by the Registrar of the Court on the Record for the Trial, and shall be signed by him, and then returned to the Office of the Clerks of Records and Writs to be filed, and if the trial shall have been by a jury, then with the jury panel and the names of the jurors who were sworn indorsed thereon.

23. The notice of any application for a new trial, whether to the Judge before whom such trial shall have been had, or to the Court of Appeal in Chancery, shall be given for the times following, that is to say :—If such trial shall have been had in Hilary, Trinity, or Michaelmas Term, then not later than for the third seal after such terms respectively; and if such trial shall have been had in Easter Term, or during the sittings after Hilary, Trinity, or Michaelmas Term, then not later than for the third motion day in the term then next ensuing.

24. Where the Court shall award damages to any party or person, by virtue of the powers contained in the 2nd section of the said Act, and shall order the amount of such damages to be assessed by a jury before any Judge of one of the superior courts of common law at Nisi Prius, or at the assizes, or before the sheriff of any county or city, the party or person to whom such damages shall be awarded shall be at liberty to sue out at the Office of the Clerks of Records and Writs a Writ of Inquiry of damages according to the form set forth in the Schedule to these Orders.

25. The rules now in force in the courts of common law relative to Notices of Inquiry shall be applicable to Notices of Inquiry under any Writ of Inquiry to be issued by virtue of the last preceding Order.

26. The return to the Writ of Inquiry of the verdict or inquisition, shall be in the form

set forth in the Schedule to these Orders, and the Writ of Inquiry, with such return thereto, shall, within ten days after such return, be filed at the Office of the Clerks of Records and Writs.

27. Any application to set aside the verdict or inquisition or any such Writ of Inquiry, and to direct a new inquiry, shall be made within ten days after the filing thereof, exclusive of any days on which the Court to which such application ought to be made shall not be sitting.

28. Either party shall be at liberty to sue

out at the Record and Writ Clerks' Office *subpoenas ad testificandum*, and *subpoenas duces tecum*, to compel the attendance of witnesses on any trial according to the forms now, or which for the time being shall be in use in this Court or as near thereto as the circumstances of each case will admit.

29. The forms of proceedings contained in the Schedule to these Orders may be used in the cases to which they are applicable, with such alterations as the circumstances of the case may render necessary; and any variance therefrom, not being a matter of substance, shall not affect their validity or regularity.

THE SCHEDULE ABOVE REFERRED TO.

1. *Form of Record for Trial of a Question or Questions of Fact.*

In Chancery.

Title of Cause or Matter.

By an Order made in this cause (*or*, matter), dated &c., the Court hath directed that the following question or questions of fact be tried by a jury before the Court itself, (*or*, before the Court itself without a jury) (that is to say) :

Whether, &c.

If more questions than one, number them consecutively, 1, 2, 3, &c.

2. *Form of Record for Trial as to Amount of Damages.*

In Chancery.

Title of Cause or Matter, &c.

Whereas, by an Order made in this cause (*or*, matter), dated &c., the Court hath awarded damages to the plaintiff in respect of the matters in the said Order mentioned, and hath directed that the amount of such damages shall be assessed by a jury before the Court itself, (*or*, before the Court itself without a jury).

The question is, what amount of damages the plaintiff hath sustained by reason of the matters in the said Order mentioned.

3. *Form of Order to summon a Common Jury.*

In Chancery.

Title of Cause or Matter.

Upon the humble petition of the _____ (*or*, upon motion this day made, &c.) It is ordered that the Sheriff of Middlesex do summon a sufficient number of common jurors for the trial of a certain question of fact, (*or*, as to the amount of damages sustained by the plaintiff, *as the case may be*) in this cause to be tried before the Right Honourable the Lord High Chancellor in his Court at Lincoln's Inn Hall, in the county of Middlesex, (*or*, other the Judge before whom and the Court in which the trial is to take place), on the _____ day of _____ 185 at Ten of the clock in the forenoon precisely. And it is ordered that the said sheriff do attend with the said jurors accordingly.

4. *Form of Order for a Special Jury.*

Title of Cause or Matter.

Upon the humble petition, &c. It is ordered that at the expense of the plaintiff (or, defendant) in the first instance, forty-eight special jurors shall be nominated by ballot out of the special jurors list for the county of _____, of persons qualified to serve on special juries for the said county, and be reduced before the Under-Sheriff of the said county, of whom, twelve shall be struck out by each party, and the names of the remaining twenty-four shall be placed on a panel for the trial of a certain question of fact (or, as to the amount of damages sustained by the plaintiff, *as the case may be*) in this cause, and that the said Sheriff of the said county do cause the said twenty-four jurors to be summoned to attend at the said trial, on &c. (*as in preceding form*), and that the said Sheriff do also summon twelve common jurors to attend at the said trial on the day and at the time and place aforesaid. And it is ordered that the said Sheriff and the said jurors do attend accordingly.

N.B.—If special jury, obtained on the application of either party without the special direction of the Court, leave out the words "in the first instance."

5. *Form of Order for a View.*

In Chancery.

Title of Cause or Matter.

Upon application, &c. It is ordered that the Sheriff of _____ shall cause the place in question to be shewn to six or more of the jury (or, if a special jury, say, six or more of the first twelve jurors,) summoned and impannelled to try the question (or, questions) between the said parties, or as many more of them as he shall think fit, to take a view of the place in question, on the _____ day of _____ next, at _____ of the clock, in the forenoon of the same day, which said jurors shall meet at the house of I. P., known by the name or sign of _____ at _____ in the county (or, city) of _____ who shall then and there be refreshed at the equal charge of the said parties, and that S. P. on the part of the plaintiff, and S. D. on the part of the defendant, shall shew the place in question to those jurors; but that no evidence shall be then and there given to the said jurors, and the Sheriff of _____ shall return the names of such of the said jurors as shall view the said place to the Registrar in the Court of Chancery, for the purpose of their being called as jurymen upon the trial of the said question (or, questions). And it is further ordered that the plaintiff (or, defendant), his attorney or agent, shall deposit in the hands of the Under-Sheriff of the said county, the sum of £ _____ for payment of the expenses of the same view, pursuant to the Order of Court made on the _____ day of _____ and if such sum shall be more than sufficient to pay the expenses of the said view, the surplus shall be forthwith returned to the plaintiff's (or, defendant's) solicitor; and if such sum shall not be sufficient to pay such expenses, the deficiency shall be paid forthwith by the said plaintiff's (or defendant's) solicitor to the said Under-Sheriff, the plaintiff (or, defendant) hereby consenting that in case no view shall be had, or if a view shall be had by any of the said jurors, whether they shall happen to be six or any particular number of the jurors who shall be so mutually consented to as aforesaid yet the said trial shall proceed, and no objection shall be made on account thereof.

6. *Form of Notice to Inspect and Admit.*

In Chancery.

Title of Cause or Matter.

Take notice that the (plaintiff or, defendant) proposes to adduce in evidence on the trial in this cause the several documents hereunder specified, and that the same may be inspected by the { defendant }
his solicitor or agent, at _____ on _____ between the hours of _____, and
the { defendant }
plaintiff } is hereby required within forty-eight hours from the last-mentioned hour, to admit that
such of the said documents as are specified to be originals, were respectively written, signed, or executed as they purport respectively to have been, that such as are specified as copies are true copies, and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence on such trial.
Dated, &c.

To E. F., solicitor
(or, agent for) { defendant }
plaintiff }

G. H., solicitor
(or, agent for) { plaintiff }
defendant. }

Here describe the documents, the manner of doing which may be as follows :—

ORIGINALS.

Description of the Documents.	Date.
Deed of Covenant between A.B. & C.D., 1st part, and E.F., of the 2nd part	1st January, 1848.
Indenture of Lease from A.B. to C.D.	1st February, 1848.
Indenture of Release between A.B.C.D., 1st part, &c.	2nd February, 1848.
Letter Defendant to Plaintiff	1st March, 1848.
Policy of Insurance on Goods	3rd December, 1848.
Bill of Exchange for £100 at 3 months, drawn by A.B. on and accepted by C.D., indorsed by E.F. and G.H.	1st May, 1840.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered when, how, and by whom.
Register of Baptism of A. B. in the parish of X.	1st Jan., 1808.	Sent by General Post, 2nd Feb., 1848. Served 2nd Mar. 1848, on Defendant's Solicitor by E. F. of
Letter from Plaintiff to Defendant	1st Feb., 1848.	
Notice to produce Papers	1st Mar., 1848.	
Letters Patent of King Charles Second in the Rolls Chapel	1st Jan., 1680.	

7. Form of Oath to be administered to the Jurors.

You shall well and truly try the question (or, questions) between the parties, and a true verdict give according to the evidence. So help you God.

8. Form of Oath to be administered to a Witness.

The evidence you shall give to the Court and Jury (or, the Court, as the case may be) touching the matters in question, shall be the truth, the whole truth, and nothing but the truth. So help you God.

9. Form in case the Witness has conscientious objections to take an Oath.

The witness is to repeat, after the Registrar, as follows, verbatim: I (A.B.) do solemnly, sincerely, and truly affirm and declare, that the taking of any oath is, according to my religious belief, unlawful. And I do also solemnly and truly affirm and declare that the evidence I shall give to the Court and Jury (or, the Court, as the case may be), shall be the truth, the whole truth, and nothing but the truth.

10. Form of Oath to be taken by the Usher of the Court, on Jury retiring to consider their Verdict.

You shall well and truly keep this Jury in some private and convenient place, without meat, drink, or fire, (candle-light excepted.) You shall not suffer any person to speak to them, neither shall you speak to them yourself, without leave of the Court, except to ask them if they are agreed on their verdict.

11. *Form of Writ of Inquiry before the Sheriff.*

**Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland Queen,
Defender of the Faith.**

To the Sheriff of _____ Greeting. Whereas, by an Order of His Honour the Master of the Rolls, made in this cause (or, matter), dated, &c. His Honour awarded damages to be recovered by A. B. against the said C. D. in respect of, &c., (*take words from the Order.*) But because it is unknown to Our said Court what damages the said A. B. hath sustained by means of the premises aforesaid, therefore we command you, that by the oath of twelve good and lawful men of your bailiwick (*if by a special jury, add here the words* "qualified to serve as special jurors, such jury to be struck and reduced according to law"), you diligently inquire what damages the said A. B. hath sustained by means of the premises aforesaid, and that you send to Us, in Our Court of Chancery aforesaid, on _____

the inquisition which you shall thereupon take under your seal, and the seals of those by whose oath
you shall take that inquisition, together with this Writ. Witness Ourself, at Westminster, the
day of in the year of Our reign.

12. Form of Writ of Inquiry to a County Palatine.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To Our Chancellor of Our county palatine of Lancaster, or to his deputy there, greeting. Whereas (as in preceding form). But because it is unknown to Our said Court what damages the said A. B. hath sustained by means of the premises aforesaid. Therefore, we command you, that by Our writ, under the seal of Our said county palatine, to be duly made and directed to the Sheriff of the same county, you command the said Sheriff, that by the oath of twelve good and lawful men of his bailiwick (if by a special jury, add the words as in preceding form), he diligently inquire what damages the said A. B. hath sustained by means of the premises aforesaid, and that you send to Us in Our said Court of Chancery, on the _____ day of _____ the inquisition which the said sheriff shall thereupon take under his seal, and the seals of those by whose oath he shall take that inquisition, together with this writ.

Witness Ourselves at Westminster, the day of , in the year
of Our reign.

13. *Form of Inquisition on Writ of Inquiry.*

To wit, }

An inquisition taken at the House of _____, called or known by name or sign of the _____ in the _____ in the said county of _____, on the _____ day of _____, in the _____ year of the reign of our Sovereign Lady Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, and in the year of our Lord, 18 _____, before _____, Esquire, Sheriff of the county aforesaid, by virtue of a writ of Our Sovereign Lady the Queen, to the said Sheriff directed, and to this inquisition annexed, to inquire of certain matters in the said writ specified by the oaths of

twelve honest and lawful men of the said county, who upon their oaths say that _____ in the said writ named hath sustained damages to the sum of £ _____, by the means in the said writ mentioned.

In witness whereof, as well I the said Sheriff, as the jurors aforesaid, have hereunto set our hands and seals the day and year and place above mentioned.

14. *Form of Writ of Inquiry of Damages to be executed before the Justices of Assize.*

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith. To the Sheriff and to Our Justices assigned to take the Assizes in and for the county of _____, greeting. Whereas (*as in the foregoing forms*). But because it is unknown to Our said Court what damages the said A. B. hath sustained by means of the premises aforesaid. Therefore, according to the statute in such case made and provided, We command you, the said Sheriff, that you summon twelve good and lawful men of your bailiwick (*if by a special jury, add here the words "qualified to serve on special juries, such jury to be struck and reduced according to law"*), to appear before Our said Justices of Assize, on the _____ day of _____, at _____, in the said county by Ten of the clock in the forenoon of that day, to diligently inquire, and on their oath to assess the damages which the said A. B. hath sustained by means of the premises aforesaid, and that you, the said Sheriff, have on that day before the said Justices of Assize, this writ. We likewise command Our said Justices that they certify the inquisition before them taken, to Us in our Court of Chancery at Westminster, on the _____ day of _____ next, together with the names of those by whose oath such inquisition shall be taken, and that they also have then there this writ. Witness Ourselves at Westminster, the _____ day of _____ in the _____ year of Our reign.

CHELMSFORD, C.

JOHN ROMILLY, M.R.

J. L. KNIGHT BRUCE, L.J.

G. J. TURNER, L.J.

RICHD. T. KINDERSLEY, V.C.

JOHN STUART, V.C.

W. P. WOOD, V.C.

GENERAL ORDERS AND RULES
OF
THE HIGH COURT OF CHANCERY

ISSUED BY THE LORD HIGH CHANCELLOR.

ORDERS OF COURT.

*Monday, the 22nd day of August, in the 23rd Year of the Reign of Her Majesty
Queen Victoria, 1859.*

THE Right Honourable JOHN Lord CAMPBELL, Lord High Chancellor of Great Britain, by and with the advice and assistance of The Right Honourable Sir JOHN ROMILLY, Master of the Rolls, The Right Honourable the Lord Justice Sir JAMES LEWIS KNIGHT BRUCE, The Right Honourable the Lord Justice Sir GEORGE JAMES TURNER, The Honourable the Vice Chancellor Sir RICHARD TORIN KINDERSLEY, The Honourable the Vice Chancellor Sir JOHN STUART, and The Honourable the Vice Chancellor Sir WILLIAM PAGE WOOD, Doth hereby, in pursuance and execution of all powers and authorities enabling him in that behalf, Order and direct that all and every the Rules, Orders and Directions hereinafter set forth be, and for all purposes be deemed and taken to be, General Rules and Orders of the High Court of Chancery.—

1. In these Orders, unless there be something in the subject-matter or context repugnant to such a construction, words expressed in the singular and in the plural number respectively, shall be construed as applied respectively to several persons or things, or to one person or thing; words importing the masculine gender shall include females; "the Accountant General" shall mean the Accountant General of the High Court of Chancery; the expression "the Bank" shall mean the Governor and Company

of the Bank of England; the word "person" shall mean any person, whether such person shall be a party to a suit or not, and shall include a body corporate or politic; the word "Order" shall include a Decree; the word "money" shall include interest or dividends on stock or securities, or any accumulations of interest or dividends.

2. Where, under or in pursuance of any General or Special Order, any money shall be

invested in the name of the Accountant General, and with his privity, in the purchase of any stocks, funds, shares or securities, or any stocks, funds, shares or securities shall be transferred into his name and with his privity in the books of the Bank or of any other public company, he is to declare the trust thereof to be to attend the Order of this Court, without any direction for that purpose in the Order directing such investment or transfer.

3. For the purpose of any payment or investment to be made under any General or Special Order of or out of any money in the Bank on the credit of any cause, matter, or account, the Accountant General is (without any direction for that purpose in such Order) to draw on the Bank according to the form prescribed by the Act of Parliament made and passed in the twelfth year of the reign of his Majesty King George the First, intituled "An Act for the better securing the Monies and Effects of the Suitors of the Court of Chancery, and to prevent the counterfeiting of East India Bonds and Indorsements thereon, and likewise Indorsements on South Sea Bonds," and the General Rules and Orders of this Court in that case made and provided.

4. Where any stocks, funds, shares, or securities standing in the books of the Bank or of any other public company, in the name of the Accountant General, in trust in or to the credit of any cause, matter, or account, shall by any Order be directed to be sold, the same are to be sold with the privity of the Accountant General, and one of the cashiers of the Bank is to have notice to attend and receive the money to arise by such sale, and upon receipt thereof, is forthwith to pay the same into the Bank, with the privity of the Accountant General, to the credit of the cause, matter, or account in which such stocks, funds, shares or securities were standing immediately before the sale, without any direction for that purpose in the Order directing such sale.

5. Where any money is directed to be paid out of court to the legal personal representatives of any person, or to any persons as legal personal representatives, the same or any portion thereof for the time being remaining unpaid, may, upon proof to the Accountant General of the death of any of such legal personal representatives, whether before, on or after the day of the date of the order, be paid to the survivors or survivor of them.

6. Where any money is directed to be paid

out of court to any person named in the Order, or named or to be named in any report or certificate, or his legal personal representatives, the same or any portion thereof for the time being remaining unpaid, may, on proof to the Accountant General of the death of such person, whether before, on, or after the day of the date of the Order, be paid to such legal personal representatives or the survivors or survivor of them.

7. Where any stocks, funds, shares or securities are directed to be transferred or delivered out of court to the legal personal representatives of any person, or to any persons as legal personal representatives of any person, the Registrar may, upon proof of the death of any such representatives, whether before, on, or after the day of the date of the order, issue a certificate authorizing the transfer or delivery of such stocks, funds, shares, or securities, to the survivors or survivor of them; and where any stocks, funds, shares or securities are directed to be transferred or delivered out of court to any person, or his legal personal representatives, the Registrar may, upon proof of the death of such person, whether before, on, or after the day of the date of the order, issue a certificate authorizing the transfer or delivery of such stocks, funds, shares, or securities, to such legal personal representatives, or the survivors or survivor of them. And in any of the cases hereinbefore mentioned, such stocks, funds, shares or securities, may be transferred or delivered accordingly.

8. No principal sum of money, nor any stocks, funds, shares, or securities, shall, under Order 6. or Order 7, be paid, transferred or delivered out of court to the legal personal representatives of any person, under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years from the day of the date of the order directing such payment, transfer, or delivery.

9. No interest or dividends shall, under Order 6, be paid out of court to the legal personal representatives of any person, under any probate or letters of administration purporting to be granted at any time subsequent to the expiration of six years after the day of the date of the order directing such payment, or after the last receipt of such interest or dividends under such order, which shall last happen.

10. Where any money is directed to be paid out of court to any persons named or to be

named in a Master's Report or Chief Clerk's Certificate, and such money shall by such Report or Certificate be certified to be due to them as partners, the same may be paid to any one or more of such partners.

11. Where, upon or after the death of any person to whom the interest or dividends of any stocks, funds, shares, or securities standing in the name of the Accountant General, in trust in or to the credit of any cause, matter or account, or any part of such interest or dividends, were or was payable for life, an Order shall be made for the sale, transfer, or delivery of such stocks, funds, shares or securities, or for payment of the interest or dividends to accrue due thereon subsequently to the death of such person; the same Order shall also provide for the payment to the legal personal representatives of such person, of such proportion of the interest or dividends on such stocks, funds, shares, or securities, as shall have accrued between the last period of payment, and the day of his death, unless the Court or Judge shall be of opinion that such legal personal representatives are not entitled thereto, or shall for any other reason otherwise direct.

12. The amounts of residues, and shares of residues, by the 28th General Order of the 21st day of December 1833, directed to be ascertained and specified by affidavit, shall be specified and ascertained by affidavit, without any direction for that purpose in the Order directing the application of any such residues or shares, unless such residues or shares shall be certified by the Taxing Master, who is to be at liberty to certify the same without a direction for that purpose in such Order.

13. Where any costs are by any Order directed to be taxed, and to be paid out of any money in court, the Taxing Master in his certificate of taxation is to state the total amount of all such costs as taxed, without any direction for that purpose in such Order.

14. Where, by any general or special Order, any money is directed to be laid out with the privity of the Accountant General, in the purchase of Exchequer bills or bonds to be deposited in the Bank to the credit of any cause, matter or account, and where any Exchequer bills or bonds shall be deposited in the Bank, with the privity of the Accountant General, to the credit of any cause, matter or account, any principal money or interest which may thereafter be received and paid into the Bank in respect of such bills or bonds, or of any bills

or bonds to be purchased with principal money or interest in pursuance of this Order, or in respect of any exchange bills or bonds, shall (unless the Order shall otherwise direct), from time to time as the same shall be so received and paid into the Bank, be also laid out in the purchase of Exchequer bills or bonds, with the privity of the Accountant General, and such Exchequer bills or bonds, when so purchased, shall be deposited in the Bank with the privity of the Accountant General, and placed to the credit of the same cause, matter, or account, subject to the further order of the Court.

15. Where any stocks, funds, shares or securities, standing in the name of the Accountant General, in trust in or to the credit of any cause, matter, or account, or any part thereof, shall be directed to be divided and transferred or delivered out of court to or among several persons, or to be carried over to several separate accounts; and where any money shall be directed to be paid out to or among several persons, or carried over to several separate accounts, the Registrar shall be at liberty, where it shall appear to him to be more convenient so to do, to state the respective amounts of such stocks, funds, shares, securities or money to be so transferred, paid or carried over, in a schedule at the foot of the Order; and it shall be sufficient to refer to such schedule in the mandatory part of the Order; but in every such case, the total amount of the stocks, funds, shares, securities or money, respectively, to be dealt with in such schedule, shall be stated in words at length in the mandatory part of the Order.

16. In taking any account directed by any Order, all just allowances shall be made, without any direction for that purpose in such Order.

17. Where, by any Order, any recognizance shall be directed to be vacated, the Clerk of Enrolments shall, on due notice thereof, attend the Master of the Rolls for that purpose, without any direction for that purpose in such Order.

18. In any order where the words "the Judge" shall be used, such expression shall mean the Judge to whose Court the cause or matter wherein such Order is made is for the time being attached. Where the words "the Taxing Master" are used, such expression shall mean the Taxing Master in rotation, or, in case any previous reference shall have been made,

the Taxing Master to whom the cause or matter stands referred, as the case may be; and where the words "the Clerk of Records and Writs" shall be used, such expression shall mean the Clerk of Records and Writs in whose division the cause or matter wherein such order is made, is.

19. Where any cause shall have been standing for one year in the Cause Book, marked as "abated," or standing over generally, such cause shall, at the expiration of the year, be struck out of the Cause Book.

(Signed) CAMPBELL, C.
JOHN ROMILLY, M.R.
J. L. KNIGHT BRUCE, L.J.
G. J. TURNER, L.J.
RICHD. T. KINDERSLEY, V.C.
JOHN STUART, V.C.
WILLIAM PAGE WOOD, V.C.

CASES ARGUED AND DETERMINED

IN THE

Courts of Chancery,

AND ON APPEAL TO THE HOUSE OF LORDS.

COMMENCING WITH

MICHAELMAS TERM, 22 VICTORIÆ.

L.C. }
Nov. 2. } WELLESLEY v. WELLESLEY.

Practice—Enrolment of Decree—Extension of Time.

Although the Court is disposed to take a lenient view of circumstances, which may have prevented an appeal from being prosecuted within five years, yet after that time it is desirable that the Orders as to enrolment, &c. should be strictly adhered to.

A decree was made in 1849, and an order on further directions in March 1853. In 1854 the plaintiff enrolled the former order. In 1858 a decree was made in another suit, which was considered favourable to a defendant in this suit; and he applied to enrol the order of March 1853, as the five years had so recently expired, and he had been for some years resident out of the kingdom; but the Court refused the application.

This was a motion, on behalf of the defendant Beavan, that an order on further directions, made on the 14th of March 1853, and a subsequent order, dated the 17th of July 1855, might be enrolled, notwithstanding the time limited by the General Order had expired. The application was made under the 6th General Order of the 7th of August 1852, relating to enrolment of decrees, &c., and which is as

follows:—“That the Lord Chancellor, either sitting alone, or with the Lords Justices, or either of them, shall be at liberty, when it shall appear to him under the peculiar circumstances of the case to be just and expedient, to enlarge the periods hereinbefore appointed for a rehearing or an appeal, or for an enrolment.”

By a decree, made in July 1849, the plaintiff (the present Countess of Mornington) was declared to be entitled to an annuity of 1,000*l.*, secured on her husband's lands in priority to certain incumbrancers, one of whom was Mr. Beavan (1).

By the order on further directions before mentioned the defendant Beavan was to be at liberty to add his costs to his security. In January 1854 the plaintiff obtained leave to enrol the order of 1849 and that of 1853, although the limited time had expired as to the former; but she enrolled the decree of 1849 only. The order of the 17th of July 1855 directed the carrying on of the proceedings under the order of 1853.

A decree was subsequently, in November 1857, made in the suit of *Wellesley v. Mornington*, and another in the suit of *The Countess of Mornington v. Keane* (2), which were considered to be favourable to

(1) *Wellesley v. Wellesley*, 10 Sim. 256; *a. c.* 9 Law J. Rep. (N.S.) Chanc. 21.

(2) 27 Law J. Rep. (N.S.) Chanc. 791.

the incumbrancers; and accordingly Mr. Beavan applied, under the order of January 1854, to the Clerk of Enrolments, to enrol the order of 1853, but without success, the five years having expired in March 1858.

The present application was made on the ground of the shortness of the time which had elapsed since the five years had expired, the decree in *The Countess of Mornington v. Keane* having been made after the expiration of the five years, and of Mr. Beavan having been resident out of the United Kingdom for some years past.

Mr. Selwyn and Mr. Cole appeared in support of the motion.

Mr. Rolt and Mr. Freeling opposed.

The following cases were cited:—

Horne v. Barton, 26 Law J. Rep. (N.S.) Chanc. 225.

Kay v. Smith, 7 De Gex, M. & G. 383; s. c. 26 Law J. Rep. (N.S.) Chanc. 136.

Brandon v. Brandon, Ibid. 365; s. c. 25 Law J. Rep. (N.S.) Chanc. 896.

The LORD CHANCELLOR said, that the defendant moving must satisfy him that it was "just and expedient, under the peculiar circumstances of the case," that after the lapse of so long a period he should be allowed to enrol this decree. The object of the General Order was to prevent parties from being kept in ignorance for an unreasonable length of time whether a decree was to be appealed from or not. Although the Court was disposed to take a lenient view of circumstances which might have prevented an appeal from being prosecuted within five years, yet after that time it was desirable that the Order should be strictly adhered to. In the present case there was a decree affecting Mr. Beavan's interests in July 1849. That decree declared the priority of the Countess of Mornington's claim over those of Mr. Beavan and other incumbrancers. Mr. Beavan might then have appealed; but an order was obtained by the Countess for enrolling the decree of 1849, and also the order on further directions in 1853, but the former only was enrolled. Mr. Beavan, although abroad at the time, was aware of

these proceedings. It was competent to him to enrol the order of 1853, when the Countess omitted to do so; but he allowed the five years to elapse without doing anything as to this order. In consequence of the decision in *The Countess of Mornington v. Keane*, he now thought that the decree of 1849 might be reversed on appeal to the House of Lords. Such an appeal would not, on account of the lapse of time, be received by the Appeal Committee of the House of Lords; but if Mr. Beavan could induce this Court to allow the decree of 1853, on further directions, to be enrolled, it might draw down leave to appeal from the former decree. But would it be "just or expedient" to do so? The order on further directions only carried into effect the decree of 1849; and the Countess having during this long period had that decree in her favour might have fairly assumed that there were no reasonable grounds of appeal, and therefore none to justify the present application. The motion must be refused, with costs.

L.C. }
Nov. 9, 10. } ATKINSON v. SMITH.

Settlement—Sufficiency of Consideration—Baron and Feme—Mortgage of Wife's Estate—Proviso for Redemption.

A. and his wife, joint tenants in fee, in 1818 mortgaged their estate to B, the proviso for redemption being, that on payment of the mortgage-money B. should re-convey to A. and his wife, their heirs or assigns, or unto such other person or persons, and for such intents and purposes, and in such manner and form as A. and his wife, or the survivor of them, or the heirs or assigns of such survivor, should appoint. In pursuance of a covenant in the mortgage-deed, a fine was levied by A. and his wife. In 1823 the mortgage-money was repaid, and in 1827, by a deed reciting these circumstances, B, by the direction of A. and wife, conveyed, and A. and wife appointed to a trustee the property to be held to the use of the wife for life, then of A. for life, and afterwards of S. (a daughter) and her children, &c. After the death of the wife, A. in 1854 conveyed the estate to his son for a valuable

consideration. The son after A.'s death instituted a suit to set aside the settlement of 1827 as voluntary and void against himself, a purchaser for value. One of the Vice Chancellors made a decree in the plaintiff's favour; but, upon appeal,—Held, that a power was created by the proviso in the deed of 1818, which enabled A. and his wife effectually to convey their interests, as they did by the settlement of 1827, without levying a fine; and that the wife's parting with her interest for the purpose of the settlement was sufficient to prevent the settlement being voluntary on A.'s part, and accordingly the plaintiff's bill was dismissed, with costs.

This was an appeal, by the defendants, from a decision of Kindersley, V.C., by which a decree had been made in favour of the plaintiff, under the following circumstances:—

John Atkinson and Barbara his wife were seised in fee as joint tenants of certain real estate in Cumberland, and, by an indenture, dated the 16th of May 1818, and made between them of the one part, and John Brown of the other part, they, in consideration of 170*l.* paid to them by J. Brown, conveyed the lands to him in fee, subject to a proviso, "that if the said J. Atkinson and Barbara his wife, or either of them, or either of their heirs, executors, administrators or assigns, should pay unto the said J. Brown, his executors, administrators or assigns, the sum of 170*l.* with interest, &c., then and in such case the said J. Brown, his heirs and assigns, should, at the request and expense of the said J. Atkinson and Barbara his wife, their heirs and assigns, or either or any of them, re-convey, &c., unto them the said J. Atkinson and Barbara his wife, their heirs or assigns, or unto such other person or persons, and for such intents and purposes, and in such manner and form as they the said J. Atkinson and Barbara his wife, or the survivor of them, or the heirs or assigns of such survivor, should nominate, direct or appoint in that behalf, free from incumbrances." In pursuance of a covenant contained in this deed, a fine was subsequently levied by J. Atkinson and Barbara his wife to enure to the uses of the deed. In 1823 the mortgage-money

was repaid to J. Brown, but no re-conveyance was then taken. By an indenture dated the 31st of December 1827, and made between J. Atkinson and Barbara his wife of the first part, J. Brown of the second part, and Joseph Atkinson (a trustee) of the third part, after reciting the mortgage-deed, and that the money had long since been repaid, and that J. Atkinson and his wife, being desirous to settle the property upon the uses after mentioned, had requested J. Brown to join with them in limiting such uses, which he had agreed to do; it was witnessed, that in consideration of the 170*l.*, and for settling, conveying and assuring the premises on the uses and trusts after mentioned, and for the nominal consideration from Joseph Atkinson to Brown, he, J. Brown, at the request of J. Atkinson and Barbara his wife, bargained and sold, and J. Atkinson and Barbara his wife appointed unto Joseph Atkinson and his heirs, the premises, to hold to him and his heirs, to the use of Barbara Atkinson for life, without impeachment of waste, remainder to trustees to preserve remainder to the use of J. Atkinson for life, with divers remainders in favour of Agnes Smith (a daughter of J. Atkinson) and her children, with an ultimate remainder to Joseph Atkinson, the trustee, in fee. Barbara Atkinson died in February 1838, and J. Atkinson went in 1853 to reside with his son, Solomon Atkinson, the plaintiff. On the 10th of June 1854 J. Atkinson, by a deed of that date, for the valuable consideration therein expressed, conveyed the property to the plaintiff in fee. In January 1857 J. Atkinson died, and afterwards Agnes Smith, the tenant for life under the settlement of 1827, brought an action of ejectment, and the present suit was instituted by the plaintiff to restrain this action, and to have the indenture of the 31st of December 1827 delivered up as voluntary, and therefore, under 13 Eliz. c. 5, void as against himself, a purchaser for value. The cause coming on to be heard, before Kindersley, V.C., on the 3rd of July, his Honour made a decree in favour of the plaintiff (1), and the defendants now appealed.

(1) The following is the judgment of Kindersley, V.C.—His Honour said that the plaintiff was entitled to the relief which he asked. Where a pur-

Mr. Solomon Atkinson, the plaintiff, appeared in person, and contended that the operation of the fine was exhausted in the mortgage to Brown, and that to pass Mrs. Atkinson's estate upon that mortgage being satisfied, another fine was necessary. The

terms of the mortgage to Brown gave no indication of an intention to alter the wife's previous estate, which would be necessary in order to effect such alteration.—

Heather v. O'Neill, 27 Law J. Rep. (N.S.) Chanc. 512.

chaser came to this Court to set aside a voluntary instrument, although perfectly cognisant that the object of the purchase was to defeat such instrument, still the law was that he was entitled to set it aside, being a purchaser for value, and the Court must not be influenced by any reluctance on other grounds in giving such relief. It was quite clear that, so far as related to the question, whether any consideration passed to the parties who made the settlement from those for whose benefit it was made, Agnes Smith and her children, no consideration whatever, pecuniarily speaking, passed. The question was, whether, on the face of the deed itself, having regard to the rights of the parties, Atkinson or the trustee, had any valuable, not necessarily pecuniary, consideration from Mrs. Atkinson? If at that time an estate in fee was vested in Mr. and Mrs. Atkinson as joint tenants, whether such estate was legal or equitable, Mrs. Atkinson, being a feme covert, could not part with her interest, except by means of a fine levied of the equity of redemption vested in her and her husband. If Mrs. Atkinson did not part with any interest by that deed, of course, John Atkinson received no consideration for parting with his, because the only contention to shew consideration was that Mr. and Mrs. Atkinson were joint tenants in equity, the effect of that being that there was a contingent remainder to the survivor in fee; that John Atkinson parted with his interest in favour of the settlement, in consideration of Mrs. Atkinson also parting with hers, each having an interest in having it so conveyed; and, therefore, if that was a parting with his and her interest, then there was a consideration to support the deed. If there was such a consideration, it must have been because Mrs. Atkinson, by the deed, parted with her interest. That she could not do, except, as was said before, by levying a fine; and that not having been done, the defendants argued that if the interest, as an estate or interest in land, could not be parted with, without a fine, yet Mrs. Atkinson was donee of a power of appointment which a married woman could exercise without a fine. It was likewise urged that the original fine supported both deeds; but that was not so, it operated only to convey the legal estate to the mortgagee. If, then, there was such a power, the defendants' case would be established, and the question really was, whether, under the proviso in the mortgage-deed any such power as above referred to was created? It was a rule well established, that where a wife's estate, or an estate in which she had a vested interest, was parted with to a mortgagee, in order that her husband might raise money, in whatever form the equity of redemption was reserved it would not affect, beyond the mere purpose of the mortgage, the interest of the wife, unless a clear intention could be found so to affect the interest *ultra* the mortgage. In the absence of an indication of in-

tention, it was always presumed that the only reason for the wife joining was to enable the husband to make a valid mortgage and raise the money, and the mere reservation of the equity of redemption, unless in a form indicating most clearly an intention to alter the settlement of the estate *ultra* the mortgage, had no such effect. Whatever might be the effect of *Anson v. Lee*, it was not that the Judge meant to dispute this rule, although he might have erred in its application. Before the mortgage Mrs. Atkinson was joint tenant with her husband in fee; at all events, there was a joint estate for life, with a contingent remainder to the survivor. Her interest was of such a character that before the abolition of fines, she was protected by law from parting with it, except by a fine, or since that period by a deed acknowledged, and by examination apart from her husband, not only to ascertain that she knew what she was doing, but that she did it voluntarily. It was not like the case of an adult male, for there was the additional protection which the law threw around a married woman. Suppose the words of the proviso created a power, were they sufficient in the absence of indication of intention to alter the position of the wife to her detriment? For, if they were, she became enabled to act without that protection which she would otherwise have against the undue influence of her husband; so that she might execute a deed without fine or acknowledgment. On the principle of *Jackson v. Innes*, in the absence of a clear indication of intention to alter the wife's position (and here none such could be found on the face of the deed, either by recital or otherwise), no power would be created, and the obligation of Brown to re-convey was nothing more than leaving the estate in Mr. and Mrs. Atkinson, as it was before the mortgage, that was a joint-tenancy in fee. The simplest mode of creating a power, had that been intended, would have been to direct, when the money was paid off, that the mortgagee should re-convey to such uses as Mr. and Mrs. Atkinson should appoint, and in default to them in fee. Supposing Brown had called in the mortgage-money, and the mortgagors could not pay it, they would have obtained the money from another person, and transferred the security; but he might have objected to re-convey to a third party, as would have been his clear right, except for the words here inserted, which would operate to enable such a re-conveyance, without the intention to create a power. On the whole, therefore, it could not be considered that there had been an intention to create a power, and it would alter Mrs. Atkinson's estate to her detriment so to hold. There was, then, such an estate as Mrs. Atkinson could not part with without a fine, and the voluntary deed, so far as she was concerned, had no operation; she passed nothing, and had she survived her husband, would have been entitled to say, by virtue of the contingent remainder becom-

It was distinctly admitted, by the plaintiff, that the words in the proviso were sufficient to create a power, although they differed from the usual form. That being so, it was contended by the plaintiff, that no power was actually created, although the words used might have been sufficient, because there was no intention that such a power should be created; and he cited a number of authorities, from *Ruscombe v. Hare* down to the recent case of *Heather v. O'Neill*, to establish the proposition, that where there is a mortgage of a wife's interest, with a proviso for redemption, reserving uses different from those in the original settlement, unless the terms in the proviso manifestly shewed an intention that the old uses should be altered, no change was effected. Indeed, Mr. Atkinson strongly urged that it was not enough that such intention to alter the uses should be apparent in the proviso itself, but that it should also appear *aliunde* from some recital or declaration. Reliance was placed upon certain expressions of Lord Eldon in *Jackson v. Innes*; but whatever opinion Lord Eldon might have entertained at first (9) as to the mode in which such intention should be manifested, he changed his opinion on the subject, and placed the matter on the footing which had ever since been followed. Lord Eldon said (10), "The judgment of this House will remove a difficulty which I know is floating in the minds of many persons. I conceive it to have been the opinion of Lord Thurlow, that in order to dispose of the equity of redemption of the wife in an estate, it was absolutely necessary there should be in the recitals of the instrument some expression that the parties meant it so; that it was not enough to collect the intention from the limitations; but that there must be something more upon the face of the deed to lead the wife to understand what those limitations were. It does, however, occur to me, on looking into the cases which have been referred to, that such a proposition cannot be supported, and therefore I am of opinion that the decree must be reversed."

The whole effect of that decision was

to leave it open as to the question of intention, but at the same time to shew that the intention to alter may be manifested by the language of the proviso itself, and that there was no necessity for an express declaration or a recital to that effect. It would be found that all the cases referred to in the argument which adverted to the question of intention were decided on the particular circumstances of intention indicated in those cases. But, in fact, all those cases had no direct or indirect bearing on the present, because in them the question was, whether the change of the limitations indicated any change of intention, but here there was, in fact, no change of limitations. The only circumstance here was, that in the proviso a new quality was annexed to the wife's estate, by which she acquired a greater facility to dispose of it. The question, therefore, was, not whether on the face of the proviso any indication of intention to change the limitations was to be found, but whether the wife, speaking by the fine, had chosen to secure to herself what might be considered an advantage, viz., that which would enable her to concur with her husband in the disposition of the property. The plaintiff asserted that, inasmuch as there was no change in the limitations, the creation of this power was utterly nugatory, because it was involved in the interest to be re-conveyed by the mortgagee to Atkinson and his wife, and for that purpose he cited *Wagstaff v. Wagstaff*. But that was no authority for the principle contended for. If a man conveyed an estate to A. and B. in fee, with power to appoint, the latter was involved in the fee which was conveyed. That, however, was different from a re-conveyance to husband and wife with a power in them to appoint to other persons, as that power was something *ultra* the fee, and annexed a quality to the estate which it did not before possess, and thereby enabled the wife to deal with her interest in the property, not by means of a fine, as otherwise she must have done. It was said by the plaintiff, that an explanation could be given for these words of the proviso, because without them the mortgagee would not be bound to re-convey except to the mortgagor. But that told strongly against the plaintiff. In many

(9) 16 Ves. 356.

(10) 1 Bligh, 135.

of the cases the ground upon which it was contended that there was no change of limitations was because expressions had been used through mistake or inadvertence. If, however, the plaintiff's explanation were correct, it appeared that these words were introduced, not by mistake, but with the intention of accomplishing a particular object. If, then, the words had a design and object, and the intention could be collected from the proviso without going beyond it, then it at once appeared that there was a direct intention that these words should form part of the proviso for redemption, and it was admitted that the words were sufficient to create a power in the husband and wife. If that was clear, why was the Court to deny to the wife the right to create such a power, and to give to herself a benefit, the facility of transferring her interest without a fine? It was said that it was to the prejudice of the wife (taking away the protection which the law gave her, guarding her against the husband's influence) to allow these words thus to operate. But it was no part of the office of this Court to force upon the wife any protection which she deliberately refused. If a husband sought to obtain possession of his wife's property the Court would not give him its assistance without a proper settlement being made upon the wife; but however strongly the Court considered her entitled to such a settlement, the Court would not force one upon her, if she refused. His Lordship, therefore, did not follow the argument that the Court was bound to interpret this proviso in a particular way by reason of the supposed protection which ought to be given to the wife. But it was said that this power had no effect whatever upon the equitable interests of the husband and wife, and that it was a mere power to enable them to direct the mortgagee to convey the legal estate to such persons as they should appoint. Undoubtedly the words were "to such persons," and not "to such uses"; but there was no doubt as to the intention of the parties in the terms they had used. That intention clearly was to enable Atkinson and his wife to direct the mortgagee to clothe with the legal estate any re-settlement that they might desire to make at any future time.

That intention being clear, the Court was at liberty to construe the power so as to render the deed of 1827 operative. If that were so, there was an end of the whole question, because if the deed of 1827 was an exercise of the power given by the deed of 1818 it ceased to be voluntary; as there was a consideration moving from the wife to her husband, by which she parted with her interest for the purpose of the settlement, which was quite sufficient to prevent the deed from being voluntary within the meaning of the statute. His Lordship differed from the Vice Chancellor with reluctance, but he had considered the case very carefully, and his opinion upon it was perfectly clear. The result therefore was that the plaintiff's bill must be dismissed, with costs.

LORDS JUSTICES. }
 Nov. 5, 10. } *In re HART'S TRUSTS.*

Will—Construction—Legacy payable out of the Proceeds of Land—Vesting.

*A testator devised his real estate to trustees upon trust for one for life, and afterwards upon trust to sell and hold the proceeds of the sale and the rents in the mean time in trust to pay H. A. D. the sum of 500l. sterling when she should attain the age of twenty-five years. He then directed that the "said legacy" should carry interest from the time of the death of the tenant for life, such interest to be paid in and towards the maintenance, education, and support of H. A. D. until she should attain the age of twenty-five years. He then directed that, subject as aforesaid, the said trust monies should remain, and be in trust for certain parties. One of the Vice Chancellors, on the authority of *Batsford v. Kebbell* (1) and *Watson v. Hayes* (2), decided that the legacy was contingent, and that, as the legatee did not attain twenty-five, the 500l. belonged to the residuary legatees of the testator; but, upon appeal,—Held, reversing his Honour's decision, that as the direction for sale was absolute in every event, and as the legatee*

(1) 3 Ves. 363.

(2) 5 Myl. & Cr. 125; s. c. 9 Law J. Rep. (N.S.) Chanc. 49.

survived the tenant for life, the legacy vested absolutely in her.

This was an appeal from a decision of Vice Chancellor Stuart, pronounced upon the petition of Mr. George Block, the administrator of the estate and effects of his deceased wife, Harriet Ann, praying the payment out to him of stock produced by the investment of 500*l.*, paid into court by trustees in respect of a legacy given by the will of William Hart, deceased, to the petitioner's wife, late Harriet Ann Dale. The facts were, that William Hart, the testator, by his will, dated the 13th of November 1849, after appointing two persons his executors, gave and devised to his mother, Maria Hart, all and singular his messuages, lands, tenements and hereditaments, to hold to her and her assigns for her life, and from and immediately after her decease, he gave and devised the same in trust for sale. The testator directed that his trustees and the survivor of them, and the heirs and assigns of such survivor, "should stand possessed of all monies to arise from the sale of his said hereditaments, and the rents and profits thereof until sale," upon trust, after paying the expenses attending such sale, "to pay to his natural daughter, Harriet Ann Dale, the sum of 500*l.* sterling when she should attain the age of twenty-five years." And the testator directed that the said legacy "should carry interest from the time of his said mother's decease, which interest should be paid in and towards the maintenance, education and support of his said natural daughter until she should attain the age of twenty-five years." The testator then bequeathed several legacies, and, "subject as aforesaid," he directed "that the said trust monies should remain and be in trust for all and every the children and child of his cousin, the widow of the late Ralph Johnson, who should be living at the decease of his said mother, and be paid to them when and as they should severally and respectively attain the age of twenty-one years, in equal shares, as tenants in common, the interest in the mean time to be applied for and towards their respective maintenance, education and support." The testator then bequeathed his personal estate to his trustees upon trust to convert

into money, and thereout to pay debts and certain legacies; and as to the residue upon trust to invest the same, and out of the interest and dividends thereof to pay an annuity to Hannah Groom during her life, and to pay the residue of such interest and dividends unto his brother during her life, and from and after their deaths the trust monies were to remain and be upon the like trusts in favour of the children of his cousin, the widow of the late Ralph Johnson, as were mentioned and expressed of and concerning the residue of the monies to arise from his real estate.

The testator died on the 14th of November 1849. His mother, Maria Hart, died in 1850. Harriet Ann Dale attained twenty-one in the month of February 1855; on the 25th of October 1855 she married the petitioner, George Block, and in September 1857 she died. After the death of Mrs. Hart the trustees sold the real estate, and out of the produce they set apart the sum of 500*l.* to answer the legacy, which sum was invested by them on mortgage at 4*l.* per cent., and the interest paid to Harriett Ann Block during her life. After her death the mortgage-money was called in, and this sum, with interest which since accrued, was paid by the trustees into court under the Trustees' Relief Act, 10 & 11 Vict. c. 96.

On the 24th of July the petition was heard, before Vice Chancellor Stuart, and the question argued was, whether the gift of 500*l.* to Harriet Ann Dale was contingent on her attaining twenty-five years, or whether it had vested, although she died under that age, or, in other words, whether the money paid into court belonged to her husband and administrator, or had fallen into the residue of the testator's estate. His Honour reserved judgment; and on the 26th of the same month held, that the legacy was contingent, and that the legatee having died under twenty-five years of age, the money belonged to the residuary legatees (3). From this decision the administrator appealed.

(1) The Vice Chancellor gave the following judgment:—"There is no doubt of the difficulty of cases of this kind, and this is perhaps as difficult a case as any. The difficulty arises from this, that in

Mr. Malins and Mr. W. D. Evans, for the appellant, argued that where a legacy was given and the interest of the legacy in the mean time for maintenance, the legacy was vested, and that the decision

of the Court below was erroneous, for it was plain that the legacy was vested, the only possible question being whether it vested on the death of the testator, or on the death of the tenant for life, *Mrs. Hart*.

Hanson v. Graham, and in *Vawdry v. Geddes* (1), and even in *Watson v. Hayes*, which is the latest case of value, there are expressions to be found which greatly favour the argument addressed to the Court to induce the Court to hold that this was a vested legacy, although the legatee died before the time when the testator directed that the legacy should be paid. It is the duty of the Court unquestionably, where a doubt occurs as to whether any interest given by a will or deed be vested or contingent, to endeavour to solve that doubt in favour of the vesting of the legacy. But it is still more the duty of the Court not to disturb authorities which have been recognized as binding authorities, and which have governed the decisions of the greatest Judges that ever sat in this court. The latest important authority cited in this case is *Watson v. Hayes*, decided by Lord Cottenham, upon a review of all the cases; and he takes care there to state that his decision was governed by the decision of the case of *Batsford v. Kebbell*. The case of *Batsford v. Kebbell*, to my mind, it is impossible to distinguish from the present case. If any distinction exists, the language and terms of the gift in *Batsford v. Kebbell* were more favourable to the vesting of the legacy than in the present case. *Watson v. Hayes* is valuable, and for this—that it points out the importance of the Court directing its attention to this circumstance, whether, when there is a gift of a legacy payable when the legatee attains a certain age, without any words of gift as separated from the time of payment, there be a distinction between the gift of the capital of the legacy and the gift of interest or dividends for maintenance in the mean time. In *Watson v. Hayes*, what Lord Cottenham says is this: 'When maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the interest; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy.' He says that before addressing himself to the case of *Batsford v. Kebbell*, which is the governing case as applicable to the present. The principle which governed the case of *Batsford v. Kebbell* was considered by Sir Wm. Grant in deciding the case of *Hanson v. Graham*—which Mr. Malins implores me not to overrule in this case, and which certainly if I had the presumption to attempt to overrule, I should think myself a very absurd person. *Hanson v. Graham* was decided by Sir Wm. Grant; and Sir Wm. Grant again, in *Leake v. Robinson*, in perhaps the most elaborate judgment he ever delivered, recurs to this question; and I intend to decide this case upon those clear and distinct principles enunciated by Sir Wm. Grant more clearly, I think, in the case of *Leake v. Robinson* than in *Hanson v. Graham*. The great argument in support of the vesting of this legacy depends upon a distinction

taken between a gift for maintenance in the mean time and a gift of the whole interest in the mean time. In *Batsford v. Kebbell* the language was neither to give maintenance nor to give interest, for it was what was equivalent to the gift of interest: it was a direction and a trust to pay the whole dividends to the legatee till the particular age was attained, and when the age was attained to transfer the principal stock to the legatee. So far from Sir Wm. Grant making any difference upon the question of dividends, between dividends and interest, when he speaks in *Leake v. Robinson* of the case of *Batsford v. Kebbell*, he says there that the case of *Batsford v. Kebbell* was more favourable to the legatee, for the interest of the fund was given to him absolutely till he should attain the age of thirty-two; therefore Sir Wm. Grant considered the gift of all the dividends of the fund and all the interest of the fund in the mean time as meaning the same thing, and treating *Batsford v. Kebbell* as a case in which the whole interest of the fund was given absolutely to the legatee till he should attain the age of thirty-two, at which time all the principal was to be transferred for his use. He quoted the words of Lord Rosslyn, who says: 'There is no gift but in the direction for payment; and the direction for payment attaches only upon a person of the age of thirty-two. Therefore he does not fall within the description'; but Sir W. Grant does not notice what Lord Cottenham took the pains to notice, and that was, that Lord Rosslyn, in *Batsford v. Kebbell*, treated the gift of the dividends and the gift of the capital as two separate legacies. If there are two distinct gifts to the same person, the duty of the Court is to attend to the language of each of the gifts, and to give effect to the intention of the testator in regard to both. If they are distinct gifts, little aid could be expected from the gift of the interest or dividends, as assisting the construction upon the question of vesting; and so it was held by Lord Cottenham in the case of *Watson v. Hayes*. Here there seems to me to be what occurred in *Batsford v. Kebbell*, that is, two distinct subject-matters of gift in favour of the legatee. The first is to pay 500*l.* to the legatee when she shall attain twenty-five, and then, beginning with new words, he says: 'And I direct that the said legacy shall carry interest from the time of my mother's death, which interest shall be paid in and towards the maintenance, education and support of my said natural daughter until she shall attain the age of twenty-five years.' If in *Batsford v. Kebbell* the gift of the dividends and the gift of the capital were held to be two separate legacies, and therefore in that view not to affect the question—the gift of the dividends not to affect the question of the vesting of the interest—much more must it be taken to be a distinct gift when the first gift, as in *Batsford v. Kebbell*, is a gift where the legatee cannot be entitled until the description is ascertained. Therefore I am bound to adhere to the case of *Batsford v. Kebbell*, which

(1) 1 Russ. & M. 203; s. c. 8 Law J. Rep. (n.s.) Chanc. 63.

On the latter point the case of *Vawdry v. Geddes* (4) was cited, and on the former the following cases were relied on:—

Hanson v. Graham, 6 Ves. 239.

Harrison v. Naylor, 2 Cox, 247; s. c. 3 Bro. C.C. 108.

Leake v. Robinson, 2 Mer. 363.

And it was argued that the present case was distinguishable from *Leake v. Robinson*: that here there was not only a gift over, but a gift over of the whole interest.

Mr. Bacon and *Mr. Southgate*, for the children of the residuary legatee, contended that this being a legacy payable out of real estate, the rules applicable to real estate must determine the case. According to those rules, the legacy was plainly contingent on the legatee attaining the age of twenty-five years.—

Carter v. Bletsoe, 2 Vern. 617; s. c. Prec. in Chanc. 267.

Prowse v. Abingdon, 1 Atk. 482.

Gawler v. Standerwick, 2 Cox, 16.

Harrison v. Naylor.

Batsford v. Kebbell, 3 Ves. 363.

Pearce v. Lomans, Ibid. 135.

Leake v. Robinson.

Phipps v. Lord Mulgrave, 3 Ves. 613.

Taylor v. Bacon, 8 Sim. 100; and 1 Spence's Equity, 524.

Watson v. Hayes, 5 Myl. & Cr. 125; s. c. 9 Law J. Rep. (N.S.) Chanc. 49.

They contended that the case now before the Court was in effect decided by *Batsford v. Kebbell*, and urged that there was a total absence of authority to shew that the gift of the interest of a legacy operated to vest the legacy, while the cases of *Carter v. Bletsoe* and *Gawler v. Standerwick* proved that if the legacy were payable out

was considered by Sir W. Grant as not inconsistent with *Hanson v. Graham*, but as consistent with it, and which was affirmed by Lord Cottenham, as governing his decision in the case of *Watson v. Hayes*. It is with great regret that I feel bound to hold, in this case, that the legacy did not vest. At the same time I have come to the conclusion with a full sense of the difficulty of the question—a sense increased by this, that Sir Lancelot Shadwell, in the case of *Watson v. Hayes*, held that the gift was the gift of a vested interest, whereas Lord Cottenham directly overruled that, as some other Judge may overrule the decision at which I find myself called upon to arrive in this case."

(4) 1 Russ. & M. 203; s. c. 8 Law J. Rep. Chanc. 63.

of real estate, such a fact had a contrary effect. Lord Cottenham, in *Watson v. Hayes*, considered that the proceeds of real estate were real estate.

Mr. Roxburgh appeared for the trustees.

Mr. Malins, in reply, said that the manifest intention of the testator was to give the whole interest in the 500*l.* to the legatee, and not to benefit the residuary legatee out of the legacy, or any part of it. He cited the additional cases of—

Fonereau v. Fonereau, 3 Atk. 645.

Saunders v. Vautier, Cr. & Ph. 240; s. c. 10 Law J. Rep. (N.S.) Chanc. 354.

Nov. 10.—LORD JUSTICE KNIGHT BRUCE.
—The order to be made by us on this petition depends upon the construction of the will of W. Hart, so far as the gift of 500*l.* contained in it in favour, absolute or contingent, of Harriet Ann Dale, the petitioner's late wife, is concerned. Whether it would have been right to dismiss the petition if Maria Hart, mentioned in the will, the mother of the testator, had survived Harriet Ann Dale, it is unnecessary to say, and I give no opinion; for, although Maria Hart survived the testator, she was survived by Harriet Ann Dale, who, if the gift in question had been a legacy out of the testator's personal estate merely, would in my opinion, equally upon principle and authority, have acquired a vested right to the 500*l.*, for her absolute use, either upon the testator's death, subject to his mother's life estate, or upon the death of his mother; for by the will, interest was made payable upon the 500*l.* from the time of the death of the testator's mother; and that interest was directed to be applied wholly for the benefit of Harriet Ann Dale. The circumstance, therefore, that she died before attaining the age of twenty-five, would certainly, I conceive, have been immaterial, if, as I have said, the 500*l.* had been made payable out of the testator's personal property, and the gift had not affected his real estate. The single question accordingly, as I view the matter, is, whether, upon the ground that the real estate only, or its produce, was made liable to the 500*l.*, Harriet Ann Dale did not acquire a vested right to that sum, or whether there was a lapse of the benefit of the gift as to the capital upon her death,

happening as it did when she was under twenty-five, which question, I think, ought to be answered in favour of her administrator, the petitioner. The whole of the real estate was by the will, not only empowered, but absolutely directed, to be sold on the death of Maria Hart—a sale not only for the purpose of raising the 500*l.*, but for that and other purposes—so that the sale would have been as proper and necessary if Harriet Ann Dale had not survived the testator, as it was under the actual circumstances. The whole of the produce of the sale has been upon all hands assumed to have been treated as having been by the will effectually disposed of. All the parties have assumed that the heir, if any, of the testator took nothing legal or equitable in that character. I am not sure whether I should or should not have taken the same view of the petitioner's case as I now do if the 500*l.* had not been directed to be raised by sale, but been made, with interest from the death of the testator's mother, a charge merely upon the land, and the land subject to the charge had been devised in any manner or allowed to descend. Howsoever the claim would have stood in those circumstances, I think the will being as it is, the petitioner has shewn a title to the disputed fund, and should, as his wife's administrator, have it, subject, of course, to the payment of such costs as it ought to bear. Possibly, it is as well to add, that I have not considered as important the use by the testator of the particular word "legacy" with reference to this sum of 500*l.*, or overlooked the circumstance of the gift being in the shape of a trust, to pay the sum directly or not otherwise than directly to Harriet Ann Dale.

LORD JUSTICE TURNER.—I also am of opinion that this legacy became vested in Harriet Ann Dale, although she died under the age of twenty-five years. The estate out of which the legacy is given is, by the will, after the death of the testator's mother, vested in trustees on trust to sell, and they are to stand possessed of the monies to arise from the sale upon trust in the first place to pay the expenses of or attending such sale or sales, and in the next place to pay to the testator's natural daughter, Harriet Ann Dale, the sum of 500*l.* ster-

ling, when she should attain the age of twenty-five years; and the testator adds the words, "I direct that the said legacy shall carry interest from the time of my said mother's decease," the mother having a previous life interest before the estate of the trustees, "which interest shall be paid in and towards the maintenance, education and support of my said natural daughter, until she shall attain the said age of twenty-five years." And then there are directions to pay two other legacies, and after the mother's death to dispose of the property, subject as aforesaid, among those of the children of the testator's cousin, Ralph Johnson, who should be living at the decease of the mother. There is, therefore, not merely a trust to pay the legacy when the legatee attains twenty-five, but a direction that the legacy is to carry interest which is to be applied for her maintenance. The legatee, therefore, was in this position. She was to be paid the legacy when she attained twenty-five, and to take the interest in the mean time. Both the principal and the interest are appropriated to her; but it was said, that the gift of the interest is distinct from the gift of the principal; and it was sought upon this ground to bring the case within the authority of *Batsford v. Kebbell* and *Watson v. Hayes*. I think, however, that those cases do not govern the present. In the former of those cases, *Batsford v. Kebbell*, the direction was to pay the legatee the dividends until thirty-two, and at that time to transfer to him the principal; and the Court, in holding the legacy not to be vested, seemed to have proceeded on the marked distinction which was drawn between the dividends and the capital; and in the latter of the cases, *Watson v. Hayes*, Lord Cottenham treats the gift of the 25*l.* per annum as a gift, not of interest, but of maintenance only. But in the present case the direction is, that the legacy shall carry interest, annexing, as it seems to me, the interest to the legacy; and I do not see how we could hold this legacy not to be vested, unless we were prepared to hold that no legacy to be paid when a legatee attains a prescribed age, with interest in the mean time, vests until the legatee has reached the prescribed age—a conclusion which would be quite at variance with

Hanson v. Graham, and many other decided cases. Where a legacy is given by a direction to pay when the legatee attains a certain age, the direction to pay may import either a gift at the specified age, or a present gift with a postponed payment; and if the interest is given in the mean time, it shews that a present gift was intended. A further point, which was urged against the legatee in this case, was, that the legacy ought to be considered as subject to the rules which apply to legacies charged upon land, and that, according to those rules, it could not have vested; and *Watson v. Hayes* was referred to on this point also; but I think that what fell from Lord Cottenham upon this subject in that case, had reference merely to the general rules applicable to legacies charged upon land; and having decided in that case that a legacy if not charged upon land was not vested, he said, *à fortiori* it could not be vested if it were charged upon land. I have not met with any case in which it has been held, that the rules as to vesting which apply to legacies charged on land, are to be applied to legacies given out of monies to arise from the sale of the land. The case of *Harrison v. Naylor* certainly tends to the opposite conclusion, and I think that conclusion the better one; for the legacy is held by the trustees, and paid to the legatee as money; and besides, the rule of the Court is to deal with property in the state in which it ought to be, and not in the state in which it is. The order, therefore, must be discharged, and there must be an order for payment to the petitioner.

LORDS JUSTICES. *Ex parte* COOKNEY, in re
 NOV. 3. THE ELECTRIC TELE-
 GRAPH COMPANY OF
 IRELAND.

Company—Winding-up—Contributory—Allottee of Shares—Subscriber—Joint-Stock Companies Registration Act.

Mr. J. T. C. applied, through an agent, for fifty shares in a joint-stock company provisionally registered, and at the same time paid up the value. He entered into no agreement in writing to take the shares, but

they were allotted to him, and when the deed of settlement was tendered to him he refused to execute it, but assigned no reason for his refusal. The deed contained a schedule in which his fifty shares bore distinctive numbers. The company was completely registered, and the name of J. T. C. was inserted in the register of shareholders as T. C. the holder of fifty shares, but numbered differently from the schedule to the deed. After an order for winding up the company, J. T. C. was placed on the list of contributories in respect of fifty shares, and upon appeal, the order was confirmed.

The alteration in the distinctive numbers of the shares was considered to be unimportant, as was the mistake in the christian name.

A person may be a contributory in respect of his application for shares, although he signs no written agreement to take shares, and does not, therefore, fall within the description of a "subscriber" mentioned in the 3rd section of the statute 7 & 8 Vict. c. 110. (*The Joint-Stock Companies Registration Act.*)

This was an appeal, presented by Mr. James Thomas Cookney, from an order of the Master of the Rolls refusing to remove his name from the list of contributories of the above-named company, on which he had been placed by his Honour's chief clerk. The circumstances were as follows:—The company was provisionally registered in January 1852, under the name of the Irish Channel Submarine Telegraph Company; which name was afterwards changed to the Electric Telegraph Company of Ireland. In the month of April 1852, Mr. Cookney, at the instance of the Hon. Mr. Curzon, one of the provisional directors, applied for fifty shares in the company, and paid by a cheque the full amount of the shares, namely, 50*l.* The shares were accordingly allotted to him, and his name appeared in the schedule to the deed of settlement, dated the 12th of July 1852, as the holder of fifty shares, numbered from 7,131 to 7,200. In this schedule, Mr. Cookney's name was correctly given as "J. T. Cookney," but in the Numerical Register of Shares and the Register of Shareholders, made after the complete

registration of the company, his name appeared as "Thomas Cookney." It appeared by the same registers that the shares actually allotted to him were numbered from 12,241 to 12,290, and that the shares numbered from 7,151 to 7,200 had been allotted to another shareholder, one Mr. Rowbotham. In August 1853, an act (16 & 17 Vict. c. cxxiii.) was passed, incorporating the company, and making it subject to the provisions of the Companies Clauses Consolidation Act, 1845. The 9th section of the last-mentioned act provides, "that the company shall keep a book to be called the 'Register of Shareholders,' and in such book shall be fairly and distinctly entered from time to time the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares."

A winding-up order having been made, the Master to whom the matter was referred on the 11th of February 1857 inserted Mr. Cookney's name in the list of contributories in respect of fifty shares, but in the month of June last Mr. Cookney took out a summons in the chambers of the Judge to review that decision; affidavits were read and witnesses were examined. Mr. Cookney's affidavit denied that he had ever possessed any shares in the company, and stated that he had never received any letter of allotment or certificate of shares, and that he had never executed the deed of settlement; that he had given 50*l.* to Mr. Curzon upon his applying to him to take shares, and that he had heard nothing more of the company until Mr. Mayhew applied to him, when, without seeing Mr. Mayhew, he had refused to sign the deed, stating that he had never signed but one deed in his life, and would not sign another. In his cross-examination he stated that he had never made any inquiries as to the 50*l.* after he had paid it; that he never received any circulars from the company, or from the official manager, although he believed that at the time of the winding-up, and subsequently, several had come addressed to Thomas Cookney, but being so addressed

he had taken no notice of them; that he had never taken any steps to procure the removal of his name from the shareholders' list, not knowing, in fact, that it was inserted there; that he considered that all his liabilities in respect of, and all his connexion with, the company had ceased upon his refusing to execute the deed; that if the undertaking had been prosperous, and paid a dividend, he should not have considered himself entitled thereto until he had signed the deed of settlement.

At the hearing of a summons before the chief clerk, he decided that Mr. Cookney was a contributory, and the summons being adjourned into court the Master of the Rolls refused to disturb his decision (1), and Mr. Cookney appealed.

(1) The judgment of the Master of the Rolls was as follows:—"I think Mr. Cookney must be held to be a contributory in this case. I have looked through the books and the evidence upon the subject, and the way in which it strikes me is this. I will shortly recapitulate what I said yesterday, and will state what I have derived from an examination of the books. I am clear that there was a distinct agreement by Mr. Cookney to become a member of the company, and that Mr. Curzon was authorized to take shares for him in the company, and to pay for them, and that in consequence of that shares were given to him in the books of the company. Now I find nothing in the evidence to shew me that at any time he repudiated those shares until the winding-up order was made. He refused to execute the deed, but even when he refused to execute the deed he did not repudiate the shares, for the expression he uses is singular. It does not appear that he saw the gentleman who brought the deed, but he only saw the clerk who came in to him, and he said, 'No; I shall not execute the deed; I never executed but one, and will never execute another.' That is, in substance, what he says, which is a little vague, but which I assume to mean this: 'I never executed but one joint-stock company's deed, and I never intend to execute another.' But that does not mean (as I infer from the evidence) an intention to say that, 'by refusing to execute the deed I mean to repudiate all the shares, and to have nothing to do with them'; but 'I do not mean to execute the deed or to have anything to do with it.' His Honour then remarked upon what was in evidence as to the receipt of the letters, and proceeded: "On looking at the books of the company it does, undoubtedly, appear that the number of shares allotted to him (Mr. Cookney) were afterwards transferred to another person, and that a new number of shares were given to him; but if this were done with a view of saying, 'In consequence of his not executing the deed we reject him as a shareholder,' I should hold it to be conclusive that he could not be a shareholder, and I should take the two together (*i. e.* the allotment of other shares, and the want of proof by the company that previously to the winding-up they

Mr. Roundell Palmer, for the appellant, relied upon the words of the 9th section of the Companies Clauses Consolidation Act, 1845, enacting, that "the company shall keep a book to be called 'The Register of Shareholders,' and in such book shall be fairly and distinctly entered from time to time the names and additions of the several persons entitled to shares in the company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number and the amount of subscriptions paid on such shares," and remarked that that statute having been incorporated with the act authorizing this company (16 & 17 Vict. c. cxxiii.), it was incumbent upon them to keep for Mr. Cookney the shares they had allotted to him, viz. from No. 7,151 to 7,200, if they intended to hold him to his bargain, whereas, in fact, they had done no such thing, but had after complete registration allotted to him Nos. 12,241 to 12,290.

Mr. Roxburgh, on the same side, relied upon the 3rd section of the Joint-Stock Companies Registration Act, 7 & 8 Vict. c. 110, which enacts, "that the word 'subscriber' shall mean any person who shall have agreed in writing to take, or have taken, any shares in a proposed company, or in a company formed, and who shall not have executed the deed of settlement, or a deed referring thereto." Mr. Cookney was clearly not a "subscriber" under this section, as it could not be alleged that there ever had been any agreement in writing by him to take shares, and he urged that he could not, as a subscriber, be held liable to the company. Again, his refusal to execute the deed of settlement when presented to him was a repudiation of the shares which, it was admitted, had been

had ever sent any letters or circulars to Mr. Cookney), as shewing that they had chosen to accept his refusal to execute the deed as a repudiation of the shares, and had acted upon it accordingly. But, on the contrary, they always kept him as a shareholder, and on no occasion does his name appear for the full amount of shares with the words 'paid-up' against it, in which case no circular for calls could be addressed to him, and all that he would receive would be the circulars to attend meetings. Not finding any distinct repudiation on his part, not finding any act of the company in which they treat him as having repudiated and rejected the shares, I am of opinion that he must be treated as a contributor."

allotted to him; and the deed contained the proviso usual in such cases, that the privileges and liabilities of shareholders should not commence until after the allottee had executed the deed. That the company so understood that repudiation was clear, for they had acted as if the shares had been forfeited by Mr. Cookney, and had allotted them to another person; and if they chose to allot to him differently numbered shares at their own pleasure, they could have no title to hold him liable for those shares. In other respects, too, their conduct proved that they had considered Mr. Cookney as having forfeited his shares, for they had failed to prove that they had addressed or sent to him a single letter or circular, until immediately before or after the winding-up order.

Mr. Selwyn and *Mr. J. T. Hamilton Humphreys*, for the official manager, argued that there had been no repudiation by the appellant, who relied only on his refusal to execute the deed of settlement. He could not have considered it as a merely executory contract, or he would, on resolving not to accept the shares, have applied to have his deposit returned; but this he never did. The company, on the other hand, had always treated him as a shareholder, and if the non-allotment of the shares as originally numbered was to be taken as any evidence that they considered him as being no longer a shareholder, surely the allotment of the same number of shares, identical in all other respects with those originally allotted, must be held to be evidence of a contrary understanding. The company had not sent Mr. Cookney any letters or circulars, simply because there was no business on which to communicate with him, as upon application being made for his shares the entire sum payable upon them had been paid up.

Mr. Roxburgh was heard in reply.

For the appellant, the case of *Ex parte Beresford* (2) was cited and relied upon; while for the respondent that of *Ex parte Yelland* (3) was cited.

(2) 3 De Gex & Sm. 175; s. c. 2 Mac. & G. 197, 19 Law J. Rep. (N.S.) Chanc. 166, 332.

(3) 5 Ibid. 395; s. c. on appeal, 21 Law J. Rep. (N.S.) Chanc. 852.

LORD JUSTICE KNIGHT BRUCE. — Mr. Cookney proposed and agreed to take fifty shares in the company, or intended company, in question; he paid for them 50*l.* Those who acted for the company or intended company accepted the proposal, accepted the 50*l.*, and on their part allotted him fifty shares accordingly. In that state of circumstances—a state of things which is substantially undisputed—it lies of course upon Mr. Cookney to exempt himself from the consequent burden which would accompany the benefit that he derived from the transaction: and it is said, on his behalf, that he desired to relinquish, and did relinquish, his shares. Assuming that he did so desire, without giving any opinion, it is plain that to make that wish effectual it must have been communicated to the other parties, and by them acceded to. There is no evidence that it was communicated to the parties; assuredly there is no evidence that they ever acceded to it. It is said that letters were from time to time addressed to Mr. Cookney, which he did not notice or answer. If he had meant to rely upon any such circumstance, he should have caused them to be informed why it was that he did not do so. Reliance has also been placed, on his behalf, on the circumstance that he declined to execute the deed of constitution of the company (or, however that instrument ought to be designated), but neither on that occasion did he assign anything that can be deemed a reason for the refusal. It must be taken, therefore, subject only to the two points I have mentioned or am about to mention, that all matters remained between him and the company just as they did from the moment of the accepted proposal and payment. It has been argued that the words “in writing” to be found in the 3rd section of the 7 & 8 Vict. c. 110, are fatal to this application; because there was no agreement in writing. My opinion, however, is, that the intention of that section was not to render impossible such a position as that which is ascribed to Mr. Cookney, but that the operation of those words, to be found in a portion of the section on which reliance is placed, was confined to the manner of reading the particular act of parliament, and I think they have no bearing upon the present question.

It has also been argued that the company or intended company, or those who acted for them, intended to release Mr. Cookney, by reason that in their allotment book, shares bearing particular numbers were originally allotted to him, but that afterwards, shares bearing those numbers were allotted to another person, and shares bearing different numbers were allotted to him. If that act could be considered as evidence of an intention to release him, it might be material, but the evidence forbids us to attribute it to any intention of that sort. It was a mere matter of internal arrangement, of convenience in the management of their affairs, without reference to the slightest notion of discharging him. They continued throughout to treat him as a member of the association, and the mere act of changing the designation of the number of the shares allotted to him, without any intention of discharging or releasing him, seems to me to amount to nothing. It appears to me, he has been rightly treated as a contributory by the Master of the Rolls, and that the order of His Honour cannot be disturbed.

LORD JUSTICE TURNER. — I entirely agree with the Master of the Rolls in the opinion which he has formed of this case. In the first place, there was in my opinion a complete agreement here to take fifty shares in the company. There was the payment of 50*l.* by this gentleman, on account of those shares to the company. That 50*l.* he never attempted to claim back. The company retained it, and retaining that 50*l.* I cannot see by what possible argument they could resist the claim of Mr. Cookney to have fifty shares for which he had paid that 50*l.* which they retained. There being, then, an agreement with these parties on the part of Mr. Cookney for taking fifty shares in the company, the only question is, whether that agreement has been put an end to. Now, no doubt that agreement might have been put an end to by the company upon Mr. Cookney refusing to execute the deed. The question which we have to consider is, not whether it might have been put an end to, but whether it was in fact put an end to. All the evidence, in my judgment, conclusively proves that the company never did intend, and never did, in point of fact, put

an end to that agreement. It is said that they altered the numbers of the shares which had been allotted to Mr. Cookney. I do not think it is necessary for us to give an opinion upon that point, for I think the company's act of parliament puts that point entirely out of the question; but if it were necessary to give an opinion upon the point, I think the alteration in the shares which, in the schedule to the deed, were described as allotted to Mr. Cookney, does not destroy the contract of Mr. Cookney to take those fifty shares, for it was clearly not intended to destroy it; and I do not perceive by what communication Mr. Cookney ever knew what were the shares which were allotted to him, for when the deed was taken to him all that passes is, that he tells his own clerk that he will not execute the deed, that he never has executed more than one deed, and that he never will execute another. Therefore, to me it is not at all apparent that Mr. Cookney ever had these shares appropriated to him, or that there ever was any binding agreement on the part of the company to appropriate those shares to Mr. Cookney, for all the company did was to put Mr. Cookney's name in the schedule to the deed as entitled to those shares; and Mr. Cookney never adopted or acceded to the appropriation that was made of them. He had continued to hold the right to fifty shares, and therefore has, I think, become a contributory within the meaning of the Winding-up Acts. I think, therefore, this motion must be refused, and, if my learned Brother concurs, refused with costs.

LORD JUSTICE KNIGHT BRUCE.—With costs, certainly.

[IN THE HOUSE OF LORDS.]

1858. { HENRY VICKERS AND JOHN
May 10, 11. { PHILPOT v. MARY POUND
AND OTHERS.

Legacy—Demonstrative or Specific.

A testatrix, by her will, gave all her real and personal estate to be converted into money, on trust, to pay debts, &c. and "the following legacies"; then followed a legacy of 10l. and a legacy of 5l., and the will proceeded thus, "Also I give to my nephew G. T. the sum of 2,000l., in which sum, or thereabouts,

he now stands indebted to me, subject nevertheless, to and I hereby charge the same with the payment of the following annuities and sums of money, that is to say, to—" &c. The will, after declaring when these legacies were to be paid, went on thus: "Provided always, and I hereby declare that I do not intend by the legacy of 2,000l. hereinbefore bequeathed to my said nephew, G. T., to exonerate or release him from the debt which may be due from him to me at the time of my decease. But I direct that whatever sum or sums of money shall be due or owing from him to me at the time of my decease, shall be taken and considered in part or in satisfaction (as the case may be) of the said legacy or sum of 2,000l., and shall be reckoned and accounted for by him accordingly." G. T. became insolvent, and was never able to satisfy the debt due to the testatrix's estate:—Held, by the Lord Chancellor and Lord Cranworth (Lord Wensleydale dissentiente), that the deficiency to meet the annuities and legacies charged on the 2,000l. must be made up out of the general assets.

The question in this case was, whether certain annuities and legacies made payable by the will afterwards stated were payable out of the proceeds of all the testatrix's estate, or were payable only out of a particular fund mentioned in the testatrix's will.

Rebecca Yonge, by her will, dated the 30th of August 1850, after directing payment of debts, &c. as soon as conveniently might be after her decease, gave to the appellants all her freehold, copyhold and leasehold hereditaments, upon trust for sale, and all her personal estate and effects whatsoever unto the appellants, their executors, &c. upon the trusts declared in the will, first, to convert the same into money, then to pay the debts, &c.; "and, in the next place, do and shall pay and discharge the following legacies, that is to say, I give and bequeath to my sister Hannah, the wife of William Lewington, the sum of 10l., and to my sister Mary, the wife of James Pound, the sum of 5l., which I direct shall be paid to them respectively as soon as conveniently may be after my decease. I also give and bequeath to my nephew George Tennant the sum

them by G. Tennant upon the decease of Mary Pound would be payable and should be provided for out of the proceeds of the testatrix's real and personal estate. The appellants contended that the annuities and sums of money so payable to the said claimants were not charges upon the general estate of the testatrix, but were only payable out of the debt owing by G. Tennant.

On the 7th of March 1854, the respondents filed their bill, in the High Court of Chancery, against the appellants, and alleged that G. Tennant was in fact wholly unable to pay the debt or any part thereof; and they prayed in effect for a general administration of the testatrix's estate.

The appellants duly appeared and put in their answer to the bill, which answer in substance submitted that the annuity and sums of money by the will of the testatrix made payable to the respondents Mary Pound, David Pound, C. Pound, J. Pound and Ann Dolley, were charged upon and payable out of the legacy of 2,000*l.* bequeathed by the will of the testatrix to G. Tennant, and that such annuity and legacies were not payable out of the general fund to be produced by the sale and conversion of the freehold, leasehold and personal estates of the testatrix.

The cause was heard, before Vice Chancellor Sir John Stuart, who, by a decree made on the 6th of March 1855, declared that the several annuities and legacies bequeathed to the respondents, and by the will charged on the debt of 2,000*l.* therein mentioned to be due to the testatrix from her nephew G. Tennant, were general bequests, and were properly payable out of the general assets of the testatrix, and were not subject to any abatement in consequence of G. Tennant not being able to pay the debt or any part thereof, and that the legacies to the half brothers and sisters of the testatrix and to the appellant H. Vickers were entitled to be paid according to the priority given to them by the will, before all the other legacies and annuities bequeathed by the will. Accounts of the testatrix's estate were also directed to be taken.

The appellants presented a petition of rehearing to the Lord Chancellor; and the cause was, on the 12th of July 1855, re-

heard before the Lords Justices of Appeal, who dismissed the appeal. An order on further directions was made in accordance with that decision.

The present appeal was then brought.

Mr. Roundell Palmer and *Mr. C. Hall*, for the appellants, contended that the annuities and legacies charged upon and made payable out of the debt of 2,000*l.* due from G. Tennant, were chargeable on that alone, and were not payable out of the general assets. They cited—

Coard v. Holderness, 22 Beav. 391.

Badrick v. Stevens, 3 Bro. C.C. 431.

Crockett v. Crockett, 1 Hare, 451; s.c. 11 Law J. Rep. (N.S.) Chanc. 279.

Oke v. Heath, 1 Ves. 135.

Robinson v. Tickell, 8 Ves. 142.

Woods v. Woods, 1 Myl. & Cr. 401.

Mr. Malins and *Mr. Welford*, for the respondents, contended that the true meaning had, by the decrees of the Court below, been put on the directions of the testatrix, and that her general estate was liable to the payment of these legacies, which were demonstrative and not specific. They cited—

Acton v. Acton, 1 Mer. 178.

Kirby v. Potter, 4 Ves. 748.

Savile v. Blackett, 1 P. Wms. 778.

Earl of Thomond v. the Earl of Suffolk, Ibid. 461.

Ford v. Fleming, 2 P. Wms. 469.

Orm v. Smith, 2 Vern. 681.

The Attorney General v. Parkin, Ambl. 566.

Ashburner v. Macquire, 2 Bro. C.C. 108.

Roberts v. Pocock, 4 Ves. 150.

Mann v. Copland, 2 Madd. 223.

Fowler v. Willoughby, 2 Sim. & S. 354; s.c. 4 Law J. Rep. Chanc. 27.

Wilox v. Rhodes, 2 Russ. 452.

Colville v. Middleton, 3 Beav. 570.

Heath v. Weston, 3 De Gex, M. & G. 601.

The LORD CHANCELLOR said, that this was an appeal against a decree of Vice Chancellor Stuart, affirmed by the Lords Justices, declaring that certain annuities and legacies were payable out of the gene-

ral assets of the testatrix's estate, and not out of a particular fund mentioned in the will of Rebecca Yonge, namely, a debt from a nephew.—[His Lordship stated the will.]—The will was ambiguous, and its construction was necessarily difficult, but after a careful consideration of all the circumstances, his mind had come to a conclusion in accordance with the decision of the Court below. On the part of the appellants, it was contended that the legacy to G. Tennant, though originally a general legacy, was made specific by the declared intention that it was not to exempt him from the debt due from him to the testatrix, and that the other legatees and annuitants were made dependent for payment upon the fund which he was to provide out of the debt. On the part of the respondents, various authorities were cited to shew that it was only where a fund was specifically bequeathed, and that fund itself ceased to exist, that the bequests failed, but that where a legacy was merely charged upon a particular fund and that fund failed, the legacy was payable out of the general assets. That, however, could not be asserted as a general rule, and each case must receive its own construction, on the apparent intention of the testator to be derived from the ordinary interpretation of the words used. In this will, the apparent intention of the testatrix was, that at all events a fund of 2,000*l.* should be provided, out of which the payment of the legacies and annuities was to be made. If at the time of her death G. Tennant had paid off his debt, the 2,000*l.* must have been raised out of the general estate, and so far as much as was beyond the amount of his debt at the same period. What G. Tennant was to supply was to be considered alternative and substitutionary. He was to be a trustee for the annuitants and legatees to the extent of the 2,000*l.*, but they were not solely to be dependent on his ability to supply the fund out of which the annuities and legacies were to be satisfied; nor did there appear to have been an intention that the estate of the testatrix was to be relieved from the payment of the annuities and legacies, or that they should fail, if he paid off his debt during her life. The conclusion therefore was, that they should be paid at all events, and that a sum of 2,000*l.* was to be pro-

vided absolutely for that purpose; that they were not bequests payable out of a specific fund, which having failed, they failed with it, but that they were to be provided for out of the general estate of the testatrix, unless provided for by G. Tennant. As he had not so provided for them, the legatees and annuitants were entitled to call on the executors and trustees to make good their claims, and the decree of the Court below was right, and must be affirmed, with costs.

LORD CRANWORTH had come to the conclusion, that the decree of the Court below was substantially correct. There was here a clear legacy of 2,000*l.* Was the character of that legacy afterwards altered? If the 2,000*l.* had been paid to G. Tennant, to him alone must the annuitants and legatees have looked for payment. He was constituted trustee for them, upon trusts beneficial to them, and *inter alia* to himself. There was a provision in the will which had been commented on in the argument, namely, that the trustees (which must mean the trustees of the will, and not G. Tennant) were to invest the two sums of 40*l.* and 50*l.* in case, at the time when, according to the terms of the will they would be payable, the persons to receive them should be infants. That must have meant that the two sums were to be repaid to the trustees, or that if the trustees actually paid the legacy to Tennant, the payment was to be reduced by 90*l.*, which was to be kept in trust for the children. At the time of the testatrix's death, G. Tennant was indebted to her in the sum of 2,000*l.*, and if nothing had been said about that debt, it would have been the duty of the executors to administer the assets, and they must have required him to appropriate the money in satisfaction of the legacies. There was nothing said in the will which altered that.—[His Lordship read the words of the will, and then said]—The contention for the appellants must go this length: that that which was given in one part of the will as a general legacy, payable out of the general assets, was afterwards converted into a specific legacy payable out of the sum of 2,000*l.* due from G. Tennant. There was nothing to shew that such was the intention of the testatrix, or that she meant to make the whole provision for her brothers

and sisters and their children dependent on the solvency of G. Tennant. Suppose that G. Tennant had been perfectly solvent and the rest of the estate insolvent? could it have been contended, when the testatrix said she gave the preference to others, that the 2,000*l.* legacy would take precedence. It could not; and yet that must have been so according to this argument of the appellants.

The fair result of the whole direction in the will was this, that this was to be the fund which was to be applied in making up the 2,000*l.*, but not the only fund for that purpose. In his opinion, therefore, the judgment ought to be affirmed.

LORD WENSLEYDALE had the misfortune to differ from his noble and learned friends. He thought the question depended entirely upon this: whether it could be collected from the will that this was a legacy left by the testatrix to be paid by her executors and trustees to the different parties as a legacy from the testatrix, in which case the pointing out the 2,000*l.*, which was the debt due from George Tennant, would only have been the pointing out the fund that was to be appropriated to the payment of the legacy, and not the absolute satisfaction of the legacy; and if that fund was deficient, then, according to the cases which had been cited, it was perfectly clear that they might have recourse to the general assets. If that was the true construction to be put upon the will, there was an end of the case. That was the view taken by the Vice Chancellor and by Lord Justice Turner. It was impossible for him to help thinking that that judgment could not be sustained. The grounds on which the judgment of the Court below proceeded, were not those which were adopted by either of his noble and learned friends. There was no ground for saying, that this was a legacy that was to be paid by the executors. Lord Justice Turner relied on the words which directed payment within twelve months, or so soon as the real and personal estate could conveniently be converted into money, as shewing that to be the true construction. But it had been, as he (Lord Wensleydale) thought, successfully contended by Mr. Palmer, that it was impossible to put that construction upon those words, because they would not apply to legacies which

were not to be paid until within twelve months after the decease of the testatrix's sister, of which kind there were several to children of her nephews. The second ground on which Lord Justice Turner placed great reliance was, that in certain events the executors were to secure the fund which was payable to the infant children. But if the whole of the sentence was looked at, it was impossible to put that construction upon it: for the direction was "that the said legacies or sums of money so given to the said David Pound, Charles Pound, Ann Dolley, Joseph Pound, the child of the said William Pound, and children of the said David Pound, shall be paid to them respectively by the said George Tennant within the space of twelve calendar months next after the decease of my said sister Mary Pound, free from legacy duty, which I direct shall be paid by the said George Tennant." Therefore, the hand to pay was his, and not the trustees'. And then the remaining part of the sentence could be easily explained, without the addition of more than a single word. The direction was, "that the said legacies payable to the child of the said W. Pound and the children of the said D. Pound shall be vested interests in them respectively at their respective ages of twenty-one years, and in the mean time shall be invested by my said trustees or trustee for the time being in or upon any government or real security, and the interest and dividends thereof either accumulated for the benefit of such children, or be paid and applied in or towards the maintenance and education of such children in such manner as my said trustees or trustee shall think proper." It was, therefore, perfectly clear that she meant the trustees to receive the money from G. Tennant, and when they had received it to invest it. This was clear from the whole framework of the will. A testator could make a gift arising out of his bounty an absolute charge upon a particular legacy. No words could be stronger than those here employed to effect that particular purpose. But then, it was said, that there was a general direction to the trustees to get in all the debts, to convert into money such parts of the estate as should not consist of money, and then to satisfy the debts, funeral and testamentary expenses, together with

the 28th of June 1822 he further charged the same property to the said S. Broadley, to secure a further sum of 500*l.* and interest.

S. Broadley, by his will, dated in May 1825, devised all the property whereof he was seised by way of mortgage unto his wife, Elizabeth Broadley, and three other persons, their heirs, executors, administrators and assigns, upon trust, on payment to his, the said S. Broadley's, executors of the respective sums secured by the said several mortgaged premises, to convey the same unto the person or persons who at the time of making such respective payments should be entitled to the equity of redemption thereof. The testator appointed the same four persons his executors, and died in July 1825.

Elizabeth Broadley, the testator's widow, died in August 1826.

By indentures of lease and release of the 20th and 21st of November 1831, William Maud and James Greenwood, the then two surviving trustees of the will of S. Broadley, transferred to Mary Bacon the said mortgage of November 1818 and further charge of June 1822, in consideration of 2,987*l.* 0*s.* 4*d.*, then paid to them by her, being the amount of the said two principal sums of 2,200*l.* and 500*l.* and an arrear of interest, amounting to 287*l.* 0*s.* 4*d.*, then due in respect thereof.

Mary Bacon, by her will and codicil, dated respectively in July 1845 and June 1851, devised to her executors, therein named, all the property which at the time of her decease might be vested in her by way of trust or mortgage, to hold the same upon the trusts and subject to the equity of redemption, which at the time of her death should be subsisting or capable of taking effect therein.

By indentures of lease and release of the 25th and 26th of July 1825, John Cromack the younger conveyed by way of mortgage certain other hereditaments and premises situate in Idle and Eccleshill, in the parish of Bradford, to the said Elizabeth Broadley, to secure a sum of 1,800*l.* and interest; and by the same indentures three several terms of 1,000 years were assigned to John Ness Blakey, upon trust for better securing the payment of the said sum and interest.

Elizabeth Broadley died in 1826 a widow and intestate, leaving Sarah Balme, spinster, and the said Mary Bacon, widow, her sole next-of-kin and also her co-heiresses-at-law, who, in December 1826, obtained a grant of letters of administration of her estate and effects.

Sarah Balme, by her will, dated in March 1828, appointed Robert Turner and Mary Bacon her executor and executrix, but the said will contained no devise of the estates vested in the testatrix as mortgagee or trustee. Sarah Balme died on the 18th of March 1828, leaving the said Mary Bacon her heiress-at-law and sole next-of-kin, who afterwards proved her said will.

Mary Bacon died in February 1853, and her will was shortly afterwards proved by the executors named therein.

On the 26th of September 1853 letters of administration of the goods, &c. of Elizabeth Broadley, left unadministered by the said Sarah Balme and Mary Bacon, were granted to John Turner Bacon, one of the executors of the said Mary Bacon.

By indenture, dated in October 1853, the executors of the said Mary Bacon, in consideration of 5,000*l.* paid to them in the proportions and in manner therein mentioned, transferred the said mortgage and further charge of November 1818 and June 1822, and also the said mortgage of July 1825 to the plaintiffs as tenants in common.

By indentures of lease and release, dated the 20th and 21st of August 1828, the several hereditaments comprised in the mortgage of July 1825, and also the hereditaments comprised in the mortgage of November 1818, were conveyed by the said J. Cromack by way of mortgage to John Jackson Lee and two other persons, their heirs and assigns, to secure 500*l.* and interest.

J. Cromack died in July 1842, leaving Jane Padgett his only child and his heiress-at-law and sole next-of-kin, and having by his will devised and bequeathed to her, her heirs, executors and administrators, absolutely, all his real and personal estate.

The bill was filed against Jane Padgett and her husband and J. J. Lee, the survivor of the mortgagees under the mortgage deed of August 1828, and it prayed

payment of the sums secured by the indentures of mortgage and further charge of November 1818 and June 1822, and the indenture of mortgage of July 1825, or for foreclosure in default of such payment.

The cause came on for hearing on the 16th of April 1857, when a decree was made to the effect that on the defendant J. J. Lee paying what should be found due on all the above-mentioned securities, he should be at liberty to redeem the mortgages of both estates, or otherwise that he should stand foreclosed.

This decree was not drawn up, and on the 23rd of December 1857 the defendant Lee presented a petition for a rehearing of the cause, under which it now came on to be reheard: the question being, whether the defendant Lee was entitled to have the decree varied by directing that he should be at liberty to redeem, at his pleasure, either or both of the estates mortgaged.

Mr. Malins and *Mr. J. Pearson* submitted that as the mortgages upon the two estates had become consolidated, the defendant Lee could not be allowed to split up the demand, and insist upon redeeming one estate alone; but must either redeem both estates or be foreclosed. They admitted that the plaintiffs and the representatives of Mary Bacon had, at the time of the mortgage to the plaintiffs, notice of the mortgage to the defendant Lee and others, and they cited—

Tilley v. Davies, 2 You. & C. C. C. 399.

Fovey v. Skipwith, 1 Ch. Cas. 201.

Smeathman v. Bray, 15 Jur. 1051.

Holmes v. Turner, 7 Hare, 367, n.

Watts v. Symes, 1 De Gex, M. & G. 240;
s. c. 21 Law J. Rep. (n.s.) Chanc.
713.

Mr. Lee and *Mr. W. H. Terrell*, for the defendant Lee, cited—

Bowker v. Bull, 1 Sim. N.S. 29; s. c.

20 Law J. Rep. (n.s.) Chanc. 47.

Ireson v. Denn, 2 Cox, 425.

STUART, V.C. said that, in taking by way of security the equity of redemption of two separate estates, the defendant Lee must be considered as having deliberately incurred the risk which he ran from those securities meeting in one hand, and the

entirety of both estates becoming thereby affected by both mortgages. The decree which had been made for payment by him of what was due upon both mortgages or foreclosure must therefore stand.

From the foregoing decision J. J. Lee appealed.

June 3.—*Mr. Malins* and *Mr. J. Pearson*, in support of the decree, besides the cases cited in the Court below, referred to—

Ex parte Carter, Amb. 733.

Bugden v. Bignold, 2 You. & C. C. C. 377.

Thorneycroft v. Crockett, 16 Sim. 445;
s. c. 2 H.L. Cas. 239.

Mr. Lee and *Mr. W. H. Terrell*, for the appellant, argued that the present case was most materially distinguishable from all the cases which had been relied upon by the other side. It was fully admitted that if two estates be mortgaged by one owner to different persons, and the two mortgages become vested in one individual, the owner cannot redeem one estate without redeeming the other. It was also admitted that a subsequent mortgagee may, by acquiring the legal estate, obtain priority over a former mortgagee, but that was only provided he had no notice of the prior mortgage at the time he acquired the legal estate. In this case, however, the distinction was, that when the mortgage of 1828 was executed it was admitted that notice to the mortgagees of 1818 and 1825 had been given, wherefore the case did not fall within the authorities cited. They cited in detail the following cases:—

Pope v. Onslow, 2 Vern. 286.

Ex parte King, 1 Atk. 300.

Ireson v. Denn.

Mackreth v. Symmons, 15 Ves. 329.

Willoughby v. Willoughby, 1 Term
Rep. 763.

Sinclair v. Jackson, 17 Beav. 405.

Bowker v. Bull.

Holmes v. Turner;

and contended that the case of *Tilley v. Davies* was an authority, when carefully examined, in favour of J. J. Lee, the appellant.

Mr. Malins was heard in reply.

LORD JUSTICE KNIGHT BRUCE said that a series of authorities precluded the possibility of there being more than one arguable question in the case, if any. The only arguable question was that which Mr. Lee had very ably put—namely, whether notice was material; and one authority for holding it so was cited—that was *Titley v. Davies*, the observation of Lord Hardwicke upon notice in which was peculiarly made with reference to another point in the case, and for a different purpose. He, the Lord Justice, had looked in vain for, and Mr. Lee had been unable to furnish the Court with, any other case in which notice had been considered material. With respect to this subject, his Lordship apprehended that according to the decisions it was perfectly immaterial whether where a first mortgagee transferred his security to a third mortgagee there was or was not notice of a second incumbrance. The second incumbrancer must be deemed to have knowledge that the two mortgages are liable to coalesce, and knowledge also of the consequences. His Lordship was, therefore, of opinion that the decision of the Vice Chancellor was correct; but he agreed with Mr. Lee that there might be ethical considerations of weight against such a doctrine; but that was a matter for the legislature to consider.

LORD JUSTICE TURNER entirely concurred, and observed that the case was governed by the authorities, beginning with *Fovey v. Skipwith*, and it was not to be supposed that, if the question of notice was one of importance to the decision of these cases, such a point would have escaped the observation of a series of eminent Judges. If notice had been a material consideration, it would have been necessary to allege want of notice in the pleadings, but no trace of any such allegation could be discovered in any of the cases which had been reported. He thought that the appeal must be dismissed; and he also agreed with his learned Brother that if any alteration of the rule upon such a subject as this were necessary, that was a matter wholly for the consideration of the legislature.

M.R. }
May 27; } BOLDERO v. THE EAST INDIA
Nov. 3. } COMPANY.

Annuity—East India Company—Contract—Refund of Subscription.

A scheme was promoted by the East India Company for granting annuities to their civil servants who subscribed to a fund upon stated terms, which in the result proved in certain cases more favourable to the fund than to the annuitant; but it was held, that in such cases the annuitant was not entitled to a refund.

The Bengal Civil Servants' Retiring Annuity Fund was promoted by the East India Company to provide annually at half the purchaseable value nine annuities of 10,000 rupees each, for nine of their civil servants who on retiring had been twenty-five years in the service, twenty-two years of which had been actually spent in India. One object in view was to keep the service efficient, and to accelerate promotion. The company, according to their statement, had fixed the value of the annuity according to the following table, which had been calculated upon the principle of their allowing interest at 6 per cent. per annum upon all the balances of the fund as thereafter explained.—

					Rupees.
If of the age of 40	...	...	...	...	107,350
41	...	...	...	...	105,800
42	...	...	...	...	104,730
43	...	...	...	...	103,560
44	...	...	...	...	102,350
45	...	...	...	...	101,100
46	...	...	...	...	99,800
47	...	...	...	...	98,410
48	...	...	...	...	97,070
49	...	...	...	...	95,630
50	...	...	...	...	94,170
51	...	...	...	...	92,730
52	...	...	...	...	91,290

The fund commenced on the 1st of May 1825. It was to be made up of deductions of 25 per cent. from the salaries and allowed emoluments of their civil servants who subscribed to the fund; the sum thus raised was to be left in the hands of the East India Company, at interest at 6 per cent., and the company were further annually to subscribe a sum equal to the amount contributed by the subscribers; this was also to be accumulated at like

interest; there were, however, some provisions stating that it was to be limited to the amount necessary to meet the nine annual annuities. If any servant having been in the service the required time retired during the first twenty-five years of the institution, he was to pay the difference to the fund between half the value of the annuity on his life and the accumulated value of his previous contributions in case the latter quantity should be less than the former. Separate accounts for each subscriber were kept to determine the accumulated value of the contributions of any subscriber. On the 1st of November 1852 the plaintiff, John Stephen Boldero, who was then between sixty-one and sixty-two years of age, retired, having been twenty-five years in the service, twenty-two of which he had resided in India. In the same year he accepted an annuity of 10,000 rupees (1,000*l.*) a year for life, its value, estimated by the table of values annexed to the regulations, being 76,170 rupees, one moiety of which was 38,085 rupees, but as the plaintiff required his annuity to be paid quarterly, an additional sum of 4,726 rupees was payable; this made the half-value of the annuity amount to 42,811 rupees. At the date of the plaintiff's retirement the sum standing to his separate account, being the accumulated value of his contributions with interest, was 87,504 rupees; this exceeded the half-value of the plaintiff's annuity by 49,419 rupees, and the total amount chargeable against the plaintiff, by the fund regulations, by 44,693 rupees. The plaintiff, accordingly, when he accepted the annuity, applied for a refund of the excess of the accumulated amount of his subscriptions and interest, and he in writing protested against the non-payment of the excess. It was alleged that after making provision for all payments to be made out of the fund, together with some additional charges, which it was proposed to throw upon the fund, there would remain a disposable balance of 1,086,257 rupees, applicable to no purpose of the fund, unless it should be applied to repay to subscribers, who had paid more than the half-value of their annuities, the excess of their subscriptions. This sum of 1,086,257 rupees, with an appropriated

balance, amounting together to 2,626,357 rupees, the East India Company proposed to capitalize, and allow the interest thereof in reduction of the contributions of the company to the annuity fund. As the company refused to recognize the plaintiff's claim to a refund, he filed the bill in this cause, and charged that the East India Company were trustees for the subscribers to the fund, and that he had been induced to become a subscriber on the belief, founded on the regulations, that on retirement he would have, in addition to his own savings, accumulated in the shape of subscriptions, a life annuity proportionate to his share in the contributions to the fund, and that he should derive advantages of larger amount than could be realized by other modes of investment, such advantages being available by those eligible to receive them upon terms of strict equality; and that in order to maintain strict equality, the amount of the purchase-money should depend on the value of the annuity, which would be regulated by the age of the annuitant, and that half the value of their respective annuities, and no more, would be required to be paid by servants becoming annuitants.

The bill then prayed for a declaration that the plaintiff and the other subscribers were entitled to a refund of any excess of the accumulated value of their contributions and interest above the aggregate amount of the half-value of their respective annuities, according to the table annexed to the regulations of the fund, and of the sums payable by them in respect of the advantages conferred by the 33rd, 34th, and 40th regulations. It also prayed for payment, with interest, out of the disposable balance in hand, and that the defendants might be restrained from capitalizing the 2,626,357 rupees.

The facts and arguments are further stated in the judgment.

Mr. Butt, Mr. Rolit, Mr. R. Palmer and Mr. Freeling, for the plaintiff.

Sir R. Bethell, Mr. Lloyd and Mr. Melville, for the East India Company.

Mr. Macnaghten, for George Palmer and Francis Boyle Pearson, subscribers to the fund, who had not paid the half-value of the annuities.

Mr. Follett and Mr. Rogers, for the managers of the fund.

Mr. Palmer, in reply.

Nov. 3.—**THE MASTER OF THE ROLLS.**—The plaintiff desires this Court to put a construction on certain written documents, some of which contain the regulations of the Bengal Civil Service Annuity Fund, and others of which are explanatory thereof; and he asks, that according to the true and proper construction thereof it may be declared that he, as one of the subscribers to this fund, is entitled to the refund of the excess of the accumulated value of his subscriptions, and the interest thereof above the amount of the half-value of an annuity of 1,000*l.* per annum for the rest of his life, at the date of his retirement from the service: such half-value to be calculated according to the table annexed to the regulations of the fund. The suit is not instituted for the plaintiff alone, but he sues on behalf of himself and all other subscribers to this fund who are similarly situated; and the prayer is for the sake of all of them. The bill further prays, that the amounts due to the plaintiff and to others situated as he is, may, in accordance with this view of the case, be paid to them out of certain funds applicable to that purpose. The defendants are, first, the East India Company, next nine gentlemen who are the managers of the fund, and lastly, two gentlemen who represent those subscribers to the fund who have not already by their subscriptions paid the half-value of their respective annuities according to the table referred to, and have not accepted the annuities to which they might be entitled. The documents adduced by the plaintiff in evidence, in support of his claim, are of three different classes. The first class consists of documents which bear date in and prior to the year 1825, and by which the annuities of retiring civil servants in Bengal were established and regulated. The documents of the second class bear date in the year 1835, and relate to the temporary substitution of a new and experimental plan for the purchase of the annuities for retiring civil servants at one-fourth of their value instead of one-half, in consequence of the

partial failure of the original scheme; and the documents of the third class bear date in the years 1838 and 1841, and relate to the substitution of a new plan for the acquisition of the annuities by retiring civil servants, and to the various modifications in the scheme of the institution which were proposed, and which were accepted or rejected. The two latter classes of documents bear little upon the real question. They relate rather to the history of the institution, after the experience of some years had shewn its working and tested its efficiency. The question really depends on the documents which bear date in and prior to the year 1825, by which the fund for compensating the retiring civil servants was created and the institution established. The documents of this period are also of very unequal value. They are four in number. The first bears date the 1st of May 1822. It is a proposal in writing made to the East India Company by their civil servants in the presidency of Bengal. It suggests the propriety of raising a fund for providing annuities for retiring civil servants, and points out the means by which this might be done, which is partly by a subscription by themselves, and partly by a contribution of an equal amount to be made by the company itself. It further suggests that the East India Company should act as treasurers of the fund, and that in that character the company should make and pay interest on the funds subscribed and to be retained by them. The second document of this series bears date the 29th of June 1822. It is a despatch from the Governor General to the East India Company, recommending the adoption of this proposal. The third document is the answer of the Directors of the East India Company, which bears date the 8th of December 1824. The fourth document is a letter written by the Secretary of the Government of Bengal to the members of the committee of the civil servants, transmitting and accompanying the answer of the directors. This last document bears date the 12th of May 1825. The document of most importance in this series is the third;—viz. the answer of the directors of the 8th of December 1824, which is an assent to the principle of the proposal made by the civil servants; but

servants should subscribe 4 per cent. per annum on the amount of their official incomes and emoluments in the first place, and as this would not be sufficient to provide a fund sufficiently large for the purpose required, the directors of the East India Company to supply a sum proportionate to what they allowed to the Madras fund, which was then in operation; that is, to supply an equal amount with the sums subscribed by the civil servants themselves: and by these means they calculated that a fund would be created, which would be sufficient to make up whatever might be required in order to admit of eight or nine retirements every year upon life annuities of 7,000 company's rupees each; and they suggested that the subscriber should become absolutely entitled to the offer of an annuity for his life of that amount when he had been a subscriber for twenty-three years, but that he was also to be able to entitle himself to a like annuity at any time before that period, provided he paid to the institution the difference between two-thirds of the actual value of the annuity on his life at the date of his retirement, and the accumulated amount of his previous subscription to the fund. The proposal then contains many regulations for working out this scheme in detail. The East India Company, by their letter of the 8th of December, adopted the principle of the proposal of the Bengal civil servants, but on a more liberal scale, and introduced several modifications which were better calculated to secure the object they both had in view. The object of the directors of the company is thus expressed in the 33rd paragraph of their public letter. They state their favourable opinion of the establishment of such a fund, because it was calculated to "answer useful and wise ends as providing for an unexpected loss of fortune, as occasioning the return of the company's servants to Europe by a quicker movement than would otherwise take place, and thus securing to the company the services of Europeans in the most active period of their lives, and making way for the advance of younger servants." The modifications which the directors introduced to promote this object, were to the following effect: they resolved that the annuities should be 10,000 rupees each, at

2s. per rupee, that is 1,000*l.* sterling per annum; raising the annuity therefore from 7 to 10; that the period to entitle a person absolutely to the annuity should be twenty-five years' subscription and twenty-two years' actual residence in India, and that before that time the civil servant might entitle himself to receive it by payment of half of the value of the annuity, towards the payment of which the amount of his subscriptions was to be allowed in account; and the East India Company undertook to contribute whatever money might be required, in addition to the contributions of the subscribers, to enable the fund to grant as many as nine annuities annually on the principle thus stated. Furthermore, in order to diminish the amount to be paid by the retiring civil servant to entitle him to his annuity, the company resolved, by Article 64, that interest at the rate of 6 per cent. per annum should be allowed on the fund set apart for the payment of the annuities, which would have the effect of causing the subscriptions of the civil servants to accumulate at that rate at compound interest. The annuities in each year were to be offered to the civil servants according to their seniority on the Gradation List of the service as settled by the directors. With respect to existing civil servants, the subscription was to be optional; but with respect to all future civil servants in Bengal it was to be compulsory: and an engagement to subscribe to the fund was to become a part of the covenants of all persons thereafter to be appointed writers.

The general effect of this scheme, in the majority of cases, is very plain. Every one of the Bengal civil servants was to subscribe 4 per cent. out of his official income and emoluments. This was to accumulate at compound interest at 6 per cent. until he retired. Whenever he was desirous to do so, provided the pensions then available were not taken by his seniors, he was entitled to a retiring pension of 1,000*l.* per annum for his life on payment of so much money as, together with the fund created by his subscriptions of 4 per cent. accumulated at compound interest of 6 per cent., would amount to half of the value of such an annuity at the age he had then attained. Thus, supposing a civil

servant to have attained the age of forty-five years, and to be then desirous of retiring, the value of the annuity of 10,000 company's rupees for his life is calculated at 101,100 company's rupees, according to the tables appended to the regulations. The consequence would be, that the price to be charged against him for this annuity would be half, or 50,550 company's rupees; and if his subscription of 4 per cent. out of his official income, with the accumulated interest thereon, amounted to 50,000 company's rupees, he would have to pay 550 company's rupees additional, to entitle himself to the annuity. If the subscriptions amounted to 50,550 company's rupees, he would have to pay nothing. In these cases, the regulations are distinct and unambiguous; but if his subscriptions, either with or without the accumulated interest, exceed the 50,550 company's rupees, then arises the question raised by the bill. In that event, is the civil servant entitled to the refund of his subscriptions over and above the 50,550 company's rupees; that is, over and above the sum which was required to be paid, or made good by him, for the purpose of purchasing his life annuity of 1,000*l.* at the rate of the half-value thereof? The plaintiff entered the civil service of the East India Company in the year 1827; he retired in the year 1852: he had been twenty-five years in the civil service of the East India Company, of which twenty-two years had been spent in India; he was then sixty-one years of age; and he was entitled to an annuity of 10,000 company's rupees, or 1,000*l.* sterling, at the rate of 38,085 company's rupees, which, according to the tables already referred to, was the half-value of that annuity, for the remainder of his then life. The balance then standing to the credit of the plaintiff, on the books of the trustees and managers of the Bengal Civil Service Fund, was 87,504 company's rupees, which, after deducting the 38,085 company's rupees, leaves a surplus to his credit of 49,419 company's rupees, which is the amount now claimed by him.

On examining the regulations proposed by the Bengal Civil Service, as altered by the directors, there is no reference made, directly or indirectly, to any payments by a subscriber exceeding the price he would

have to pay for his annuity. No allusion is made to any refund under any circumstances, except that in the 14th clause it is provided that any subscriber who may be dismissed from the company's service, shall forfeit all right to any benefit from the institution, and shall be entitled to no refund of any payments which he may have made. We are, therefore, driven, in the absence of express enactment, to consider what view of the case is either impliedly involved in, or if not is most consistent with the frame of the scheme of the existing regulations. The clauses which may be said to relate more especially to this subject, are the 1st, 10th, 11th, 12th, and the 30th. The 1st is in these words: "The subscribers shall, from the 1st of January 1824, contribute for the purposes of the fund one twenty-fifth part of their salaries and all other public emoluments, however denominated, compensation for travelling expenses excepted." The 10th is: "Should any subscriber, having resided in India, in the civil service, not less than twenty-two years, and been a member of the institution the full period of twenty-five years, retire from the service before the option of an annuity may devolve on him, he shall be entitled to the same in his proper turn, without any payment to the fund, save what may be claimable under the following rules." The 11th is: "Any subscriber who may accept the tender of an annuity shall be required, to entitle him to such annuity, to pay to the institution, previous to the date at which the annuity is to commence, the difference between one-half of the actual value of the annuity on his life and the accumulated value of his previous contribution, in case the latter quantity shall be less than the former: these values shall be determined as below provided." The 12th is: "Any member so choosing may decline paying the difference defined in the foregoing rule, and shall in such case be entitled to an annuity, diminished in proportion to the sum by which the accumulated value of his contribution is less than one-half of the actual value of an annuity on his life." The 30th is: "To determine the accumulated value of the contributions of any subscriber, the accountant shall keep separate accounts

for each member ; and these accounts shall be annually made up with the rate of interest allowed by the company." These, therefore, do little more than specify the amount, if any, which the civil servant will have to pay, should he accept the annuity when his turn comes. And the 30th specifies how the sum already contributed by the retiring civil servant is to be ascertained. It would seem, therefore, if the matter rested on these regulations alone, that the utmost that could be urged on the subject would be, to say that it was a *casus omissus* ; but if so, it would be unfavourable to the plaintiff ; because to decide in his favour would be to import into the institution, to meet an unforeseen event, a regulation not only not specified, but not even included, by any inference that could fairly be drawn, either from the general scope of the scheme itself, or from any of the particular and individual classes provided for by regulation. It would, therefore, be impossible for this Court, in expounding the meaning of a contract, to adopt any such course ; but on these clauses, the objection to the plaintiff's case does not rest here ; for what is more important is, that to decide in his favour would not be merely to import a new regulation into the institution, but one which would be inconsistent with some of those which are already established. The first regulation provides that a subscriber shall contribute 4 per cent. from his income, without any limit of time ; viz., that he is to remain a subscriber as long as he continues in the service of the company. The 10th provides that after subscribing for twenty-five years and residing in India twenty-two years, a subscriber may cease to be a subscriber, and retire from the service without forfeiting his right to an annuity in his turn, and without making any further payment than that specified by clause 11 ; that is, without doing more than paying the balance, if any, which may be necessary to make up the half-value of the annuity. In other words, if the subscriber at that time has paid his half-value of the annuity, he will have nothing more to pay ; but if he has overpaid the half-value, what more is to be done, according to the regulations ? Nothing : for it is not stated that the excess is to be refunded

to him. It might, no doubt, be extremely difficult to introduce a series of regulations which should exactly specify when the subscription should cease, so as to fit exactly the time when the amount standing to the credit of the subscriber would precisely equal the half-value of the annuity at the age when he chose and was about to retire ; but if it had been the intention of the company and directors to effect such an object, nothing would have been more easy than to have approximated very closely to this end. They might have provided, that the subscription to the fund should at all events cease at that period whenever, having regard to the age of the subscriber and the accumulated amount of his subscriptions, an amount was standing to his credit of not less than half the value of the annuity he would be entitled to receive, if one could then be tendered to him for acceptance ; and the regulations, by way of further approximation to this idea of perfect equality, under all circumstances, if such had been the object, might have further provided that when the annuity was afterwards tendered to and accepted by this civil servant, any accumulation which had arisen over the half-value of the annuity, which it would necessarily have done in consequence of his increased age, since the period when his subscription was stopped, should be refunded to him. But the contrary of all this seems to be contemplated ; and, looking at these regulations alone, it would seem to be provided that the subscriptions are always to be paid by every person as long as he continues a civil servant ; that he is not to retire from the service without forfeiting all right to any annuity, unless he have subscribed to the fund for twenty-five years, and have passed twenty-two of these years in India. This is how the matter stands, when rested solely on the regulations themselves. Upon them exclusively the plaintiff would have nothing on which to found an argument in favour of his claim.

But I then turn to the dispatch itself, and to the clauses which precede and accompany the regulations. I am unable to discover anything to controul or alter the view I have taken of the plaintiff's case, as derived from the regulations them-

selves; but, on the contrary, when taken as a whole, I find somewhat to confirm it. The clauses principally relied on by the plaintiff are the following: The 52nd, 53rd, 54th, 55th, 56th and 57th. I read the first and last, which are the most important and most favourable to the view of the plaintiff.

"The third part requiring attention is the proportion of value of the annuity which should be paid by the annuitants, or, in other words, what shall be the sum paid by a servant, including his accumulated subscriptions, to entitle him to an annuity, if otherwise eligible; upon which point we must observe, that we consider it of essential importance that so far as may be practicable the advantages afforded by the fund should be available by those eligible to receive them, upon terms of strict equality." The last may be termed a species of summary or winding up of the former ones. It is of considerable length; but the beginning of it is to this effect:—"But although in the mode here proposed all servants upon becoming annuitants will pay half the value of their respective annuities, and no more, and will be so far placed upon an equal footing, yet it has not escaped our observation that there will be a material difference in the value of the risks incurred by the several subscribers of losing, by death or early retirement, the amount of their contributions. The extent of this risk depends upon the sum contributed in each year, and upon the number of years for which the contribution has been paid." Then it proceeds to discuss that subject at considerable length. The first part is the most important for the plaintiff. The first of these regulations, therefore, it is contended, contemplates, as a foundation for the scheme, in the first place, strict equality; which would not, it is argued, be attained if one civil servant contributed a much larger sum than another, and after having so done received only the same amount of annuity. To enforce and maintain this equality, it is argued, by the plaintiff, to be essential to repay to the civil servant the excess which he has paid over and above the half-value of his annuity. The other clause (the 57th) is, it is contended, still more precise in the same direction; for it expressly lays

down that the principle of the scheme is "That all servants upon becoming annuitants will pay half the value of their respective annuities, and *no more*, and will so far be placed upon an equal footing." For the plaintiff, it is argued (and apparently at first sight with great force), that it would be a direct violation of this rule to say, that when a civil servant has contributed out of his official income more than half the value of his annuity, that excess is to be retained, and he is not to have any increase made to his annuity. It is impossible to say, that there is not great weight in these arguments, when these clauses are looked at alone, without the rest of the document with which they are united, but taken in connexion with the rest of the clauses which constitute this institution, it is impossible to give to them the effect contended for by the plaintiff.

In the first place, when we come to the clauses which specify the means by which the annuity fund is to be formed, from 60 to 66, both inclusive, it is stated that the fund is to arise from three sources, and three sources only: viz., first, by subscriptions from civil servants proportioned to their official income; secondly, by contributions from the company; thirdly, by fines from persons being annuitants. In the former case, it is expressly laid down that it is to be an inseparable condition, attached to all persons thereafter appointed writers, that they are to contribute 4 per cent. upon their salaries and allowed emoluments. There is no exception stated; no deduction allowed; no period specified, when this subscription is to cease; but as long as any person is a civil servant, so long must he be a subscriber, and that he shall be a subscriber is to form a part of the covenant which he is to enter into with the East India Company. I have already noticed, how easy and obvious it would have been to stop the subscription at a time when the amount standing to his credit equalled the half-value of the annuity at the age which the subscriber had then reached. If such had been their intention, why did this clause omit to state the period when the subscription should stop, or be silent as to any refund? But what is still stronger, when we look

at the words of this clause, according to their rigid and strict construction, they do not import that no civil servant is ever to subscribe more than half of the value of the annuity, but they import that he shall never pay any more than half the value of the annuity. In other words, it simply enacts that the payment, if any, which he will have to make, and which constitutes the third source by which the fund is to be supplied, shall not exceed what, together with his contributions to the first source from which the fund springs, viz. his subscription, accumulated at 6 per cent., shall amount to the half-value of the annuity of 1,000*l.* at his period of life. It might appear, at first sight, that this was a trifling and technical distinction to draw between the word "subscribe" and the word "pay"; but a more careful examination will shew, that it is the true effect and meaning of all these clauses. There are three sources of income by which the fund is to be created. Two of these spring from the civil service: viz. subscriptions and fines, which is the word used, for the payment of the half-value of the annuity. The clauses from 52. to 57. inclusive relate to the latter of these two sources of income. The word "equality" in the 57th paragraph has reference, therefore, exclusively to the equality of price to be paid for the annuity. So, also, the words "no more," in paragraph 57, have reference to the same point, viz. the amount to be paid for the annuity. This point is also made clear, by considering in what manner, and to what extent, the rules provide for the remaining sources of income, by which the fund is to be provided. This (which in these regulations is treated as the second source) is the contributions by the company.

Now by these regulations it is expressly provided that the company shall contribute such a sum, whatever it may be, in addition to the contributions of the subscribers, as will be sufficient to enable the fund to grant the annuities in question: but that is the effect of clause 61. The words are, that "the company shall contribute whatever sum may be required, in addition to the contributions of subscribers, to enable the fund to grant such number of annuities as may be accepted under the

prescribed regulations, not exceeding nine per annum." Now the contributions of the civil servants consist of two distinct matters, namely, subscriptions and fines. If the contention of the plaintiff prevailed, it would be necessary for the company not only to contribute what might be required for the purpose here specified, but also what, in addition, might be required for the purpose of refunding to subscribers the excess of the sum standing to their credit above the half-value of their annuity. To effect, therefore, the objects of the plaintiff this clause 61. must be modified, and its present import wholly varied. The express constitution, therefore, of the scheme, as propounded in this letter, negatives the argument founded on the clauses relied upon by the plaintiff, and shews that these clauses must be intended to refer, and to be confined, to the case of the third source of income, viz. the case when the civil servant accepting the annuity has not standing to his credit, as a subscriber, as much as the half-value of the annuity he seeks to obtain. The fact is, that not only is perfect equality, in all cases, not contemplated by the scheme, but the directors point out, and the scheme itself shews, that equality is unattainable. It is prevented by the death, dismissal or resignation of a subscriber before obtaining his annuity; it is prevented by the circumstance that prior claims may exhaust the fund; all which is confirmatory of the observation, that perfect equality was not considered attainable, and that the equality spoken of in the clause in question refers exclusively to the payments to be made in respect of which the third source of income was derived.

This view of the case is confirmed by another circumstance, drawn from the whole of the papers taken together. If we refer to the basis on which the scheme is founded, we find that the contention of the plaintiff would frustrate or impede one of the principal objects it was intended to attain. This object is thus stated by the directors in the opening of their observations on the proposal from Calcutta:—It is in clause 33, already referred to as being that which refers to the "quicker movement." This principle is repeated again in other places. In paragraph 43. it is observed, "Those

advantages should certainly be considered, because, in order that the fund may be beneficial to the service, it is important that all the annuities from it, as they accrue, should be accepted by old servants, so that the fund may not be instrumental to the retirement of young and active servants, and it cannot be expected that old servants in the possession, as they generally are, of lucrative offices, would be tempted to retire, if the annuity did not afford a material addition to such income as the party may possess." This is again referred to in paragraph 46:—"As the efficiency and utility of an annuity fund must materially depend upon the inducement afforded by it to old servants to retire, and as it cannot be expected that civil servants will retire to England without adequate provision"—and the same view seems to pervade the whole of the document on this subject. But if a refund of the excess of the sum standing to the credit of the civil servant in his subscription account above the half-value of the annuity at the date of his retirement were allowed, it is manifest that it might, and in many cases must, have an effect subversive of this very object; for as 6 per cent. was to be allowed by the company on the fund set apart for the payment of the annuities, and which fund consisted in part of the subscriptions of the civil servants, the effect is, that their subscriptions accumulate at compound interest at 6 per cent. per annum. If a civil servant received the offer of a retiring annuity, at the period when the sum standing to his credit equalled the full amount of the half-value of his annuity, or nearly so, he might well find it for his advantage to decline accepting this offer, as in every year the half-value of his annuity would diminish, and in the mean time the saving from his subscriptions would be accumulating at compound interest at 6 per cent. per annum; all of which would come back to him when, at some future time, he accepted the annuity. This would be the result if the plaintiff's view of these regulations were the correct one. It is true that the plaintiff does not, at the bar, claim the accumulations of his subscriptions at compound interest at 6 per cent., although he does so by his bill, and that he now only claims a refund of

the actual excess paid by him since the time when his subscription fund amounted to the half-value of the annuity. Now it is manifest that this distinction is not maintainable, by any construction to be placed on any of the clauses of the scheme itself, and that if the plaintiff is entitled to any refund at all, he is entitled to the refund of the whole excess of his subscription-fund, as it stands to his credit in the books kept by the trustees and managers of the institution.

Then, again, the whole of the clauses which relate to the principal part of the scheme, and which contain the calculations on which it is founded, negative the view put forward by the plaintiff, both in express words, and in the general scope and spirit of them. Thus it is that in the calculations mentioned in the 62nd clause, and worked out in the 71st clause, the interest is calculated on the balance of the fund in the hands of the trustees; but if in any case there was to be a repayment of subscriptions, what is calculated as the balance would not have been the real balance of the fund, as a part would have been refunded to the civil servant, and accordingly, in that event, all the calculations on the scheme so established would have been erroneous, and a wholly distinct set of figures and calculations would have been necessary. The prospective calculations of the scheme carried on for twenty-four years, anticipate that the whole fund would be exhausted by the annuities accepted. So that if the working of the scheme had been precisely what was anticipated by the directors, and which was the point to which they endeavoured to approximate, there would not have been a penny available to provide for any such refund to any person whatsoever; and any refusal in any case would have created a failure of funds to meet the payment of the annuities. On the hypothesis on which the plaintiff's case is founded, viz., of perfect equality to all persons connected with the institution, although it would have been very difficult to arrive at that result precisely in all cases, yet a considerable approximation to it might have been made very easily by one or two simple additional regulations, if such equality had been the object; but on the assumption that this perfect equality

to all subscribers was intended, and that the subscriber is entitled to the refund now contended for, nothing can be conceived more clumsy than the whole scheme, as it would then stand. If the civil servant is to be entitled to a refund, why not stop the subscription when his account equals the half-value of his annuity? and also, why not compel him to accept the annuity as soon as one can be offered to him? What possible explanation can be suggested for the East India Company taking the trouble to accumulate 1-25th part of a civil servant's income and emoluments at compound interest, at 6 per cent., to be repaid to him when he thought fit to retire and accept his annuity of 1,000*l.* per annum? Then, again, what possible explanation can be suggested for depriving of the whole excess of his subscriptions the estate of the civil servant who has notified his intention to retire and accept the annuity, but who dies the day before he retires, and yet paying that excess to the executors of the civil servant exactly similarly situated, but who happens to live two days longer? Why, also, should the civil servant, who has retired when he was entitled so to do under the 10th regulation, but without receiving any annuity, because the option of one had not then devolved upon him—why should he be entitled to receive back the excess of his subscriptions if he live long enough to obtain his annuity, but not if he die before the option of an annuity should devolve upon him?

It is needless to go on accumulating instances of the incongruity, and want of harmony, existing in all parts of the plan, on the hypothesis of the plaintiff's construction. They spring up at every turn. But, on the other hand, the plan, though not productive of equality in all cases, is perfectly consistent and harmonious, if the basis of it is supposed to be this, viz.: that all persons must be subscribers to it as long as they fill the character of civil servants; that if they die or are dismissed or retire from the service, not having resided in India twenty-two years, and not having been a member of the institution twenty-five years, they lose all their contributions and subscriptions, whatever may be the amount of them; that if they live to attain the annuity

they get it for nothing, provided their subscriptions accumulated at compound interest at 6 per cent. equal or exceed half the value of their annuity, and if not, they have to pay the difference between their accumulated subscriptions and the half-value of their annuity; that these subscriptions and this payment of the half-value of the annuity, when it takes place, are to make up the sources of income of the fund; and that the East India Company provides what may be required to make up the annuities. This is plain and simple, and appears to be the scope of the whole scheme; and the regulations are well drawn to express these intentions. The arguments, however, which appear to flow from the paragraphs above referred to, and from the general scope and purpose of the scheme, are attempted to be refuted by the plaintiff, in the following manner:—It is argued, on his behalf, that this is a case of contract between the East India Company and each civil servant, and that it must be construed, therefore, according to the terms of the contract, and that the public letter to Bengal of December 1824, so far as it relates to this subject, consists of two branches: first, the clauses which constitute the contract, and then the clauses which describe how that contract is to be carried into effect. This distinction, it is urged, is clear, and recognized in all cases. As, for instance, when a vendor agrees to sell a message to a purchaser for a given sum, this constitutes the contract; but the necessity of making out and of accepting a good title, and of preparing and of executing the conveyance, are the means by which that contract is carried into effect, and which need not be expressed in the contract, but are necessarily incidental to it; and that still less can such clauses, if expressed, controul the effect of the contract, but that they are to be treated on the well-known rule, *expressio eorum quæ tacite insunt nihil operatur*. This argument is applied to this document thus:—It is urged that the clauses in this letter, from 44 to 59, both inclusive, specify the terms of the contract, and that the clauses from 60 to 72, both inclusive, are merely the machinery by which the contract so expressed is to be carried into effect, and that therefore, no inference can fairly be

drawn from them to prejudice or hinder conclusions which fairly result from the words used in the first clauses. But this distinction, though accurate in many cases, has not any application to this case. The contract is not contained in any of the earlier clauses, taken separately and conjointly, but it is a contract made up of all the clauses of the letter, and it can only be ascertained by taking them all together. It is not a contract to provide annuities for life to retiring civil servants at a particular price; but it is a contract to provide such annuities in a particular manner, and subject to certain specified conditions, all which conditions are essential and part of the contract. It is also not a separate contract between the East India Company and each one of its Bengal civil servants; but it is a contract between the East India Company and the whole body of their civil servants in Bengal, for the general benefit and advantage of that aggregate body taken collectively. The contract consists in mutual engagements to perform certain acts by the body of the civil servants of Bengal on the one side, and on the other side by the East India Company. The acts to be done by each party are specified in, and are to be collected from, all the clauses of this public letter, taken together with the regulations which are appended to it. The pecuniary part of it is not the only part of the contract; but, so far as that part is concerned, it seems to be distinctly to this effect, viz.: that in consideration of the civil servants subscribing 4 per cent. per annum out of their pay and emoluments as long as they are in the service, and in consideration of their paying what, if anything, may be required to make up the half-value of their respective annuities, to be calculated according to the tables specified, the East India Company will grant and pay nine annuities annually of 1,000*l.* each, for the respective lives of nine retiring civil servants; and this Court can no more diminish the amount to be paid by the civil servants than it can lessen the annuity to be granted by the company.

This is how the question stands upon the construction of the first class of documents, taken alone. Other considerations, however, have to be noticed. When the terms of a contract are plain, usage can little affect the construction to be placed upon

it. When it is ambiguous, undoubtedly usage for a long time may influence the judgment of the Court, by shewing how it was understood by the original parties to it. If usage is to have any effect in this case, it is wholly against the plaintiff. From the time of the establishment of this scheme until the year 1835, that is, for ten years, no refund, such as that sought by the plaintiff, was ever made to any one; nor, indeed, does it ever appear to have been claimed. Still, however, the plan was not successful in accomplishing the object which influenced the East India Company in adopting it. The plan was based on the belief, that at least nine persons would be found, in each year, desirous to accept the proposed annuity on the terms so offered, and that accordingly nine annual vacancies in the civil service would by this means be produced. This expectation turned out to be delusive. Even in the absence of any refund the advantages offered were not sufficient to induce a sufficient number of civil servants to retire. Accordingly it so happened that for several years after the establishment of the annuity fund in 1825 nine annuities in each year were not accepted by the subscribers; the consequence of which was, that the annuity fund increased to a considerably larger extent than had been anticipated, and the "quicker movement" in the civil service, intended to be effected by the scheme, did not take place. A memorial was, in consequence, addressed by the civil servants to the directors, praying for some modification of the scheme. To this the East India Company returned an answer on the 27th of May 1835, in consequence of which additional regulations were proposed for the management of the fund by the civil servants of Bengal in 1836, and were sent for approval to the East India Company. They were approved by the directors in a letter, dated the 3rd of May 1837. The effect and general scope of these proposals was, that in future, at the close of every year, two-thirds of the unaccepted annuities were to be offered to subscribers in order of seniority on payment of one-fourth instead of one-half of the value of the annuity, and that in the event of the accumulated subscriptions, with interest, exceeding that fourth, the balance was to be returned to

the subscriber. This arrangement was intended to be experimental, and it was proposed that it should last for three years, in order that its effect might be tried. By this plan the regulations expressly contemplate and enact, although only as a temporary and experimental measure, a refunding to the retiring civil servant of his subscriptions if they exceed the price at which the annuity is to be purchased which is fixed at one-fourth of its real value. It is not necessary to go very minutely into this scheme, which was adopted only as a temporary expedient, and was soon afterwards abandoned. But it is not suggested that any alteration should be made in the original scheme, by which the annuities are first offered to the subscribers at half-value, or that this principle of refunding is applicable only to that portion of the fund which is unapplied by reason of the whole of the nine annuities not having been accepted. Practically, however, with this alternative to fall back upon, it was evident that no one would accept the annuity on payment of half-value; and accordingly under the altered scheme six annuities, instead of nine, were granted in each year on payment of one-fourth instead of one-half of the value of the annuity; and in the payment of that one-fourth the amount standing to the credit of the subscriber was to be taken into account, and the balance, if any, in his favour was to be repaid to him. This plan lasted some years, and under it twenty-eight persons received from 1835 to 1842 annuities on these terms. This plan was soon objected to by some of the civil servants who were low on the list, unless it were made a perpetual arrangement, in which case the permanent contributions to be made by the East India Company must have been very materially increased. The result of this was that the new plan was abandoned, and the whole matter was discussed over again from 1838 to 1842 with a view to the permanent establishment of the institution. This discussion gave rise to that which has been termed the third class of documents. They add little light to the subject before the Court. By the 30th clause of the original scheme, any changes might be introduced into it, provided they were carried by a majority of three-fourths of the civil servants at Bengal, and were

afterwards sanctioned by the directors of the East India Company. No point on the alterations has been made, and therefore, unless the construction contended for by the plaintiff is to be found in the original scheme, it does not now form any part of it. The short account of these last transactions is as follows. In January 1838 a memorial was sent by the civil servants to the directors, objecting to the refunding the excess of subscriptions as long as the price at which the annuity is to be purchased is to be at one-fourth of its value. On the 1st of September 1841 the Court of Directors sent a despatch to Bengal, in which, in the first place, they point out that the excess of the real balance of the fund over that which had been estimated as the probable balance when the institution was founded had amounted to 2,794,663 company's rupees, and that the half of that sum was 1,397,331 company's rupees; and the directors suggested that this half should be applied in reducing the amount to be paid by the retiring civil servant by way of what is called a fine for the purpose of obtaining his annuity. And, in the second place, they suggested with respect to the refunding to the retiring civil servant, that it would be desirable to confine this refund to the excess which may be standing to his account over and above the half-value of the annuity. This matter was discussed by the civil servants in Bengal in January 1842. Some modifications were introduced into the rules which were sanctioned by the directors, but a clause expressly enacting that the excess of subscriptions over and above the half-value of the annuity should be returned to the retiring civil servant was proposed and rejected by the civil servants at Bengal in consequence of its not having the requisite majority of three-fourths in favour of it. All these proceedings, which I have not thought it necessary to notice in detail, leave the matter very much where it stood before. The arrangement in 1835 was but temporary, and has been finally superseded. A new regulation, removing all doubt in the matter by the express enactment of it, has not been adopted. It cannot influence the decision of this Court on this question; but in considering the argument to be derived from usage, it is singular that when this regula-

tion was proposed and discussed, and also during the previous discussion as to the modifications to be introduced into the scheme itself, it should never have occurred to any one, so far as appears from these documents, to suggest that the rules of the institution then in force contained the very provision which they were seeking to introduce into them, if in truth, with any shew of reason, any such provision could be discovered in the existing regulations; or, what is more material, any person could be found who believed that it had been intended to form a part of the original arrangement. This is how the matter stands on the evidence; what may have occurred at Madras or Bombay cannot affect the question. As to authority, there is little of moment, but what little there is, is unfavourable to the plaintiff. They consist of decisions of the Courts at Calcutta and at Madras. They can have no effect on this question, except so far as the Court may in the judgments then pronounced discover arguments which may assist it on the present occasion. At Calcutta the decision was adverse to the view of the plaintiff. At Madras the decisions were in accordance with his present contention. There is, however, a considerable distinction between the case at Calcutta and that which occurred at Madras. The case of *Blunt v. Halliday*, which occurred at Calcutta, was a decision *in pari materid*; and although it will not bind this Court, which is compelled to exercise its own independent judgment, it unavoidably has considerable effect on the judgment of this Court, when it finds that the three learned and eminent Judges who constituted the Court at Calcutta in 1852 have come to a conclusion unfavourable to the claim of a person similarly situated to the plaintiff. With respect to the two cases at Madras, viz., *Davis v. the Trustees of the Madras Civil Service Annuity Fund*, in August 1856, and *Robertson v. the East India Company*, in September 1857, Sir Christopher Rawlinson, in deciding these cases, does not in terms dissent from the decision in *Blunt v. Halliday*, but expressly founds his decision on the fact that a rule had been made and published in 1838, with the knowledge of the East India Company, expressly authorizing the refund which was claimed, and on the fact that the prac-

tice of refunding the excess of the subscriptions over and above the half-value of the annuity had prevailed uniformly in that Residency from 1834 down to 1851, without having been objected to. "How then," says Sir C. Rawlinson, referring to a rule passed by the civil servants in that Presidency abolishing the refund, and to which a retrospective effect was endeavoured to be given,—“how then is the plaintiff to be deprived of the benefit of his payments, made on the faith of an express rule and of an unvarying practice of more than twenty years in conformity with it, by the act of a majority, whose power so to bind him was not attempted to be shewn? and certainly no portion of the despatches or of the original regulations contained any provision for such a proceeding—one *primd facie* contrary to all the rules of equity and of good faith.” It is impossible to dispute that the strong inclination of Sir C. Rawlinson's argument and opinion on the question of construction of the original documents are in favour of the plaintiff; but this was by no means essential for his decision, nor is it in fact rested upon it.

This, then, is how the matter rests on authority. Taking the whole together, then, I find that on the face of the original document, the public letter to Bengal of the 8th of December 1824, and the regulations attached to it, the construction which it bears is unfavourable to the plaintiff; that the whole of the subsequent usage under this document is in accordance with this construction; that no alteration in conformity with the plaintiff's view has since been made in these regulations; and that the only case in which the question has come simply before the tribunals of the Courts in the East Indies, a decision has been pronounced, in accordance with that construction and with that usage, which negatives the case of the plaintiff. The bill, therefore, must be dismissed.

M.R. } *In re* THE LIVERPOOL BOROUGH
Nov. 20. } BANK, *ex parte* DURANTY.

Company—Winding-up—False Representations by Directors—Contributory.

If the directors of a banking company which is in difficulties, make a flourishing

report to the shareholders and public of the financial condition of the company, and it induces a person to purchase shares in open market, or of third parties, and it turns out after he is registered in the books of the company that the report was altogether untrue and without foundation, and the company stops payment, still the purchaser is a shareholder and liable as a contributory.

The Liverpool Borough Bank was established on the 1st of July 1836; it stopped payment in October 1857, and was registered under the 20 & 21 Vict. c. 49, on the 11th of November 1857. By the return then made, the name of Alexander Duranty appeared on the registered list as a holder of 151 shares. On the 12th of November 1857, resolutions were passed dissolving the company, and also to wind it up voluntarily under the 19 & 20 Vict. c. 47, 20 & 21 Vict. c. 49, to which has since been added the 21 & 22 Vict. c. 60, and this winding-up was subsequently continued by an order of this Court. A call of 5*l.* per share was then made, amounting in this case to 755*l.* Mr. Duranty now sought to have his name removed from the list of contributories. From his affidavit it appeared that from 1850 he kept an account at the Liverpool Borough Bank; he also became acquainted with the published half-yearly reports of the directors which were circulated among the shareholders: they purported to shew a most flourishing business, which would yield a dividend of 7*l.* per cent., and at the same time retain a large reserve fund. In consequence of the report of the 30th of June 1857, setting out the financial affairs of the bank, and stating the dividend then, and thereafter likely, to be paid to the shareholders, Duranty, relying upon the truth and accuracy of the report, was induced, on the 19th of August and the 6th and 9th of October 1857, to purchase from different parties as an investment 100, 30 and 21 shares; but on the 27th of October 1857, shortly after he was registered as owner, the bank suspended payment. The affidavit also stated that he subsequently ascertained that the report was false and fraudulent; and that in a case of *Scott v. Dixon* (1), tried at the Liverpool Assizes,

an action was brought against one of the directors, to recover not only the purchase-money but also the calls made by the liquidators, and that it had resulted in a verdict for the full amount of both, on the ground of fraud, which had been committed through the report.

Mr. Follett and Mr. Bardswell, for Mr. Duranty.—The fraud committed by the directors through the misrepresentation in the report had so vitiated the contracts for purchase, that neither the bank nor the liquidators as representing them, could recover anything for calls; on the contrary, the petitioner was entitled to recover the purchase-money, with interest, from the directors themselves.

In re the Deposit and General Life Assurance Company, ex parte Ayre, 27 Law J. Rep. (N.S.) Chanc. 579.

In re the Royal British Bank, ex parte Brockwell, 26 Law J. Rep. (N.S.) Chanc. 855.

The National Exchange Company of Glasgow v. Drew, 2 Macq. 103.

Mr. R. Palmer and Mr. Giffard, for the official liquidators, were not called on.

THE MASTER OF THE ROLLS.—The application is founded upon a misapprehension of the cases; they should be clearly understood. I will endeavour to make the grounds upon which I proceed plain. The rules affecting shareholders and contributories are not new: they are an application of existing rules of equity, where persons enter into contracts, or are induced so to do by the representations of others. In this case, the parties to the contract should be kept in mind. There may also be a third person, whose representations induced one of those persons to enter into the contract. The equitable distinctions which follow on false representations made by every one of those parties must be borne in mind. If one party to the contract makes a false representation, which induces another to enter into a contract, the Court sets that aside, and it becomes void; but if a third person says to A, Do you enter into a contract with B, it will be for your benefit, and makes false representations to induce him to enter into the contract, but without B. making or being privy to any

(1) A rule nisi for a new trial is pending.

false representations made by the third person, then the contract is valid. But the person who made the false representations is liable to an action to compel him to make good the damage sustained in consequence. That is really the key to the whole of these circumstances. There were formerly many cases in which persons were induced to become original shareholders in joint-stock companies, upon the false representations made by another shareholder, who told them that it was a thriving company, and by a series of false representations induced them to take shares, from which ultimately they desired to be relieved and not to be contributories, upon the ground that they had taken the shares, trusting to the false representations of a third person. This Court said, You did not take the shares from him, but from the directors; they made no false representation to you; you are a shareholder and a contributory, and your only remedy is an action against the man who induced you to take shares. But if a company, by means of its directors, through misrepresentation, induce other persons to become shareholders and obtain a contract from them, it is void, and the company cannot have any advantage from it. In *The Deposit and General Life Assurance Company, ex parte Ayre*, I held that, where directors, through the secretary, made the original representation to a stranger by which he was induced to subscribe for and take shares from the directors, it was a contract entered into by the directors for the company, and that the false representation avoided the contract. But here the contract is entered into with persons whom I assume to have been *bonâ fide* shareholders. Each contract was, in this case, between Mr. Duranty and the holder of a certain number of shares, who sold them to Mr. Duranty. If the shareholder had made any false representations,—if he had been cognizant of any false representations, on the strength of which Mr. Duranty bought the shares, and fostered and encouraged those false representations,—then Mr. Duranty, but only as against such shareholder, might set aside the contract and restore the shares, but the shares would still have been held of the company, and being *bonâ fide* shares they would

have been restored to the person who attempted by false representations to sell them. But all the shareholders of the company subscribed, upon the strength of the number of shares taken. The effect, however, of acceding to this application would be, to destroy a certain number of shares; they would no longer exist; they could not be restored to the person who sold them, because, assuming they were not issued originally upon false representations, and that the vendor was a *bonâ fide* holder, he sold them *bonâ fide* to Mr. Duranty, who cannot set aside the sale. Had the directors made false representations which induced Mr. Duranty to buy these shares from them,—and it must be admitted that the report of the directors is the report of the company,—still, the observation which I made with respect to the agent of the company not being an agent for the purpose of committing a fraud applies. It does not make the company liable for an action for deceit by reason of their making that false representation; that may possibly be a case for damages against the directors individually, but they are agents of the company simply for the purpose of the contract, and, so far as the contract applies, they can bind the company; but if, by issuing a report, containing misrepresentations, which is in that sense the report of the company, they induce persons to enter into a contract with them, that contract may be set aside, but if it induces other parties to enter into contracts with third persons, the company does not become liable to an action for deceit, although they themselves, severally and individually, who are parties to making the representations, do become liable. That really is the distinction which prevails in these cases. The case of *Scott v. Dixon* proves this distinctly. It was an action brought, not against this company, but against an individual director, or, if you please, all the individual directors, for issuing a report by reason whereof the plaintiff was induced to buy shares *bonâ fide* from another shareholder, and in consequence of that to be subject to all the liabilities which attach on a shareholder; and accordingly, in the amount of damages he claims, there is estimated the amount of calls paid by him solely in his character of shareholder and contributory, because,

having become a *bond fide* shareholder from another person by contract, he is obliged to make good the calls which, if he had not bought the shares, would have had to be made good by the person from whom he bought them. That is the measure and the extent of the damages, and consequently it is not necessary to wait for any other action upon the subject, for I assume that the action would apply exactly in the same way. But, assuming *Scott v. Dixon* to be law, he has his action for deceit, or his action for damages, against the person who made those representations, upon the faith of which he purchased and became a shareholder and liable to pay calls. Were this application granted, the consequence would be that every person who had sold shares from the time that the false representations were made would not be shareholders of the company, and the persons who had bought them would not be shareholders of the company, and if that had taken place to any very considerable extent, the few remaining shareholders would be utterly ruined, and probably the creditors of the company would be ruined also, and that contrary to the faith upon which the one took shares and the other advanced money to the company. It was with reference to that, and that alone, I made the observation I did with respect to its being a question in which creditors were materially concerned, but not more so than other contributories and shareholders in the company. Mr. Durranty has, therefore, made a mistake in this application, and he must remain a contributory. I shall allow the costs of counsel; and the official liquidators' costs must be paid out of the estate.

M.R. }
 Nov. 13, 22. } BIDDLES v. JACKSON.

Ward of Court—Marriage after Twenty-one—Settlement—Fund in Court—Jurisdiction.

A ward of Court married a fortnight after attaining twenty-one. Upon a joint petition of her husband and herself, asking for payment of a fund in court, part of her fortune, to her husband, the Court refused to accede to the prayer of the petition, though the wife attended and offered to consent; but a refer-

ence was directed to the chief clerk to approve of a settlement.

This was the petition of John Thomas Jackson, a miller, and Caroline his wife, asking for the sale and payment of the proceeds of two sums of 493*l.* 14*s.* consols and 96*l.* 10*s.* 1*d.* reduced annuities, standing to the credit of this cause, to an account entitled "The separate account of the plaintiff, Caroline Biddles," and also of a small sum of cash, and any dividends which should accrue due prior to the sale.

It appeared that Caroline Biddles was a legatee under the will of Thomas Biddles.

This suit was instituted, by the mother of Caroline, against Edward Philip Jackson and George Jackson, the executors, and the daughter was made a ward of Court.

The funds were brought into court in pursuance of various orders made in the cause, and other funds remained to be brought in.

On the 10th of August 1858, Caroline Biddles attained her age of twenty-one years. On the 24th of the same month her marriage with the present petitioner was solemnized. She now appeared in court to consent to the prayer of the petition.

Mr. Dean, in support of the petition.

THE MASTER OF THE ROLLS refused to make any other order than to refer it to the chief clerk to approve of a settlement.

Mr. Dean subsequently asked that the petition might be re-heard, as cases had been decided holding that no contempt had been committed, and the wife being of age, and willing now to consent to the disposition of the funds, the Court would not act in opposition to her wishes.

THE MASTER OF THE ROLLS.—If parties postpone their marriage until after a ward of Court has attained her age of twenty-one years, merely with a purpose of avoiding the jurisdiction of the Court, that I hold to be a contempt, and further argument upon this petition will avail nothing before me.

See *Austen v. Halsey*, 2 Sim. & S. 123.

Walker v. Symonds, 3 Swanst. 69.

In re Donne, 2 Moll. 490.

Hobson v. Ferraby, 2 Coll. 412.

20 & 21 Vict. c. 57.

L.C. }
 Nov. 6, 8, 9. } ROLT v. HOPKINSON.

Mortgage — Priority — Subsequent Advances.

A. mortgaged to B. to secure present and future advances, and afterwards executed a similar mortgage of the same property to C. B. and C. had mutually notice of each other's deeds. B. made advances after the date of C.'s mortgage, and it was held, affirming the decision of the Master of the Rolls, that C. was, in respect of his advances, entitled to priority over B, on account of such subsequent advances made by him.

The case of Gordon v. Graham (1) overruled.

This was an appeal, on the part of the defendants, from a decision of the Master of the Rolls; and the question was, whether the Commercial Bank of London, who were mortgagees prior to a mortgage to Mr. Peter Rolt, the plaintiff, of certain property of Charles John Mare, were entitled to priority over him in respect of advances made by them after notice of the plaintiff's mortgage, or whether the plaintiff's advances were to have the priority. The facts of the case, as far as necessary to be stated, were as follow:—

Mr. Mare was in extensive business as a ship-builder, at Blackwall. He had a banking account with the Commercial Bank of London, and also with private bankers, Messrs. Spooner, Attwood & Co. The Commercial Bank had advanced to Mr. Mare various sums of money on the security of certain promissory notes, made jointly by Mare and the plaintiff, his father-in-law, and also of certain bills of exchange, accepted by Mare, and indorsed by the plaintiff. These notes and bills were renewed from time to time, but were ultimately paid off by the plaintiff. On the 6th of January 1855 Mr. Mare executed a mortgage to the Palladium Company for the sum of 45,000*l.* On the 26th of January he executed a mortgage to the Commercial Bank, stating that it had been agreed, "in order to secure the sum and

sums now due, and which shall from time to time become due from him, the said Charles John Mare, on the balance of such account, not exceeding at any one time the principal sum of 20,000*l.*, exclusive of any sum or sums to be paid for insurance and loss by fire, as hereinafter mentioned," that Mare should execute a mortgage in fee of certain property. And then there was a proviso for redemption, by which it was agreed "that if Mare, his executors, &c. should, on demand, pay to the public officers of the Commercial Bank all and every the sum and sums of money which then were, or at any time, or from time to time thereafter should become due from or by Mr. Mare to the Commercial Bank, on the balance of his account current with the bank, either for money paid or advanced or to be paid or advanced by the bank unto or on account of the said C. J. Mare, or what should be secured by any and every bond, bill of exchange, or promissory note, drawn, accepted, indorsed or made by C. J. Mare, upon, to or in favour of the Commercial Bank, then that the bank would re-convey." The plaintiff, Mr. Rolt, had notice of this mortgage prior to the execution of a mortgage to him by Mare on the 12th of February 1855. The plaintiff's mortgage recited, "that the plaintiff, at the solicitation and for the benefit and accommodation of the said C. J. Mare, has for some time past been in the habit of accepting, drawing and indorsing divers bills of exchange, and has also been liable to pay for and on account of the said C. J. Mare, divers sums of money, as the said C. J. Mare doth hereby admit and acknowledge, and the said Peter Rolt, at the like solicitation and request, has consented and agreed to afford the said C. J. Mare similar benefits for accommodation, upon having such security executed to him as hereinafter expressed." There was then a proviso for redemption, which proviso was unlimited, but the amount to be advanced and to be recovered upon the security was ascertained and limited—at least, the extreme limit of it was provided for by the *ad valorem* stamp being for 30,000*l.* This deed to the plaintiff contained a power of sale, and also a clause upon which considerable stress was laid, "That if the sums of 45,000*l.*" (which was

(1) 2 Eq. Ca. Abr. 598; s. c. 7 Vin. Abr. 52, pl. 16.

the amount of the mortgage to the Palladium Office) "and 20,000*l.*" (the amount of the covering security to the defendants), "or any part thereof respectively, shall, during the continuance of this security, be paid off or otherwise satisfied, the amount thereof shall become extinguished in the said hereditaments and premises to the benefit of the said Peter Rolt, his heirs, executors, administrators and assigns, and shall go to augment and enhance the value of his security." It was admitted, by the defendants' counsel, that the Commercial Bank had notice of the mortgage to the plaintiff before they made the advances to Mr. Mare on which the question turned; although this fact was denied in a qualified manner by the defendants' answer. These advances were made respectively as follows: 8,000*l.* on the 28th of July 1855, and 7,500*l.* on the 11th of September 1855. The defendants' counsel admitted that the first advance of 8,000*l.* was made by the bank without any specific authority from Mr. Rolt, but alleged that the advance was made under a general authority. For this advance, however, the bank did not rely solely, if at all, on their security of the 26th of January 1855, but upon other securities. With respect to the advance on the 11th of September 1855, it was contended, by the defendants' counsel, that it was made upon the authority of the plaintiff, and that he himself had the benefit of a considerable amount of the advance. The fact, however, appeared to be, that so far from sanctioning this advance, the plaintiff actually gave notice to the bank on the very day upon which the advance was made, that he would not be security for any further advances to Mr. Mare. It was suggested that the fact of giving that notice shewed an intermediate knowledge of all the transactions of Mr. Mare with the bank, which involved the plaintiff in those transactions. But, in explanation of this, it appeared that Mr. Rolt was aware that the wages of the workmen at Blackwall would become due on that day. He thought from his knowledge of the circumstances of Mr. Mare, that it was extremely probable he might apply to the bank for a further advance, and he took the precaution of sending to give them notice that he would

not be security for any further advances to him. No part of the money advanced was, in fact, applied to the plaintiff's use. Mr. Mare's account was closed at the Commercial Bank and also at Spooner & Attwood's, and a fresh account was opened in the name of the plaintiff; but that account was entirely for Mr. Mare's benefit, was operated upon solely for the use of Mr. Mare, and was so known to be at both the banks. It was asserted, on the part of the defendants, that the evidence shewed that the plaintiff, Mr. Rolt, was carrying on the works at Blackwall in his own name, and that the payment of a portion of the 7,500*l.* into Spooner & Attwood's bank was received by him for his own benefit, for the purposes of the works, and that, therefore, he must be, at all events, chargeable; that he could not claim a priority in respect of that particular sum. But it was not satisfactorily shewn that the works at Blackwall were carried on in the plaintiff's name, but the sum paid into Spooner & Attwood's bank was actually applied for the purposes of Mr. Mare.

The Master of the Rolls having decreed in the plaintiff's favour, the defendants appealed.

Mr. R. Palmer, Mr. Waller, and Mr. H. Smith appeared for the plaintiff.

Mr. Lloyd and Mr. Taylor were for the defendants.

Mr. R. Palmer was heard in reply.

The following cases were cited:—

Shaw v. Neale, 6 H.L. Cas. 581; s. c. 27 Law J. Rep. (N.S.) Chanc. 444.

Gordon v. Graham, 2 Eq. Ca. Abr. 598; s. c. 7 Vin. Abr. 52, pl. 16.

The LORD CHANCELLOR, after stating the facts of the case as before set forth, said:—The case therefore simply resolves itself into this: a prior mortgage for present and future advances, a subsequent mortgage of the same description; both mortgagees have notice of the other's deed, and advances are made by the prior mortgagee after the date of the subsequent mortgage, and with full knowledge of it. Is the prior mortgagee entitled to priority for these advances over antecedent advances made by the subsequent mortgagee? It

appears to me impossible to decide in favour of the subsequent mortgagee, without distinctly dissenting from the opinion of Lord Cowper in *Gordon v. Graham*, if not expressly overruling his decision. I have been unable by tracing this case to its final result in the registrar's books to arrive at any satisfactory conclusion respecting the mode in which Lord Cowper ultimately dealt with the advances made after notice of the subsequent mortgage. It is said in the report of the case both in *Vin. Abr.* and in *Equity Cas. Abr.* that upon the importunity of counsel, it was ordered that the Master should report what money was lent by the first mortgagee after he had notice of the second mortgage," which, as Lord St. Leonards observes in *Shaw v. Neale*, is inconsistent with the opinion he was at first supposed to express. The decree for the Master to report appears to me to bear out the statements in the reports, and to be completely irreconcilable with the strong opinion attributed to Lord Cowper; for although he certainly directed that the first mortgagee should be paid what was due to him for principal and interest, yet if he was of opinion, as he is reported to have been, that the first mortgagee was entitled to everything which he advanced, it appears to have been wholly unnecessary to have directed an inquiry, as he did, as to any monies advanced by Turner on the credit of the mortgage after the 25th of August 1713, upon which, if the Master found that there were any such subsequent advances, he was to state the same specially. The fate of this case of *Gordon v. Graham* has been singularly unfortunate. It has never been followed as an authority; it has frequently been questioned by text-writers, and whenever it has been cited in argument it has elicited some expression of disapprobation from the Judges. In the recent case of *Shaw v. Neale* the Master of the Rolls intimated his doubts of the soundness of the decision; and in the same case, in the House of Lords, all the remarks made upon it have a similar tendency, though it was unnecessary to determine whether it ought to be regarded as a binding authority. The case, therefore, has been repeatedly shaken by side winds, and must now have its foundation examined; for

if the opinion of Lord Cowper is right, then the decision of the Master of the Rolls in this case was wrong. Now, the reason given by Lord Cowper for giving priority to advances made by the first mortgagee, after a second mortgage, though he had notice of it, is because it was the folly of the second mortgagee, with notice, to take such a security; but this is a two-edged reason which reaches to the first as well as to the second mortgagee, for it may as well be said to have been the folly of the first mortgagee to hazard further advances after notice of the subsequent incumbrance. Mr. Lloyd suggested that there might be a difference between the case of *Gordon v. Graham* and the present case, because in the case of *Gordon v. Graham* there was a sum actually advanced, and the security was taken for that sum and further advances, but that here nothing was due at the time of the mortgage, which was a covering security merely for advances in future. I confess I am unable to appreciate this difference. But then he insisted that instructions having been given to the same solicitor for the mortgage to the Commercial Bank and to the plaintiff, the two mortgages cannot be considered as one transaction; and that it would therefore be unreasonable to suppose that the effect of the first mortgage was to be immediately paralyzed by the second, when it was known that the very object of the first mortgage was to secure only future advances, and this was very strongly pressed upon me in the course of the argument by Mr. Taylor. There seems to me to be no ground for asserting that the two mortgages can be regarded in any sense as one transaction; but if they could, the first mortgagee knew that the second mortgage was created, and he knew (and upon that very considerable stress has very properly been laid) that it contained a power of sale, which, if it were exercised, would have prevented his tacking subsequent advances against a *bonâ fide* purchaser, and thus render his security for advances subsequent to the second mortgage extremely precarious. Nor would the case supposed by Mr. Lloyd of a second mortgage depriving the first mortgagee of the benefit of the security for future advances,

necessarily arise, because advances might have been made by the first mortgagee before the execution of the second mortgage, even to the utmost limit of amount; and in the ordinary course of such a transaction it seems extremely probable that some advances should have been immediately made, which, of course, would have priority over a subsequent mortgage. If the case of *Gordon v. Graham* were to be followed as an authority, then the moment a covering security, as it has been called, for future advances was made, it would preclude the possibility of the mortgagor being able to raise money from any other person, because the claim of a second mortgagee under such circumstances would be indefinitely postponed, according to the fluctuating nature of the balance under the prior mortgage. For these reasons, I am not disposed to consider *Gordon v. Graham* as an authority by which I ought to be bound; but I am of opinion that in this case the plaintiff is entitled to priority for his advances made before the advances by the Commercial Bank with full knowledge of the plaintiff's security. I think, therefore, that the decree ought to be affirmed and the appeal dismissed, with costs.

KINDERSLEY, V.C.	{	<i>In re</i> THE WELSH POTOSI MINING COMPANY, <i>ex parte</i> TOBIN.
Nov. 6.		

Company—Winding up—Costs of Action by Creditor.

A creditor of a joint-stock company (limited) commenced an action against one of the shareholders. A petition for winding up was then presented, and notice given to the creditor of such petition, but the creditor continued proceedings in the action until the advertisement appeared for a creditors' representative:—Held, that the creditor was entitled to his costs of action up to the period of advertisement.

On the 27th of January 1858, an action was commenced, by Messrs. Tobin, gunpowder merchants, at Liverpool, against the Messrs. Lyell, who were shareholders

in the Welsh Potosi Mining Company, to recover a sum of 214*l.* 15*s.* 10*d.*, alleged to be due to them, in respect of a debt contracted on account of the company. On the 12th of February the declaration was delivered in that action. On the 22nd of the same month, two pleas were put in to the action.

On the 4th of February, the Messrs. Lyell presented a petition to this Court, praying that the company might be wound up under the provisions of the Winding-up Acts, and an order was made accordingly. Notice of the petition was served upon all the creditors. On the 23rd of the same month, an advertisement appeared in the *Gazette*, in conformity with the 1st section of the Joint-Stock Companies Amendment Act, 20 & 21 Vict. c. 78, calling upon the creditors of the company to appoint a creditors' representative. The winding-up order was prosecuted in the Judge's chambers. The action at law being stayed by the advertisement for a creditors' representative, an affidavit of debt was brought in on behalf of the Messrs. Tobin. On the 19th of April, the chief clerk admitted proof of the debt, but disallowed the claim made by them for costs in the action, amounting to 12*l.*, incurred prior to the date of the advertisement. The case was adjourned into court, upon the question whether the Messrs. Tobin were entitled to such costs.

Mr. Baily and Mr. Baggallay, for the Messrs. Tobin, contended that they were entitled to their costs of the action. They were perfectly justified in commencing proceedings for the recovery of their debt before the winding-up order had been applied for; and though by the 7th section of the statute 20 & 21 Vict. c. 78, they were estopped from proceeding in their action, when the advertisement appeared for a creditors' representative, still they were entitled to their costs up to that period. This case was analogous to a creditors' suit, where the decree put an end to all actions at law; but then the creditors who had brought actions were entitled to their costs. It was true, this was not the case in bankruptcy; but the reason of that was, that the creditor had then the option of continuing his action or not, as he

thought most for his own interest. Under the act of 20 & 21 Vict. c. 78, the creditor had no such option, and ought to be allowed his costs.

Mr. Glasse and Mr. Giffard, for the official manager, submitted that the Messrs. Tobin had, in this case, put the company to unnecessary expense, for they had proceeded with the action after notice had been given to all the creditors that a petition for winding up had been presented. There had been many other actions commenced by creditors, and no fewer than 150 writs had been issued by various creditors against the different shareholders, but the other actions had been stayed upon notice of the petition: there were assets sufficient in this case to pay all the creditors in full. It was true, that a creditor in bankruptcy might continue his action pending the proceedings, but not after the certificate had been obtained. This Court had also jurisdiction, under the 7th section of the 20 & 21 Vict. c. 78, to allow a creditor to continue his action; but no such permission was applied for in this case. They cited the Bankrupt Law Consolidation Act, s. 181, and *Ex parte Bell* (1).

KINDERSLEY, V.C. — In the abstract, the matter stands thus: by the 20 & 21 Vict. c. 78. s. 7, where there is no bankruptcy, after the advertisement for creditors to appoint a representative, no such action as mentioned in the 73rd section of the act of 1848 is to be prosecuted, except by leave of the Judge or Master, so that the advertisement for a representative to protect the rights of creditors operates as an injunction. Now, where a creditor has *bond fide* brought an action, either against a company or any member of it, in order to recover a debt which afterwards turns out to be really due, it is clear, in the abstract, that in moral justice, he ought not to be stopped from doing so, except upon the terms of having his costs up to the time of issuing the advertisement, provided he is an honest creditor. That abstract justice is recognized in an administration suit, where the decree, under a proceeding of the Court of Chancery, and

not an act of parliament, operates as an injunction as against all creditors; but they are allowed their costs up to the date of the decree, and it is impossible not to see that justice requires that a man who has been fairly proceeding to recover his rights ought not to be suddenly and peremptorily stopped, except on being recouped his expenses. Unless there is anything special in this particular case, that must be the creditor's right here, and he must be allowed either to prosecute his action and recover all he can, or to prove for his costs as well as his debt. It will be for every one's benefit (the debt not being disputed) that no further costs should be incurred, in other words, that the action should not go on; but leave to go on with the action cannot fairly be refused, except on the terms of allowing proof of the costs, in addition to the debt. It does not appear to me, upon the facts of this case, that any improper expenses have been incurred, for it was not Messrs. Tobin's fault that a number of other creditors were proceeding at the same time, which rendered so many writs necessary. The action was brought before any notice was given of an intention to present a winding-up petition, and when it was presented, the creditor was not only not bound to stop, but he might have lost by so doing, for the petition might never have been prosecuted, or it might have failed, more particularly considering the peculiar position of this company, with a limited liability. The Messrs. Tobin are, therefore, entitled to the costs of the action up to the time of the advertisement, to be taxed in the usual way.

WOOD, V.C. }
Nov. 15, 18, 23. } NEALE v. DAY.

Voluntary Settlement—Goodwill of an Attorney's Business—Stat. 13 Eliz. c. 5.

An attorney being in insolvent circumstances, assigned the goodwill of his business in consideration of a sum of money paid down and an annuity secured by bond to be paid to his wife for life, with remainder to himself for life:—Held, that the settlement of the annuity was void as against creditors.

previously thereto, the defendant, E. A. Day carried on business as a solicitor, in the Temple, and being somewhat straitened in his pecuniary affairs, applied to the defendant Westoby for an advance of money. In consideration of this advance, Day granted to Westoby an annuity of 360*l.* for his (Day's) life, and gave him a bond in the penal sum of 6,000*l.*, dated the 6th of May 1852, to secure the annual payments. By deed, dated the 26th of June 1852, Westoby assigned the annuity to one Studley, who died in November 1853, having appointed the plaintiffs his executors.

In November 1852, Westoby brought an action against Day, to recover certain arrears of the annuity, and in March 1853, obtained a judgment for 174*l.* 4*s.*, which was registered.

Other actions were brought against Day for further payments of the annuity, and judgment was, in December 1855, entered up against him for 611*l.* 12*s.*

No payment had been made in respect of the annuity since December 1855, and there was now due in respect thereof 1,165*l.* for principal, with an arrear of interest, besides what was due on the judgment.

In May 1856 Day disposed of his business in the Temple to W. W. Wright, in consideration of 1,800*l.*, or thereabouts, and also an annuity of 100*l.*, which was secured by bond, to be paid to Day's wife, for her life, with remainder to Day himself, for his life.

The bill was filed against Day and his wife, W. W. Wright, W. K. Wright, the obligee named in W. W. Wright's bond, and against Westoby, praying that, as against the plaintiffs, and if necessary, all other the creditors of Day, the settlement of the annuity so secured by the bond, might be declared to be fraudulent and void, and that the defendant W. K. Wright might be declared a trustee thereof for securing the same for the plaintiffs and the other creditors of the defendant Day; and also praying that W. K. Wright might be ordered to pay into court the annuity and the arrears thereof when due.

The defendant Day admitted, by his answer, that at the time of the assignment of his business to W. W. Wright he was

greatly embarrassed in his circumstances and unable to meet his engagements.

Mr. Daniel and *Mr. Whitbread*, for the plaintiffs, contended that the case was identical with *French v. French* (1), and the settlement of the annuity, therefore, was voluntary and void under the 13 Eliz. c. 5. They cited also *Barrack v. M'Culloch* (2).

Mr. W. M. James and *Mr. Chapman Barber*, for the defendants Day and wife, took a distinction between this case and *French v. French*, on the ground that the goodwill of the business of a solicitor, which was the consideration for the annuity, was not assets available for creditors.

Mr. C. Hall, for W. W. Wright.

Mr. G. L. Russell, for W. K. Wright.

Mr. Daniel, in reply.

Nov. 18.—Wood, V.C. (after stating the facts of the case).—The question is, whether the settlement of the annuity, secured by the bond of May 1856, is void as against judgment creditors, in respect of its being, under the statute 13 Eliz. c. 5, an attempt to hinder creditors. The bill has been filed on the authority of *French v. French*, and it seems to me impossible to distinguish that case from this. In that case a person made over his business, stock-in-trade and fixtures, in consideration of a sum of money paid down and an annuity to be paid to himself during the joint lives of himself and the purchaser, and afterwards a smaller annuity to his wife, in case she survived him, with power to himself to dispose of his wife's annuity; and by one of the exhibits it appeared that the annuities were granted for the name and goodwill of the business, and were to be collaterally secured by the policies of assurance; and the Lord Chancellor deals thus with the case. In his judgment he says, "I consider that annuity so payable to the widow just in the same light as if it were taken and applied to his own purposes and abstracted from his creditors, and, in my opinion, it amounts to a voluntary settlement in favour of his wife."

(1) 6 De Gex, M. & G. 95; a. c. 25 Law J. Rep. (N.S.) Chanc. 612.

(2) 3 K. & J. 110; s. c. 26 Law J. Rep. (N.S.) Chanc. 105.

With regard to the older authorities, there are several in the books, by which it appears that where property has been voluntarily assigned, which could not have been reached by the creditors, it was considered not to be within the meaning of the statute, and on that ground a purchase in the name of a wife or child was considered not to be within the statute, inasmuch as the settlor might have given them the money; and in commenting upon those authorities, Lord St. Leonards remarks (3), "It has been strenuously argued that a purchase is not within the operation of the statute of the 13 Eliz. c. 5; for as the purchaser may give the money to the object of his bounty to purchase the estate for himself, he may, by the same reason direct a conveyance to be made to him; and this seems to be the better opinion where the case is clear of actual fraud." It appears to me, however, in the first place, that *French v. French* is precisely the case before me, and, therefore, conclusive of the question; and, in the next place, if that case were out of the way, it appears to me that the real test is, whether or not a fraud upon the creditors was intended in the transaction. In this case it is in effect a contract by which the debtor is making sale of his property by means of a covenant that he will abstain from carrying on business, and taking a settlement of the purchase-money upon his wife for life, for her separate use, with the immediate remainder to himself for life; the whole object plainly being to obtain the benefit of the entire property for his own use and advantage. Even upon the older authorities alone, it is very questionable whether such a transaction would not be a fraud within the direct purview of the statute; but independently of that, the case of *French v. French* is an authority precisely in point, and I must follow it.

Nov. 23.—The case being in the paper this day to be spoken to on the minutes, the following decree was made:—Declare that the provision made in the condition of the bond of the defendant W. W. Wright, for payment of an annuity of 100*l.* per annum to the defendant H. S. Day, the

wife of the defendant E. A. Day, is fraudulent and void as against the plaintiffs, as judgment creditors of the defendant E. A. Day, and that as between the plaintiffs and the same defendants, the said annuity ought, during the life of the said H. S. Day, to be paid to the plaintiffs until satisfaction of the judgment, interest and costs. Direct the defendant E. A. Day to deliver up the bond to W. K. Wright, the obligee thereof, as trustee for the plaintiffs, until such satisfaction of their judgment, interest and costs; and let the defendant W. K. Wright deposit the same with the clerk of records and writs; and on his so depositing the same, tax his costs as between party and party, and let the same be paid by the plaintiffs without prejudice to the said defendant's retaining his extra costs as between solicitor and client, out of any money to be recovered on the bond; and tax the defendant W. W. Wright his costs of the suit, to be paid by the plaintiffs. Tax the plaintiffs' costs; order the defendant Day to pay the plaintiffs their costs, and also the costs which shall be paid by the plaintiffs to the defendants W. K. Wright and W. W. Wright; and in default of his so paying the same, the plaintiffs are to be at liberty to add such costs to their judgment debt. Liberty to the plaintiffs to apply at chambers with respect to putting the bond in suit; and also to the defendant W. K. Wright to apply as to extra costs.

WOOD, V.C. }
Nov. 3. } JONES v. NOYES AND ALLEN.

Lunatic—Debt due to Committee—Application of Purchase-money—3 & 4 Will. 4. c. 104.

A committee of a lunatic has no special lien upon the estate, after the death of the lunatic, for money expended by him on his behalf, and a purchaser having notice of the claim of the committee is no more bound to see to the application of the purchase-money than if he bought with notice of simple contract debts.

The bill, in this case, stated that, by the settlement made on the marriage of Mr. and Mrs. Battaglia, dated in 1815, certain

(3) Sugd. Vend. & Pur. 917, 11th edit.

real estates were conveyed to trustees, of whom the defendant Noyes was one, upon certain trusts, which subsequently failed, with an ultimate trust to convey the same to the use of Mrs. Battaglia, in fee. In 1848 Mrs. Battaglia, who had then become absolutely entitled under the ultimate trust, was found lunatic by inquisition, and the plaintiff was appointed committee of her estate. In 1851, having survived her husband, she died, without issue, illegitimate, and intestate, and thereupon the defendant Noyes, the surviving trustee, entered into possession of the real estates, and shortly afterwards sold them to the defendant Allen, applying the purchase-money to his own use.

The personal estate of Mrs. Battaglia was insufficient for her debts, and the plaintiff having been sued for, and compelled to pay a sum of 130*l.*, for costs incurred in the matter of the lunacy, now filed his bill against Noyes and Allen, stating that at and previously to the time of the said sale the defendant Allen had distinct notice of the proceedings in the said lunacy, and that the final accounts of the plaintiff, as such committee, had not been passed, and that monies were due from the lunatic's estate to the plaintiff as such committee, and that the defendant Noyes took the real estate, subject to what was so due from the lunatic's estate, and that it was the intention of the defendant Noyes to appropriate the purchase-money to his own use; also, that on the occasion of such sale an arrangement, by way of indemnity, was entered into between the defendants Noyes and Allen, to protect Allen against any claim to be thereafter made by the plaintiff, in respect of what might be due to him from the estate of Mrs. Battaglia; and the bill prayed that the 130*l.* might be declared to be a charge on the real estate in the hands of Allen. To this bill the defendant Allen put in a plea, denying that at the times of the sale and conveying to him, he had any notice that it was the intention of Noyes to appropriate the purchase-money to his own use, except what might remain after satisfaction of such claims as the real estate was subject to, and averring that no arrangement was made between him and Noyes to protect him against any claim of the plaintiff.

Mr. Willcock and *Mr. Phear*, for the defendant Allen, contended that though the estate might be assets in the hands of Noyes for the payment of debts, the claim of the committee was not a specific charge upon the estate, and the purchaser was not bound to see to the application of the money.

Kinderley v. Jervis, 22 Beav. 1; s. c.

25 Law J. Rep. (n.s.) Chanc. 538.

Watkins v. Cheek, 2 Sim. & S. 199.

Eland v. Eland, 4 Myl. & Cr. 420;

s. c. 8 Law J. Rep. (n.s.) Chanc. 289.

Sugd. Vend. and Pur. 11th ed. 834.

Mr. C. M. Roupell (with *Mr. Rolt*), contra, contended that the claim of the committee being similar in its effect to a *lis pendens*, of which the purchaser had notice, he stood in a higher position than an ordinary creditor—*Beale v. Symonds* (1).

Wood, V.C. (without calling for a reply) said, that clearly an ordinary creditor would have no charge upon the real estate of a deceased debtor, and a purchaser from his heir or devisee would not be bound to see to the application of the purchase-money. In this case Noyes was in the same position as the heir or devisee of a deceased debtor, and the only question was, whether the creditor, having been the committee of the lunatic's estate, had any higher rights than an ordinary simple contract creditor. His Honour had come to the conclusion, that he had not. There was no lien upon the estate, for the grant to the committee was only during the lunacy, and his interest ceased upon the death of the lunatic; and the knowledge which the defendant Allen had of the claims of the committee could not affect him any more than the knowledge that the lunatic had died indebted to her butcher or baker, or any other simple contract creditor. The plaintiff's remedy was clearly against Noyes alone; and the plea must, therefore, be allowed, with costs.

(1) 16 Beav. 406; s. c. 22 Law J. Rep. (n.s.) Chanc. 706.

KINDERSLEY, V.C. }
 Nov. 8. } HEWITT v. NANSON.

Mortgage—Foreclosure Suit—Conduct of Sale.

A second mortgagee is entitled under the 15 & 16 Vict. c. 86, to apply in a foreclosure suit for the conduct of the sale of the estate; but the Court will exercise a discretion, and will refuse such application, upon being satisfied that expense will be saved by giving the conduct of the sale to the first mortgagee.

Certain property was mortgaged in fee by a testator to Elizabeth Nanson. The testator died, having devised the equity of redemption in the estate to his four daughters, as tenants in common. One of the daughters executed a mortgage of her fourth to Elizabeth Nanson, by way of further charge. Subsequently, another of the testator's daughters mortgaged her fourth share in the estate to the plaintiff Hewitt. Elizabeth Nanson died, and this suit was instituted, by the plaintiff, against her representative and against the four daughters of the testator for a foreclosure, and for a sale of the property, the plaintiff asking that he might have the conduct of the sale.

Mr. Bagshawe, jun. appeared for the plaintiff, and submitted that he was entitled to apply for a sale of the mortgaged estate under the 15 & 16 Vict. c. 86. s. 48, and that the conduct of the sale ought to be given to him.

Mr. Greene and *Mr. T. D. Salmon*, for the defendant Nanson, said that no objection would be raised to the sale, provided the conduct of it were given to the defendant. The title-deeds were in his possession, and, therefore, the title could be made out at less expense by him than by the plaintiff. They cited *Hurst v. Hurst* (1).

Mr. Glasse and *Mr. Bedwell* appeared for the daughters of the testator.

KINDERSLEY, V.C.—This is a case in which, *prima facie*, it will be for the benefit of all parties that a sale should take place, and the only question, therefore, is,

(1) 16 Beav. 372; s. c. 22 Law J. Rep. (N.S.) Chanc. 538.

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who ought to have the conduct of the sale? Now, the plaintiff, although he is only second mortgagee, and then only of a fourth part of the estate, is nevertheless entitled to apply for a sale, under the act 15 & 16 Vict. c. 86; but, by the 48th section of that act, the Court is empowered to exercise a discretion for the purpose of doing justice between the parties. Now, it appears that the defendant Nanson, who was the first mortgagee, has got all the title-deeds and papers relating to the property, and it is stated that he would be able to prepare the title and give the requisite information much more easily and at less expense than the plaintiff; consequently, I think, that justice and convenience would be best consulted by the conduct of the sale being given to the first mortgagee.

KINDERSLEY, V.C. }
 Nov. 9. } EDWARDS v. MARTIN.

Mortgage—Foreclosure—Decree.

A suit having been instituted by a first mortgagee to redeem or foreclose several subsequent incumbrances, the Court made a special decree, fixing a day for any of the subsequent incumbrancers to redeem or be foreclosed.

By a mortgage, dated the 22nd of September 1852, certain property, called the Marlborough Hill Gardens, was mortgaged by William White to John Edwards, for the purpose of securing the sum of 2,500*l.*, with a proviso for redemption, on payment of the 2,500*l.* and interest, and all sums which should in the mean time be advanced. On the 20th of April 1854, William White mortgaged a portion of the property comprised in the previous mortgage to Edward Martin and Octavius Wood, for securing a sum of 300*l.* On the 14th of June 1854, William White mortgaged other portions of the property comprised in the first mortgage, to John Culverhouse, to secure other sums of money therein mentioned. On the 13th of September 1855, William White mortgaged certain other property in the Finchley Road to the first mortgagee John Edwards, as an additional security for the money already advanced by him, and for

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what might thereafter be advanced, not exceeding in the whole 800*l*. William White subsequently executed successive mortgages of the Finchley Road property to four other persons, named Samuel Tildesly, John Weston, Edward Spiller and Edward Simms, to secure the several sums mentioned in such mortgages. In September 1855, William White became a bankrupt, and the bill in this case was filed by John Edwards and George Thomas Edwards, as the representatives of John Edwards, the first mortgagee, against the subsequent incumbrancers, for an account of what was due in respect of the mortgages of the 22nd of September 1852 and the 13th of September 1855, and for redemption or foreclosure.

The usual decree having been made at the hearing, the chief clerk made his certificate on the 7th of June 1858; and the case now came on upon a discussion as to the form of decree to be adopted.

Mr. Baily and *Mr. R. W. Moore* appeared for the plaintiffs; and—

Mr. George Lake Russell and *Mr. Collins*, for the defendants. They cited—

Thornycroft v. Crockett, 7 Jur. 712.

Seton on Decrees, last edit. 217.

KINDERSLEY, V.C., after consulting with the registrar, directed the usual accounts, and made a decree in the following terms:—"And let, upon the defendants Edward Martin, Octavius Wood, John Culverhouse, Samuel Tildesly, John Weston, Edward Spiller and Edward Simms, or any or either of them, paying unto the said plaintiffs, John Edwards and George Thomas Edwards, what shall be certified to be the amount so remaining due to them, within six months after the chief clerk of the Judge to whose court this cause is attached shall have made his certificate, at such time and place as shall be thereby appointed, the said plaintiffs, John Edwards and George Thomas Edwards, convey the said premises comprised in the said mortgage securities, dated respectively the 22nd of September 1852 and the 13th of September 1855, free and clear of and from all incumbrances done by them or by the said John Edwards, and deliver up all deeds and writings in their or either of their

custody or power relating thereto upon oath, to the said defendants or to such of them as shall so redeem the said plaintiffs, John Edwards and George Thomas Edwards; such conveyance to be settled by the said Judge, in case the parties differ about the same: and let, in case the said defendants Edward Martin, Octavius Wood, John Culverhouse, Samuel Tildesly, John Weston, Edward Spiller and Edward Simms, or any or either of them shall so redeem the said plaintiffs John Edwards and George Thomas Edwards, the said defendants or defendant so redeeming the said plaintiffs, be at liberty to apply to this Court as they or he may be advised; and on such application it is not to be incumbent on the defendants or defendant so applying, to give the said plaintiffs, John Edwards and George Thomas Edwards, notice thereof: but let, in default of the said defendants or any or either of them so redeeming the said plaintiffs, John Edwards and George Thomas Edwards, by the time aforesaid, the said defendants Edward Martin, Octavius Wood, John Culverhouse, Samuel Tildesly, John Weston, Edward Spiller and Edward Simms, from thenceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the mortgaged premises comprised in the said indentures, dated respectively the 22nd of September 1852 and the 13th of September 1853; and in taking the said accounts all just allowances are to be made."

KINDERSLEY, V.C.
Nov. 15.

In re THE NORTHUMBERLAND AND DURHAM DISTRICT BANKING COMPANY, *ex parte* BIGGE.

Company—Winding-up Acts—Liability of Shareholders—Misrepresentation of Directors.

A. B. was tenant for life of certain shares in a banking company, under a will of which his uncle was executor. At the request of *A. B.*, his uncle, who was a director of the company, transferred these shares into his name for a nominal consideration, in order to qualify him to be a director. *A. B.*

became a director, and the company failed, and was ordered to be wound up. A. B. objected to his name being placed on the list of contributories, on the ground that, prior to his taking the shares, the directors had published fraudulent reports of the affairs of the company, and his uncle, being a director, must have known that they were fraudulent; and also that, being only tenant for life of the shares, it was a breach of trust on the part of his uncle to transfer the shares into his name, and that the directors must have been aware of the fact; and therefore that the transaction was a nullity:—Held, that A. B. must be placed on the list of contributories.

This case came on upon an adjourned summons, for the purpose of obtaining the decision of the Court, as to whether Charles Selby Bigge had been rightly placed upon the list of contributories, in the winding up of the Northumberland and Durham District Banking Company.

The facts were as follows:—Charles Selby Bigge attained the age of twenty-one years on the 21st of July 1855, two months after he had left college. He went to reside at Linden, and shortly afterwards, upon the death of his grandfather, Charles W. Bigge, he became entitled under his will to a large amount of property as tenant for life, and part of this property consisted of shares in the Northumberland and Durham District Banking Company. In the month of September 1856 it was suggested to Charles Selby Bigge, by some of his family, that it would be a desirable thing for him to become a director of the above bank, for the purpose of giving him employment; whereupon he applied to his uncle, Matthew Robert Bigge, who was the executor under his grandfather's will, and who was himself a director of the bank, to ascertain whether his wishes could be carried into effect. He was then informed by his uncle, that it would be necessary, in order to qualify him for becoming a director under the banking company's deed, that he should be the holder of at least fifty shares, and an arrangement was thereupon come to by which, in September 1856, the uncle, for the nominal consideration of 5s., transferred sixty of the bank shares standing in the name of the grand-

father into the name of Charles Selby Bigge. It was understood that this transfer was made for the sole purpose of qualifying Charles Selby Bigge to become a director, and he was accordingly appointed a director; but the dividends upon the shares were not paid to him, but were received by Matthew Robert Bigge, as such executor of his grandfather.

The company was ordered to be wound up in April 1858, and Charles Selby Bigge was placed upon the list of contributories in respect of the said sixty shares.

There was evidence to shew, that previously to Charles Selby Bigge taking these shares, two reports, with accompanying accounts, had been issued by the directors of the company, which contained false representations as to the position of the bank, and a report to that effect had been made by the official liquidator, who stated that the reports and accounts did not represent the true state of the affairs of the bank at the respective dates of such reports and accounts, the bank having to the best of his belief been, at the dates of such reports and accounts, in a state of insolvency.

An affidavit by Charles Selby Bigge contained a statement of the circumstances under which he was induced to take the shares.

Mr. Glasse and Mr. Karslake appeared in support of the application to remove Mr. Bigge's name from the list of contributories, and contended that he was not liable on two grounds: first, that there were false and fraudulent representations made by the directors, in their reports, as to the condition of this company before he became a director, and that his uncle, who was the person who transferred the shares to him, was himself a director, and must have known that at that time the company, instead of being in the flourishing condition set forth in the reports, was in fact insolvent. In support of this argument they cited—

In re the Royal British Bank, ex parte Brockwell, 26 Law J. Rep. (N.S.) Chanc. 855.

In re the Deposit and General Life Assurance Company, ex parte Ayre, 27 Law J. Rep. (N.S.) Chanc. 579.

The second ground was, that although

there had been a transfer of the sixty shares to Charles Selby Bigge, that transfer was only nominal and apparent, for the purpose of qualifying him to be a director, and that in fact his uncle, Matthew R. Bigge, had no right to transfer the shares to him, as he was only entitled to them as tenant for life. Consequently it was a breach of trust on the part of his uncle, and the directors of the company must have been aware of the fact, since the shares up to this time had been standing in the name of the executors of his grandfather, and the transfer to him was made for the nominal consideration of 5s. only. The whole transaction was therefore a nullity.

Mr. G. M. Giffard, for the official manager, submitted that, whatever misrepresentations might have been made to C. S. Bigge by his uncle Matthew R. Bigge, the directors had nothing to do with them. The reports and accounts put forth by the directors were not proved to have misled Mr. Bigge in his determination as to taking the shares, and, at any rate, this could not affect the question between Mr. Bigge and the other shareholders. The cases referred to had gone upon an express misrepresentation by the directors, which had induced particular individuals to take shares. Then, as to the transfer of the shares: there could be no fraud on the part of the directors, as it was not their business to inquire into the reasons for any shares being passed from one person to another. The transfer was evidently made at the express desire of C. S. Bigge, for the purpose of qualifying him to become a director, and if there were any fraud in the matter, as between Matthew R. Bigge and C. S. Bigge, the latter was a party to it, and could not now complain of the directors.

KINDERSLEY, V.C.—I am sorry for the position of this gentleman. He is a young man, but when this transaction took place he was not so recently of age as has been assumed. Being possessed of considerable property, or rather being tenant for life of the property, and wishing to have some occupation, he was desirous of becoming a director of this company. He thought it would give him occupation, and his uncle, Mr. Matthew Robert Bigge, the executor

of his grandfather, from whom the property was derived, thought it would be a desirable thing. He says his mother and brother discussed the matter of his being a director, as he was desirous of having something to do. He says he attained the age of twenty-one on the 21st of July 1855, and up to the month of May 1855 he pursued his studies at Christ Church, Oxford, and had no knowledge whatever of business. In July 1855 he went to reside at Linden; the place of which he is tenant for life. About September 1856—that is, not a month or two, but one year and five months after he left college, and one year and two months after he attained twenty-one—it was suggested to him that he should become a director. It was not suggested by the directors of the company or the shareholders of the company: they did not want him as a director; but some of his own family suggested to him, Why should you not become a director of this company? He says, "At this time I was in the habit of seeing frequently Mr. Matthew Bigge, who resided at Oakwood." But he does not say it was his uncle, Mr. Matthew Bigge, who suggested the expediency of his becoming a director. Then he says, "Linden is about two hours' ride by road and railway from Newcastle. It was from Mr. Matthew Bigge that I learned it would be necessary that I should have a certain number of shares transferred into my name before I could be qualified to be appointed a director." Mr. Matthew Bigge, not appearing to be the person who suggested his becoming, or urged him to become, a director, had told him what was perfectly true, that it was necessary for him to hold certain shares; and this he found to be quite accurate according to the terms of the deed of the company. The 45th section of the deed says, "That no person shall be eligible for or be elected as a director of this company who shall not possess in his own right, at the fewest, fifty shares therein at the time of his election, or who shall become a bankrupt." Mr. Matthew Bigge gave him the information, "You must be the owner of fifty shares at least before you can become a director." "Mr. Matthew Bigge," he says, "offered to transfer into my name the requisite

number of shares, and I was informed by him that there was every prospect of my being elected by the directors upon the first vacancy which might occur. Nothing that I heard or was informed of at the time led me to believe or suspect that the affairs of the bank were not in the satisfactory state in which they were publicly represented to be, and which the dividends paid upon the shares would lead any one to suppose, or even to entertain any doubt on the subject." I confess, in that state of things I commiserate this gentleman. He is a young man who, wishing to have occupation, desires by the advice of some friend or other to be appointed a director of this company. In order to do it he is told, and truly, "You cannot do it unless you hold fifty shares." He said, "I had no reason to doubt this was a good company, and therefore I was desirous of becoming a director, and my uncle, Mr. Matthew Bigge, who was himself a director, said, 'I would transfer fifty or sixty shares to you.'" There are many persons who have been fixed on the list of contributories of this company for whom I confess I entertain more commiseration than I do for Mr. Bigge, but it is not on the ground of commiseration that I can discharge him from any liability which he has incurred. The grounds, then, on which, after he had these shares transferred to him, and after he had been, upon the faith of his possessing these shares in his own right, according to the language of that deed, appointed a director, he claims to be discharged from liability are these: first of all, he says there were false, and, in that sense, fraudulent, representations made by the directors as to the condition of this company before I became a director. Two reports are referred to particularly as having been made, containing those false representations; and he says, "My uncle, Mr. Matthew Bigge, who was the person who transferred those sixty shares to me, was himself a director of the company." He was therefore one of the body of persons from whom the false representations emanated. That is one ground, and it is founded upon the false and fraudulent representations made by the company; and *Brockwell's case*, and *Ayre's case* decided on the same ground as

Brockwell's case, have been referred to on this point. The other ground upon which Mr. Bigge considers he ought to be discharged is this—he says that, "although there was this transfer by a deed of these shares to me, and although I was apparently the registered shareholder, and upon the faith of being such shareholder was appointed a director, in point of truth there was no reality in all this, because these shares which my uncle transferred to me were the property of my grandfather, under whose will I was not absolutely entitled to these shares; I was only tenant for life of the property of which these shares formed a part, and my uncle, who transferred them to me, was the executor of my grandfather, and the only executor who had proved his will; it was a breach of trust in him to transfer these shares to me. I, it is true, knew perfectly well what was being done, and I concurred in it, and was desirous of having it done, and it was done in order to forward my wish of being a director; but it was a breach of trust—not indeed a breach of trust against me, but a breach of trust against somebody else interested in the testator's property; my uncle, of course, knew it was a breach of trust; and, moreover, the directors acting for the shareholders must have known it was a breach of trust." Why? "Because," he goes on to say, "they knew that, up to the time of the transfer, the shares stood in the name of the executors; they knew the transfer was made to me not for a full pecuniary consideration, but for the nominal consideration of 5s.; they also knew that after the transfer, instead of the dividends of the shares coming to me, they were placed to the credit of the executors of my grandfather, just as was the case before the transfer; and therefore the whole thing is such a nullity that not only as between me and my uncle, but as between me and the shareholders, I have a right to say that I am not liable to them as a brother shareholder." Now those are the two grounds on which Mr. Bigge relies; and I should observe, those two grounds are perfectly independent. On the first ground, he has a right, of course, to the consideration of the ingredient that his uncle was one of the directors. He is

entitled to that; but the two grounds are as distinct as two grounds can be. Now, let me consider the first ground, that is, of representations made to the public by the directors. In the first place, the evidence as to misrepresentation is extremely scanty; it amounts to this:—It is the evidence of Mr. Coleman, who is perfectly competent, because he is one of the official liquidators, a very experienced and competent accountant, and perfectly able to judge of the whole matter. He says he has investigated the whole thing, and he has stated, no doubt, the truth, and all that could be fairly stated on either side, as much for Mr. Bigge as for the shareholders generally. He refers to the two reports which are alleged to contain these misrepresentations, and they are followed by certain accounts; and he adds, that from the investigation and the inquiries he has made, those reports and accounts “do not represent the true state of the affairs of the bank at the respective dates of such reports and accounts, the bank having, to the best of my belief, been at the dates of such reports and accounts in a state of insolvency.” Therefore, there is no doubt those accounts did not represent the true state of things, because the bank was then insolvent, and those accounts did not represent them as being insolvent. On the contrary, they represented that for the periods to which those accounts related there had been profits made, enabling them to pay a dividend of 7½ per cent. upon the profit. There is no doubt that was a misrepresentation; but was it such a misrepresentation as in *Brockwell's case* (the case of the Royal British Bank), which amounted to actual intentional fraud on the part of the directors putting forward that representation? In the case of *Brockwell* that was so; but in that case there were ingredients which do not occur here. This case has not any of the ingredients upon which *Brockwell's case* and *Ayre's case* were decided. In *Brockwell's case* we have this: that there were representations put forth by the company,—that is, by the directors acting for the company and the authorized body; and therefore their acts were treated as the acts of the company—for the express purpose of inducing persons to take shares, newly created, from the com-

pany itself. Those persons took up shares, newly created under the authority of an act of parliament which the directors had obtained for the purpose, and all the dealings which were brought about by means of these representations were dealings between the company and the persons sought afterwards to be put upon the list. In that case it was proved that the shareholder had entered into the taking of these shares because he had himself read and relied upon and trusted to those representations, which turned out to be false. Now, not one of those ingredients exist in the present case. There is the ingredient of misrepresentation, and I would even assume, for the purpose of the argument, that there was misrepresentation amounting to fraud, although that is not established. But, supposing it to be a fraud, it is a fraud which does not induce any individual to deal with the company as a body guilty of that fraud and making those misrepresentations; and the fact that Mr. Matthew Bigge was one of the directors could never have the effect of making all the directors parties to the transaction between Mr. Matthew Bigge and Mr. C. S. Bigge, so as to vitiate the transaction between those two. Moreover, Mr. C. S. Bigge does not pretend to say that he was led to take these shares by these representations. On the contrary, he says this: “I wanted to be a director of this company; my object was to be a director. When told that I must take shares in order to be a director, then, of course, I desired to have shares; and then, and only then, my uncle offered to transfer the shares to me.” But what does he say as to being misled by misrepresentation? He does not say that he read one syllable of either of these reports, or that anybody told him what the reports contained; but what he says is this: “I am not sure, but I believe I saw them.” He does not say he ever read them, or that he was induced to suppose there was a single word of truth in what he saw; still less does he say that because of those representations he was induced to enter into this transaction. In order to bring this transaction within *Brockwell's case*, it must be shewn to have been a transaction between Mr. C. S. Bigge and the company, who again must be shewn to have been

guilty of this fraudulent misrepresentation. So that except as to this alleged fraudulent misrepresentation—misrepresentation there undoubtedly was, though I do not think it was fraudulent—all the other ingredients in *Brockwell's case* are wanting in the present. Therefore, it does not appear to me, on that ground, that I can dismiss Mr. Bigge from the liability that he has incurred.

Now with regard to the other ground, which appears, if possible, less favourable than the former. If the transaction was a breach of trust, does it lie in the mouth of Mr. C. S. Bigge to complain of that breach of trust when he was himself a party to it? Further, what is there to lead me to the conclusion that the directors, as a body, even if that were important, knew of any breach of trust? It was argued, that inasmuch as they knew that Mr. Matthew Bigge was an executor, they were put upon their guard, according to some of the authorities, and that therefore they could not properly allow this transaction. But, it must be recollected that the authorities which are referred to, are these: If a man is dealing with an executor, that is, entering into any bargain of purchase or sale, or any other transaction, he is bound to take notice that that man is acting as an executor. How does that apply to the directors of a company who are merely acting for the purpose of seeing that a transfer from A. to B. is regularly effected on the part of their office? What business have they with the question whether the person who proposes to make the transfer is an executor or not? That is an affair between the transferor and the transferee; the directors have nothing to do with the question. Their function is to see that the thing is regularly done, and is done according to the requisitions of the deed, if the deed require any particular forms, or ceremonies, or acts to be performed or done. Well, then, Mr. C. S. Bigge chose to take from the executor a transfer of these shares. He, by taking that transfer, and by being put upon the register, and upon the faith of those acts, was made a director; and if there be any breach of trust he himself was a party to it. One thing, at least, I cannot understand. I cannot understand

how Mr. Bigge can say, "I knew that this was all a sham. I knew that I was bound to hold in my own right fifty shares in order to be a director; I was a participator in this sham, which made it apparent that I held these shares, when in reality I had not a single share." I confess I cannot concur in the view that has been taken on the part of Mr. C. S. Bigge, and it appears to me, therefore, that he must be put on the list of contributories for the sixty shares.

LORDS JUSTICES. }
 Nov. 17, 20, 22. } *In re ORMEROD.*
 Dec. 10. }

Trustee Acts—Jurisdiction—Person of Unsound Mind not found so by Inquisition—Statute 17 & 18 Vict. c. 82. relating to the Court of the County Palatine of Lancaster.

The Court of the County Palatine of Lancaster has not any jurisdiction to appoint a new trustee in the place of a trustee of unsound mind not so found by inquisition. Such jurisdiction is given by the legislature (by the Trustee Acts) to the Lord Chancellor, or other persons intrusted with the care of lunatics, and not to the Court of Chancery.

Mr. Smale stated that, at the request of his Worship, the Vice Chancellor of the Duchy of Lancaster (Mr. W. M. James), he was instructed to mention to and obtain the opinion of the Lords Justices, upon the question how far the Court of the County Palatine of Lancaster had jurisdiction to appoint a new trustee, in the place of a trustee who was of unsound mind not found a lunatic by inquisition.

A petition had been presented, in the above-named court, stating that Thomas Barton Ormerod, one of the trustees under a will, was of unsound mind, and incapable of acting in the execution of the trusts of it, and was detained in a private lunatic asylum at Clifton, near Manchester, under a medical certificate of unsoundness of mind, but had not been found of unsound mind by inquisition. The petition prayed that Thomas Barton Jervis might be appointed a new trustee in the place of Tho-

mas Barton Ormerod (the person of unsound mind), in addition to the two remaining trustees; and that the estate, subject to the trusts of the will, might be vested in him jointly with the two remaining trustees accordingly.

Nov. 22.—LORD JUSTICE TURNER.—The question in this case is, whether the Duchy Court of Lancaster (1) has, as to lands and personal estate within its jurisdiction, power under the Trustee Acts to appoint a new trustee in the place of a trustee of unsound mind not so found by inquisition. We think that the Duchy Court of Lancaster cannot now safely be held to have any such power. By the statute 17 & 18 Vict. c. 82. s. 11. the Duchy Court has, indeed, as to lands and personal estate within its jurisdiction, all the powers under the Trustee Acts which by these acts are given to the Court of Chancery in England; but we consider that, whatever the decision might have been in the absence of authority, it is now settled by the decided cases that the power to appoint new trustees in the place of trustees of unsound mind not so found by inquisition is, by the Trustee Acts, given, not to the Court of Chancery, but to the Lord Chancellor, or other persons intrusted with the care of lunatics. The point came before both the Master of the Rolls and the Lord Chancellor, in a case, *In re Hall's Trusts*, on the 16th of July 1856. The Master of the Rolls had declined to make the order, and it was made by the Lord Chancellor on the petition being amended and addressed to him. Again, Vice Chancellor Kindersley, in *Re the Good Intent Benefit Society* (2), after looking into the acts, expressed his opinion that he had no jurisdiction in such cases; and again, in *Re Piggott*, on the 4th of March 1858, Vice Chancellor Wood having intimated that it would be more safe that the order should be made by the Lord Chancellor or the Lords Justices, the matter was mentioned to the full Court, and the order made by that Court, with an opinion expressed, that

(1) It seems incorrect so to designate the Court. It should be "The Court of the County Palatine of Lancaster." The Duchy Court is one of common-law jurisdiction.

(2) 2 W. R. 671.

the jurisdiction had always been considered to be in the Lord Chancellor. We understand that since the decision in the last case the practice has been considered to be settled, and the Vice Chancellors have declined to make such orders, referring the parties to the Lords Justices. We think that these authorities, and the course of practice, decide this question; and it is also worthy of remark that, before the passing of the Trustee Acts now in force, it had been held, that under the existing acts, which, however, were different in language, the Vice Chancellor had not even the power, in the case of a lunatic trustee, to make the common order for inquiry—*In re Shorrocks* (3).

Dec. 10.—*Mr. Smale*, this day, appeared in support of the petition which had been presented to this Court, and the order was made according to the prayer.

STUART, V.C. } THE COLLINS COMPANY v.
June 28, 29. } REEVES.

Special Injunction — Trade Marks — Alien Company, Right of, to sue.

The bill was filed, by an American trading company, incorporated by the law of the State of Connecticut, in the United States of America, for an injunction to restrain the defendant, a manufacturer, of Birmingham, from continuing the fraudulent use, as alleged, of the trade marks of the plaintiffs, and for an account of the profits made by him from such use. The defendant, by his answer, admitted the user of the trade marks complained of, but by way of rebuttal of the charge of fraud, stated that in so using the said trade marks he had only followed a custom prevalent at Birmingham for manufacturers of goods of the kind sold by the plaintiffs, to affix on the goods ordered by merchants a particular trade mark, relying on the respectability of the merchant, when known to them, for the fact that those merchants had authority to act as agents of, or by way of licence from, the person entitled to the exclusive use of the trade marks; and, further, that he had

(3) 1 Myl. & Cr. 31.

been informed that the plaintiffs themselves had ordered goods to be manufactured at Birmingham, with their own trade mark upon them, for the purpose of sale in foreign countries. These statements of the defendant were left uncontradicted by the plaintiffs. The Court, upon motion for decree, ordered that an interim injunction, which the defendant had previously submitted to, should be continued for a year, with liberty to the plaintiffs to bring an action within that time to try their right at law; and in case of their not proceeding at law and to trial within that time, then that their bill should thereupon stand dismissed, with costs.

The Collins Company, of Collinsville, in the county of Hartford, in the State of Connecticut, in the United States of North America, edge tool-manufacturers, filed the bill in this suit against the defendant Reeves, stating the following case as a ground for the relief prayed by them of the Court. The plaintiffs were, by virtue of a resolution passed by the General Assembly of the State of Connecticut in May 1834, and afterwards modified by another resolution passed by the same Assembly in 1843, duly constituted according to the law of that State a corporate body, by the name of the Collins Company, to be located in the town of Canton, in the county of Hartford, for the purpose of manufacturing edge tools in the most advantageous manner, and with full power to manufacture iron and steel and other metals, and by that name they and their assigns and successors were authorized and empowered to sue and be sued in any court of record or elsewhere. The company had ever since continued, pursuant to the charter thus granted to them, and according to the law of the State of Connecticut, to carry on their business as a body corporate, under the name of the Collins Company, of Collinsville. Their business consisted principally in the manufacture of edge tools to be used by persons employed in felling and fashioning timber, of tools called "Matchets," to be used for cutting sugar-canes, and of pickaxes to be used at the diggings in Australia and California.

As manufacturers of these articles, they had acquired a high reputation in the mar-

kets of various parts of the world, and especially in the markets of America, Cuba and Australia. For the purpose of distinguishing their manufactures, the company had been in the habit of causing to be stamped or engraved on the articles manufactured by them the words "Collins & Co., Hartford, cast steel, warranted," and had also been in the habit of causing to be pasted or fixed upon such articles printed labels containing the following words:—

"Look for the stamp, Hartford, if you want the genuine Collins & Co. Sam. W. Collins."

The labels thus used by them were all in the same form, with white letters printed on a black ground, the words "Sam. W. Collins" being in written characters and forming a *fac-simile* of the signature of Samuel Wilkinson Collins, the manager of the company, and all the other words being in Roman capital letters. These labels and stamps had always been affixed to goods manufactured by the company before they left the manufacturing premises of the company.

The company claimed, under these circumstances, to have acquired the exclusive right to the said mark and to the said labels. The company, having had it intimated to them that a great variety of tools of similar manufacture with their own, but of inferior price and quality, had been imported into America, Cuba, Australia and other places, with marks and labels thereon similar to those upon the tools of the company, discovered for the first time, in 1857, that the defendant had been long fraudulently using and imitating the said trade marks and labels, by stamping and affixing them to goods manufactured and sold by the defendant, which goods in form and appearance closely resembled the tools manufactured by the plaintiffs, but were of an inferior quality and price.

The bill charged that the defendant had in his possession stamps having the words "Collins & Co., Hartford, cast-steel, warranted," or some other words or marks, only colourably differing from the marks used by the Collins Company; and that he had caused to be printed very large quantities of labels, which were fac-similes of, or which

only colourably differed from, the labels used by the said company; and that such stamps and labels the defendant used for the purpose of stamping and labelling the inferior goods manufactured and sold by himself, being fraudulent imitations of the goods manufactured by the plaintiffs. The bill, after charging that, by the use as above-mentioned of the plaintiffs' trade marks, the defendant had realized large profits for himself, and caused great loss to the company, prayed that an account might be taken of the profits made by the defendant on tools manufactured by him having the marks or labels of the company; that the defendant might be decreed to pay to the company the full amount of such profits, and to deliver up all tools in his possession having such marks or labels, and also all stamps, blocks, plates and labels; that an injunction might be issued to restrain the defendant from using the marks and labels of the company; and that the defendant might be ordered to pay the costs of the suit.

The defendant, in his answer, filed in August 1857, stated that it had long been the custom of foreign manufacturers to order, through merchants or agents in this country, goods similar to their own manufacture in all respects, except, perhaps, the quality, which would often be better, to be both manufactured for them at Birmingham and stamped with their own name or mark by manufacturers in this country; and it had for many years been his habit to receive orders from English merchants for the manufacture of wholesale quantities of goods of the particular sorts or patterns furnished to him by them, and to be stamped or marked with a particular name or label, also furnished to him by them; and he had executed many such orders given to him by English merchants, with different foreign names stamped upon or labelled to the goods, according to the order given; and he had executed similar orders with different English names stamped upon or labelled to the goods, according to the orders given to him by English merchants; for he believed it was not an uncommon practice, even for English manufacturers through English merchants, or other agents, to give orders for some of their own goods

to be both manufactured and stamped with their own names or marks by other manufacturers, when, through press of business or other circumstances, they were unable to manufacture their own goods themselves, or a sufficient quantity of them to meet the demand. In every such case of receiving and executing an order for the manufacture of goods with a particular name or mark stamped upon or affixed to them, apparently not that of the English merchant giving the order, he had always looked to the respectability of the merchant giving the order as a sufficient guarantee that he was acting as the agent of the party whose name or mark or label he directed to be so used, or that he had full authority to give the particular order; and had generally, if not always, upon the first occasion of taking such an order, required the merchant, if he had not before transacted business with him, to give him, in writing, his name and address, and his direction to execute the particular order. The defendant admitted that it was not his custom in such cases to insist upon the merchant shewing him some particular and specific evidence of the authority under which he assumed to act, since to have done so would, he conceived and submitted, be deemed to convey an uncalled-for impertinent suspicion of the respectability and *bona fides* of the merchant giving the order, and to be altogether contrary to the usages of commerce; and more particularly so in cases where he had been previously well acquainted with the merchants giving the orders and knew of their respectability. However, although he did not at the time of receiving and executing such orders, for the reason aforesaid, insist upon the production of such evidence, he had in numerous cases, after such orders so given by English merchants had been executed by him, received proof or assurance, either direct or by implication, from the parties themselves, whose names were placed upon the goods, that the orders were given for them, or with their sanction. The defendant further stated, that until the case of the plaintiffs, he had never known or experienced, in the whole course of his trade, an instance of orders being given by English merchants without their having the sanction and authority of the

parties whose names they assumed to use; that he did not know of the existence of the Collins Company before 1849, when the first pattern of a matchet was sent to him by some merchants of Birmingham, with whom he had previously transacted business to a large extent, and of whose respectability he was well assured, which had on it the name or mark or label of the Collins Company, and he was ordered by those merchants to manufacture a quantity of matchets for them according to such pattern, and with the same name or mark and label upon it, according to such pattern; and he had since that period manufactured for them and other merchants of respectability quantities of matchets of the same pattern, and with the same name or mark upon them, in pursuance of orders received from them in the ordinary course of his trade, and according to his ordinary practice of receiving and executing orders from merchants as aforesaid, and in the belief and upon the assumption, justified by the circumstances before stated, that the merchant giving such orders had authority to give the same. He had no actual knowledge that the said Collins Company were really manufacturers, or were an existing company, until the recent institution of proceedings against him and others in this court. For anything he before knew to the contrary, the words "Collins & Co., Hartford, cast-steel, warranted," or "Hartford cast-steel warranted," might have been used to denote a particular make or pattern of article, or a particular quality of article, and not to denote that the article was manufactured by a particular company. In every instance in which he had manufactured matchets with the name and label of the said Collins Company upon them (and he had never manufactured any articles, except matchets with their name or label upon them), he had received orders from English merchants for such manufacture, and in no single instance had ever manufactured them without such orders or order. And such orders he considered or believed at the time to be perfectly authorized, and to be either for the use, or to be given with the sanction, of some firm of that name, the same as in the numerous other cases in which, as before stated, he had been in the habit of receiving orders

from English merchants for the manufacture of goods with foreign names placed upon them, and in which he had always believed, as indeed the fact was, that the foreign names directed to be placed on the goods to be manufactured by him were the names of foreign firms, who chose to have their names placed on the goods they sold, and who gave orders to English merchants accordingly; who, in their turn, gave the orders to the manufacturer. The defendant denied that he ever did in any single instance mark an article with the name of the Collins Company, unless by the positive order of the merchant who ordered the goods in the usual course of trade; and stated that he always required such order to be in writing, when it was the first order of the kind from a merchant with whom he had not before transacted business.

The defendant further stated, that the name and labels of the said company and punches for stamping the name upon the goods had been supplied to him in every instance in which he had manufactured goods bearing the name and labels, by the parties who ordered the goods of him; and that he had never supplied a single article bearing any name, unless he had previously been furnished therewith by the person who ordered the goods of him, and who had in every case sent him a pattern of the particular article to be manufactured, and of the labels to be affixed thereto. He had nothing whatever to do with the sending of such goods abroad; and he said that he had been informed that the Collins Company had themselves been in the habit of ordering matchets and edge tools to be made by English manufacturers, with the name of the said company upon them for the purpose of sale in foreign countries; and that it was frequently the practice of foreigners to employ several separate firms or persons, merchants in this country, as their agents, to order their goods to be manufactured by one or more manufacturers in this country.

After the bill was filed the defendant had, by his solicitor, offered to abstain from further use of the marks and labels of the plaintiffs, and expressed his willingness to settle the suit upon being reason-

ably satisfied that the plaintiffs were entitled to the rights claimed by their bill.

The plaintiffs, however, through their solicitor, declined to settle the suit until they should have had the fullest discovery, &c. relating to the goods manufactured and sold by the defendant in the manner they complained of, and an account of the profits made by the sale of such goods.

In July 1857 the plaintiffs applied to the Court for an injunction to restrain the further use by the defendant of the marks and labels, and an order for an interim injunction was thereupon made, no opposition being offered by the defendant.

The cause now came on for hearing, upon motion for decree for a perpetual injunction, and for an account in the terms of the prayer of the bill.

Mr. Bacon and *Mr. Eddis*, in support of the motion, contended that, inasmuch as the trade marks of the plaintiffs were here admitted by the defendant to have been used by him, the Court would presume fraud, and at once make the injunction perpetual and decree an account, without putting the plaintiffs to establish their title at law—*Southern v. How* (1), *The Collins Company v. Brown* (2), *Sykes v. Sykes* (3), and *Rodgers v. Nowill* (4). Besides, there was a title to trade marks independently of fraud; and, the injunction having been already granted, it was now too late to direct an action.

Mr. Malins and *Mr. J. T. Humphry*, for the defendant, were not called upon.

STUART, V.C. said, that the plaintiffs, if they had an exclusive right to the use of the trade marks in question, were entitled to the protection of this Court in the enjoyment of such use. Though they were aliens, they were entitled to sue in this court against any fraudulent invasion of their right, and that notwithstanding the tools stamped with the marks, the fraudulent use of which was complained

of, were not usually sold by them in this country. Wood, V.C. had so decided in *The Collins Company v. Brown*. In the case before the Court, the user complained of by the plaintiffs was admitted by the defendant, who in explanation thereof had alleged circumstances entirely novel, and which, so far as appeared, had never appeared in any known case in which an injunction had been granted. One of the circumstances thus alleged was, that it was the custom at Birmingham for manufacturers of goods of this kind to affix on the goods ordered by merchants a particular trade mark, the manufacturers relying on the respectability of the merchants, if known to them, for the fact that these merchants had either authority to act as agents of, or else by way of licence from, the person entitled to the exclusive use of the trade mark. The truth of that allegation must be assumed, for no evidence had been adduced to contradict it. The defendant said, that in accordance with that custom, he had acted in this case, but that as soon as he had notice of the bill in this suit, he discontinued the use of the trade mark complained of by the plaintiffs, and had, moreover, upon the former motion, agreed to be bound by an injunction of this Court. The plaintiffs, however, insisted upon their right to an account of profits, without any trial at law upon the question, how far their alleged legal right might be affected by the facts stated in the defendant's answer. Counsel for the plaintiffs, however, on being asked for an authority in which such a course had been pursued, had been unable to refer to one. That such a course would be improper, was apparent from an observation of Lord Cottenham, in *Motley v. Downman* (5), in the following terms:—
“The Court, when it interferes in cases of this sort, is exercising a jurisdiction over legal rights; and although, sometimes, in a very strong case it interferes in the first instance by injunction, yet in a general way it puts the party upon asserting his right, by trying it in an action at law. If it does not do that, it permits the plaintiff, notwithstanding the suit in equity, to

(1) Pop. 140.

(2) 3 Kay & J. 433.

(3) 3 B. & C. 541; a.c. 3 Law J. Rep. K.B. 43; 3 D. & R. 392.

(4) 6 Hare, 325; a.c. 17 Law J. Rep. (N.S.) C.P. 52; 5 Com. B. Rep. 100.

(5) 3 Myl. & Cr. 1; a.c. 6 Law J. Rep. (N.S.) Chanc. 302.

bring an action. In both cases, the Court is only acting in aid of, and is only ancillary to, the legal right. I can hardly conceive a case in which the Court will at once interfere by injunction, and prevent a defendant from disputing the plaintiff's legal title." In conformity with the law, as thus stated, he (the Vice Chancellor) felt bound to act. The propriety of that course was, he thought, confirmed in this particular case by the facts, that the plaintiffs had not attempted to deny the existence of the general custom, averred by the answer, and that they, claiming title as they did as a corporate body, to manufacture goods of a particular description in the United States, had not scrupled themselves to send out to the world goods manufactured in England, stamped with their own American trade mark—for that this was the fact must be presumed against them, it being averred in the answer, and nowhere contradicted. The present case differed from *Sykes v. Sykes*, which had been relied on, in this, that here there were circumstances rebutting the presumption of fraud arising from the use by one person of the trade marks of another, whereas in that case no such circumstances were proved. In the view that, inasmuch as the injunction had been already granted, it was now too late to direct a trial at law, he did not concur. His Honour then made an order to the following effect:—The defendant submitting to the injunction, let it be continued until further order; and order that the bill be retained for a year, with liberty to the plaintiffs to bring an action within that time to try their right at law, and with liberty to apply. In case the plaintiffs shall not proceed at law, or not proceed to trial within that time, then their bill is to stand dismissed, with costs; but in case the plaintiffs shall proceed at law and to trial within that time, then the consideration of the costs of this suit and all further directions are to be reserved until after such trial (6).

(6) Notice of appeal was afterwards served upon the defendant, but before it came on to be heard before the Lords Justices, a compromise was agreed to between the parties.

L.C.
Nov. 12, 13, } MANSENGH v. CAMPBELL.
15, 18.

Annuity—Perpetual Rent-Charge—Construction of Will.

*A testator gave an annuity, or clear yearly rent-charge, of 300*l.* to his niece A. B, for her life; and after her decease he gave the said annuity or rent-charge unto her children equally, if more than one, share and share alike, to be applied for their maintenance until the youngest should attain twenty-one; on the happening of which event he directed the said annuity to be absolutely sold by such children, and the proceeds to be equally divided among them; and he charged the said annuity upon his real estates, which, subject to the said annuity, he devised to H. in fee:—Held, affirming a decision of the Master of the Rolls, that the gift created a rent-charge on the estates in fee simple.*

This was an appeal, by the defendant, from the decision of the Master of the Rolls, reported 27 *Law J. Rep.* (N.S.) Chanc. 769, declaring that an annuity of 300*l.* given by the will of William Hinton was a perpetual annuity. The bequests, upon which the question arose, were in the following terms:—

"I give and bequeath to my niece Ann Baker, now living with me, an annuity or clear yearly rent-charge or sum of 300*l.* of lawful money, current in Great Britain, to be paid to her by four equal quarterly payments in the year (that is to say), the 25th of March, the 24th of June, the 29th of September, and the 25th of December, in each and every year, by even and equal portions, for and during the term of her natural life; and I do hereby will and direct that the said annuity, yearly rent-charge, or sum of 300*l.* shall be paid by the proportions aforesaid into the proper hands of the said Ann Baker, for her own sole and separate use and benefit during her life; and from and after the decease of her my said niece, Ann Baker, I give and bequeath the said annuity, yearly rent-charge or sum of 300*l.* unto all and every the children (if any) of my said niece, lawfully to be begotten, if more than one share and share alike, and if but one,

then to such only child, to be paid and applied for and towards the support, maintenance and education of such child or children, by equal quarterly payments, on the days and times and in manner aforesaid, until such only child, or the youngest of such children, shall attain the age of twenty-one; and when and as soon as such only child, or youngest of such children, shall have fully attained the age of twenty-one years, I direct that the said annuity of 300*l.* shall be absolutely sold and disposed of by such child or children of her my said niece, Ann Baker, and that the money to arise and be produced by and from such sale shall go to and be equally divided among such children, if more than one, share and share alike; and if but one, to such only child."

The testator afterwards gave an annuity of 20*l.* to his kinsman, Thomas Eyre Hinton, for the term of his natural life; and then he proceeded thus:—

"I do hereby charge, and make chargeable, all and singular my freehold estates situate in the Isle of Wight, and the counties of Southampton and Wilts, or elsewhere in England, with the payment of the said several annuities or yearly rent-charges of 300*l.* and 20*l.* accordingly, and subject to and charged and chargeable with the payment of the said several annuities as aforesaid, I give and devise unto my good friend, James Harvey, of Whitecroft, in the Isle of Wight aforesaid, yeoman, all and singular my freehold estates called Marvell and Blackwater, and all my tithes and hereditaments situate in the Isle of Wight aforesaid, and also all and singular my freehold estates situate in the said counties of Southampton and Wilts, and all other my freehold messuages, lands, tenements, tithes, hereditaments and real estates whatsoever and wheresoever, and to which I may be entitled either in possession, reversion, remainder or expectancy with their and every of their rights, members and appurtenances, to hold the same, and every part and parcel thereof, with their and every of their rights members, and appurtenances (subject as aforesaid), unto and to the use of the said James Harvey, his heirs and assigns for ever." And the testator appointed James Harvey his sole executor.

Mr. R. Palmer and *Mr. J. H. Palmer*, for the plaintiff, supported the decree of the Master of the Rolls, referring to—

Whiskon and Cleyton's case, 1 Leon. 156.

Jennor and Hardie's case, Ibid. 283.

Blewitt v. Roberts, Cr. & Ph. 274; s.c. 10 Sim. 491; 9 Law J. Rep. (n.s.) Chanc. 209; 10 Ibid. 342.

Heron v. Stokes, 2 Dru. & W. 89; s.c. 4 Irish Eq. Rep. 492; 12 Cl. & F. 191.

Yates v. Maddan, 3 Mac. & G. 532; s.c. 21 Law J. Rep. (n.s.) Chanc. 24.

Robinson v. Hunt, 4 Beav. 450.

Potter v. Baker, 13 Beav. 273; s.c. 21 Law J. Rep. (n.s.) Chanc. 11; 15 Beav. 489.

Pawson v. Pawson, 19 Beav. 146; s.c. 23 Law J. Rep. (n.s.) Chanc. 954.

Mr. Selwyn appeared for the defendants in the same interest.

Sir R. Bethell, *Mr. Giffard*, and *Mr. Karlake*, for the appellant, the owner of the estate sought to be charged.—The testator had charged upon the estate that only which he had previously given, referring to it as "the said annuity," and consequently, the previous part of the will must be looked to for the purpose of ascertaining what the gift is. The Master of the Rolls, however, had invented the will, and sought for the description of the gift where the estate was charged. The word "annuity" meant sometimes the sum and at other times the right or interest in the money. This distinction had been disregarded by the Master of the Rolls. In *Co. Lit.* 144, b, it is said, "An annuity is a yearly payment of a certain sum of money granted to another in fee, for life or years, charging the person of the grantor only." "But if a rent-charge be granted to a man and his heirs, he shall not have a writ of annuity against the heir of the grantor, albeit he hath assets, unless the grant be for him and his heirs." Again, in *Co. Lit.* 2, a, "So it is if an annuity is granted to a man and his heirs, it is a fee simple, personal; *et sic de similibus*." In *Savery v. Dyer* (1), Lord Hardwicke said,

(1) 1 Ambl. 140.

perty, or of the property to produce an annuity, but the creation of an annuity *de novo* with a charge of it upon real property. Now, the principles which may be considered to be applicable to a case of this description carry us a very little way towards a decision of the present question, because although it was said by Lord Hardwicke, in *Savery v. Dyer*, that where an annuity not existing before is created by will *de novo* and given to A, he shall have it only for life; and it was held, by Lord Cottenham, in the case of *Blewitt v. Roberts*, that where an annuity was given to one for life, and after her death to be equally divided among six persons, or the survivors or survivor of them, they had the annuity only for life; and it was taken for granted by the Master of the Rolls, in *Potter v. Baker*, that if an annuity is given to one for life, and after his death to another simply, the latter would not take an absolute interest, yet it appears from several authorities that the intention to give what is called a perpetual annuity may be collected from the will without any express declaration to this effect. This leaves the question open in many cases to infer the intention of the testator from the language used, on which differences of construction will almost inevitably arise, leading to perplexing uncertainty; and it not unfrequently happens that different minds are led to opposite conclusions, and sometimes to the same end, though by different ways and upon entirely different grounds. The Master of the Rolls seems to have been influenced in his judgment that the annuity is perpetual, principally by the circumstance of the testator having given his estate subject to and charged with the payment of the annuity to James Harvey in fee. That, his Honour says, is the gift which is the limitation of an annuity or rent-charge. I am unable, however, from the mere charge of an annuity on property devised in fee simple, to collect an intention that the duration of the annuity should correspond with the limits of the estate charged. The annuity is created *de novo*, and its extent must be determined by the words creating it, not by the estate on which it is charged, which is equally susceptible of a charge of an annuity for years, for life or in fee, and in

this very case is subjected to the charge of an annuity which is given expressly for life. It is unnecessary for me to revert to the different parts of his Honour's judgment brought to my notice in the course of the argument, because, agreeing with him as I do, that this is a perpetual annuity, though on somewhat different grounds, it is sufficient to explain the reasons which have led my mind to the conclusion at which it has arrived. It does not appear to me that much aid can be derived for the argument in favour of the perpetuity of the charge from *Whiskon and Cleyton's case* and *Jennor and Hardie's case* in *Leonard*, because though it was held in those cases that the words, "I will that my land shall be at the disposition of A. B.," gave him a fee simple, and here the annuity is directed to be absolutely sold and disposed of by the child or children of Ann Baker; yet to give the same effect to those words as applicable to the annuity, as it was decided they had with respect to land, is to assume the whole question, that the annuity was in fee. Where the lands are to be at the disposition of any person, the subject-matter having perpetual continuance, and there being no qualification or limitation, the whole must necessarily be comprehended, but to direct that an annuity shall be sold and disposed of might be equally well applied to an annuity for life as to an annuity in fee. The question in this case is, not whether such a clause carries the entire interest, but what is the entire interest? or, in other words, what is the duration of the annuity which is thus to be disposed of? This being the question, it must be determined entirely by the intention of the testator, to be collected from the language of the will. He begins, in the first place, by creating an annuity of 300*l.*, which he gives to Ann Baker for her life. Now, does that annuity, so created, terminate with the life of Ann Baker? or, to use the words of Lord Cottenham in *Stokes v. Heron*, does the testator deal with it as being in existence and operative beyond her life? He proceeds to give and bequeath, "from and after the decease of my niece Ann Baker, the said annuity or yearly rent-charge of 300*l.*" Stress was properly laid in the argument upon

the words "the said annuity," because, assuming that Lord Truro is right in saying that the words "same annuity" may mean no more than the same annual sum, or an annual sum of the same amount,—although *Hedges v. Harpur* (5), to which he refers for the suggestion, does not countenance it,—yet on a question whether a similar sum given by way of annuity is newly created, or is the same annuity previously given to another person for life, the use of the word of reference, "said," cannot be disregarded as wholly immaterial to the determination. I am satisfied that in giving "the said annuity" or rent-charge of 300*l.* to the children of Ann Baker, the testator was dealing with the annuity which he had previously limited for life, and continuing it by a further limitation. In pursuance of this intention, he gives it "to all and every the children, if any, of my said niece, lawfully to be begotten, if more than one, share and share alike, and if but one then to such only child." If the will had stopped there, I think there would have been no doubt that the children would have taken only a life interest, as the bequest would have been very nearly similar to the first gift in *Blewitt v. Roberts*; but there being no words of survivorship each child would have had his share only of the 300*l.* annuity,—only for his own life. If the limitation had been, as in *Blewitt v. Roberts*, to be equally divided between the children or the survivors or survivor, then I apprehend that the annuity in its entirety would subsist until the death of the survivor, and when any of the lives dropped it would become divisible among a smaller number of persons. But, in this case, if the annuity of 300*l.* continued only during the joint lives of the children, there being no survivorship, each child would have his share of the annuity for his own life, and upon his death that share, or, in other words, his separate annuity, would have come to an end. It is this circumstance, coupled with the words of the will, which has led me to the conclusion that it was not the intention of the testator that the annuity should be merely for life. The testator, having given an annuity to the children of Ann Baker, in the words I have

read, directs it to be paid and applied for and towards the support, maintenance and education of such child or children, by equal quarterly payments, on the days and times and in manner aforesaid, until such only child, or the youngest of such children, shall attain the age of twenty-one years; and when and as soon as such only child or the youngest of such children shall have attained the age of twenty-one years, "then I direct the said annuity or yearly sum of 300*l.* shall be absolutely sold and disposed of." Now suppose, what is by no means an improbable supposition, nor unlikely to have been in the contemplation of the testator, that one of the children, or more than one, had died before the youngest child had attained twenty-one, as his share of the annuity would have fallen, there would have been no annuity of 300*l.* in existence at the time when the sale is directed to take place, but an annuity, if it is to be taken in the aggregate, diminished by the portion of it which had ceased by the death of the child or children; yet the sale is to be not of any reduced annuity, but of the said annuity of 300*l.*, referring to it as something which had been already the subject of disposition, and which was to be sold in its integrity when the prescribed period arrived. It would certainly appear a strange thing, though not altogether unaccountable, that the testator should first have given an annuity merely for life, and then have directed that life annuity to be sold; but it seems still more extraordinary that, even supposing all the children had lived until the period of sale, so as to leave the aggregate annuity of 300*l.* divisible amongst them all, the sale must have been not of an annuity of 300*l.* as the testator directed, but of so many annuities as there were lives, the annuities being of different values, according to the probable duration of those lives, depending not only on the respective ages, but also on the strength or weakness of their constitution. The language of the will as to the charge of the annuity on the estate appears to me also in favour of the view I have taken, and to assist the construction which I have adopted. The testator expressly charges his freehold estates with the payment of the said several

(5) 9 Beav. 479.

annuities or yearly rent-charges of 300*l.* and 20*l.* The charge is not only of one entire annuity, but of an annuity of a certain and unvarying amount; but if the annuity is merely for the lives of the children, then it would not be a charge of one annuity only, but of several annuities, not of one fixed and certain amount, but of an amount diminishing gradually as each life dropped, until at last the remaining portion of the charge would terminate by the death of the survivor. Anything more contrary to the apparent intention of the testator can hardly be imagined. He creates an annuity of 300*l.* He disposes of that annuity for life. He gives the said annuity of 300*l.* to the children of the person who has enjoyed it for life; he directs equal shares of the said annuity to be applied to the support, maintenance and education of the children; and when the youngest child attains twenty-one he directs the said annuity to be absolutely sold and disposed of, and charges all his freehold estates with the said annuity of 300*l.* Every part of the will appears to me to militate strongly against the construction that life interests merely in the annuity were given to the children. The difficulties in the way of such a construction have been pointed out, and all the inconveniences and absurdities which would follow from adopting it. But if such an intention had been expressed, or were reasonably to be collected from the words of the will, it would not be for the Court to speculate upon the motives of the testator, or to substitute for his express disposition of his property something which I might consider more reasonable; but I found myself entirely on the language of the will, which in its plain and ordinary meaning presents a natural construction apparently consistent with the intention of the testator, and enabling it to be carried into effect without inconvenience, complication or difficulty. I am of the same opinion with the Master of the Rolls, that the annuity of 300*l.* given by the will of William Hinton was a perpetual annuity; and I affirm the decree and dismiss the appeal, with costs.

M.R. { JONES v. THE CONSOLIDATED
Nov. 11. { INVESTMENT AND ASSUR-
ANCE COMPANY.

Insurance on Lives—Assignment of Policy—Current Account—Suicide.

A policy of assurance on the life of E. W. was subject to a condition avoiding it on suicide, but provided that in case the policy should have been assigned to other parties for a valuable consideration six calendar months before the death of the assured, it should remain in force to the extent of the beneficial interest therein of the party to whom it should have been assigned. E. W. deposited the policy with the plaintiff. The policy was accompanied by a letter, stating that it was to be held "as security, in case of death or otherwise, for any notes of hand or bills of exchange you may have cashed for me." From that time a current account existed between the parties; the plaintiff cashed or discounted for E. W. divers bills of exchange, and frequently took renewals of them as they came due. E. W. afterwards shot himself. At that time a sum of money was due to the plaintiff by E. W. on several outstanding bills of exchange, &c. exceeding the amount payable on the policy; but none of them bore date much more than two months before the death of E. W. Upon a bill to obtain payment of the sums insured,—Held, that the policy was duly assigned; that the security continued from the date of the deposit, notwithstanding the consideration for it was fluctuating; that the payment or withdrawal of the earlier bills did not necessitate a fresh deposit; and that it was, and was intended to be, a security for what was due on the current account at the death of E. W. or otherwise.

The Consolidated Investment and Assurance Company was incorporated in pursuance of the 7 & 8 Vict. c. 110. By a policy, dated the 9th of March 1850, the company assured the life of Edward Woolcott, a builder, in the sum of 600*l.* One of the conditions indorsed on the policy was as follows:—

"The policy of a person assuring his own life will become void if he dies by his own hand, or by the hand of justice, or in consequence of a duel; but in case of

death, not *felo de se*, the board of directors may pay to the executors of the assured a sum not exceeding the value of the policy on the day previous to the death; but should such policies have been assigned to other parties for a valuable consideration six calendar months before the death of the assured, they remain in force to the extent of the beneficial interest therein of the parties to whom they shall have been so assigned."

In June 1854 there was a current account between E. Woolcott and the plaintiff for monies advanced on divers bills of exchange and promissory notes, which were either indorsed to, or drawn by and accepted in favour of the plaintiff. These were frequently renewed at maturity; and E. Woolcott delivered the policy of assurance on his life to the plaintiff, and subsequently wrote the following letter:—

"To Mr. Joseph Jones, 7, Henry Street, Foundling.

"7, Hereford Street, June 29, 1854.

"Sir, I hereby authorize and empower you to hold the policy of insurance you hold upon my life for 600*l.* as security, in case of death or otherwise, for any notes of hand or bills of exchange you may have cashed for me. The policy of insurance alluded to is effected with the Consolidated Assurance Office, 45, Cheapside.

"I am, &c. Edward Woolcott."

These dealings were continued up to the death of E. Woolcott. The plaintiff paid several of the premiums for keeping the policy on foot, and took successive renewals of several of the bills and notes.

On the 10th of November 1857 E. Woolcott shot himself, and died wholly insolvent; and upon an inquisition held the jury found that at the time of shooting himself he was of unsound mind.

A sum far exceeding the amount payable on the policy was then due to the plaintiff. He accordingly gave notice to the company of the death of E. Woolcott, and claimed payment of the sum assured, at the same time offering to produce the policy, the cheques for the premiums paid, the letter of the 29th of June 1854, and, if required, to administer to his estate. He also offered to vouch the account between himself and the deceased, which was as follows:—

1857.	£.	s.	d.
Nov. 9. Cheque to Sandars & Woolcott	142	15	0
" 14. Jones on Sandars & Woolcott, dishonoured acceptance, due this day ...	100	0	0
Promissory note, signed by E. Woolcott, due this day	30	0	0
Sandars & Woolcott, on Griffith, bill, due this day	125	0	0
Dec. 2. Ditto	125	0	0
Jones on Sandars & Woolcott, bill, due this day ...	75	0	0
" 5. Ditto	84	0	0
" 19. * Woolcott on Camsew, bill, due this day	100	0	0
" 31. Sandars & Woolcott, on Griffith, bill, due this day	155	0	0
1858.			
Jan. 26. Ditto, on Ridgway, bill, due	250	0	0
Feb. 24. * Ditto, on Seyd, ditto ...	48	2	6
June 24. Ditto ditto ditto ...	48	2	6
	£1,283	0	0
Received of Griffith ...	202	10	0
	£1,080	10	0

None of these bills bore date earlier than the 23rd of August 1857.

Note.—The debts marked with an asterisk were paid before the bill was filed.

On the 15th of January 1858 the solicitors of the company wrote, saying that they would submit the case to the board; and stated that the probable objections would be—First, that there was no assignment of the policy; secondly, that the letter only covered the personal accommodation of E. Woolcott, and had nothing to do with Sandars & Woolcott's unpaid cheques or dishonoured acceptances.

On the 2nd of March 1858 they again wrote:—

"Looking at the terms of the letter of the 29th of June 1854—First, it is open to doubt if it intended to relate to any bills beyond such as had been then cashed for Mr. Woolcott: '*you may have cashed for me*' are the words; secondly, in the next place, as we have already stated, it is not an assignment under the condition indorsed on the policy; thirdly, nor, if treated as an assignment, does it appear to come within the condition, as it is not '*for valuable consideration*'; fourthly, nor can it be contended, as we think, that advances to Sandars & Woolcott are advances to E. Woolcott."

They then proposed to allow the policy to stand as security for such sums as Mr.

Jones might have advanced to Mr. Woolcott, and said:—

“This (if the 100*l.* due on the 19th of October 1857 is paid) will be only the 30*l.* bill, dated the 11th of September 1857. If it can be proved that the premiums mentioned by you were paid by Mr. Jones, and not charged to Mr. Woolcott in subsequent accounts, the company will allow them, or such part of them as were actually paid by Mr. Jones, and not repaid in subsequent accounts, to be added to the claim.”

On the 23rd of March the plaintiff declined the proposal. He subsequently filed this bill, charging that the aid of the Court was necessary to obtain payment of the policy; that the letter and deposit extended to bills and notes, including cheques thereafter to be cashed as well as those already cashed by the plaintiff; and that in either case the sums due, besides the interest and sums paid for premiums, exceeded the amount of the policy; that it was assigned for a valuable consideration; and that the bills were cashed, at the request of E. Woolcott, for monies advanced to or due by him separately from Mr. Sandars, his partner. The bill then prayed for a declaration that the policy was assigned, within the meaning of the condition, for a valuable consideration, more than six months before the death of E. Woolcott; and that the plaintiff had a beneficial interest therein, exceeding the amount of the policy. It also prayed for payment of the policy in full, together with interest on the amount, from the day when it ought to have been paid. It then prayed that the necessary accounts for ascertaining the plaintiff's interest might be taken, and that the stocks, funds and securities of the company might be ascertained and declared liable to pay the amount of the policy.

Mr. Lloyd and Mr. Bagshawe, jun., for the plaintiff.—The plaintiff has a beneficial interest in the policy as assignee for value. This was made more than six months before the death of the assured—

Dufaur v. the Professional Life Assurance Company, 27 Law J. Rep. (N.S.) Chanc. 817.

Cook v. Black, 1 Hare, 390; s. c. 11 Law J. Rep. (N.S.) Chanc. 268.

Mr. R. Palmer and Mr. Schomberg, for the company.—An assignment in equity means such an act as would pass the property. It was true that no notice had been given to the office; but that was immaterial, except that, if any doubt was raised on the transaction, it might lead to further inquiry. An equitable assignment embraced nothing beyond what was presently due upon a valuable consideration. If 600*l.* due at the date of the letter was subsequently paid off, then after six months, if nothing was due, it could not amount to an assignment. Whenever, therefore, nothing was due on the bills existing at the time, the letter had spent its force. The plaintiff failed altogether in shewing any consideration to support the letter as an effective assignment at its date.

[THE MASTER OF THE ROLLS.—Suppose an assignment was made to cover a balance of account, with a condition avoiding it if nothing was due for six months. If nothing was due for five months before death, but something was due one month before death, the condition would not be satisfied.]

Mr. R. Palmer.—You could not import an *ex post facto* consideration after the six months had expired, or connect it in any way with the previous valuable consideration which had been satisfied. All the produced bills were dated after the 23rd of August 1857. The renewal of bills had not been traced back. The terms of the letter, however, related to bills “*you may have cashed for me*”; a prospective period was not referred to, and death was referred to, but not as defining any period of time. All these cheques bear the names of “Sandars & Woolcott.” The letter was not given as a security for the firm; the defendants, therefore, were entitled to an account.

THE MASTER OF THE ROLLS. — The assignment of the benefit of the policy was made six months before the death of the assured; and I think it was within the condition indorsed upon the policy. The letter of the 29th of June 1854 was clearly an equitable assignment; and I must dissent from the argument that the assign-

ment recurs every time a fresh consideration passes. If an assignment is once made to secure a balance, then as soon as anything becomes due there is a valuable consideration to support it, and the assignment continues, though the beneficial interest in it may fluctuate. *Rolt v. Hopkinson* (1) was a question of priority which depended upon notice; but that was not so in the present case. The assignment made by the letter of the 29th of June 1854 was good within the terms of the condition. For what, then, was it a security? Was it for money actually due, and not for subsequent advances? There is some obscurity; but that is not the meaning or the intention. The parties themselves, by their dealings, have put a construction on the transaction; it was, that you shall hold it as a security that you may receive the money you have advanced, in the event of death or otherwise. This obviously meant the bills, notes and cheques which the plaintiff might at that time have cashed. What was the course that the parties adopted? The policy was not taken back when any money was paid; on the contrary, it was allowed to remain until death, and up to that time the same dealings were continued. There were at that time bills outstanding, which had been cashed by the plaintiff, who had discounted them. The assignment, therefore, being good, it covered all the bills, &c. which had either been cashed or discounted at the death of the assured; and so far the plaintiff was entitled to recover what was due. I shall therefore direct an account to be taken of all sums paid or advanced by the plaintiff to or for the use of E. Woolcott, upon or in respect of any bills of exchange or notes of hand, and of what is due in respect thereof: there must also be an account of what is due for premiums paid by the plaintiff. This decree, however, must be without prejudice to any right the defendants may be entitled to against the estate of Richard Sandars in respect of such bills of exchange and promissory notes. The defendants will be at liberty to use the name of the plaintiff; but they must indemnify him from all liability which may arise from any proceedings they may take.

(1) *Ante*, 41.

M.R. }
Dec. 15. } CANHAM v. NEALE.

Practice — Staying Proceedings — Creditors' Suit — Administration — Costs.

If two creditors' suits are instituted for the administration of the estate of a deceased debtor, and one is stayed by order of Court, provision will not be imperatively made for payment of the costs of the suit stayed in the suit to be prosecuted, but they will be left to depend upon the result of the assets after debts are satisfied.

If two suits are instituted for one purpose, and one is stayed, no order will be made which will give the plaintiff in the suit stayed a priority for his costs, especially if the application is made in the one suit only.

This was a motion, on behalf of the plaintiff, Noah Clarke Canham, brickmaker, for leave to vary an order staying the proceedings in this suit, by making it imperative upon the parties in a suit of *Cobbold v. Neale*, to pay him the costs he had incurred in this suit.

Thomas Neale, a builder, was indebted at the time of his death to various persons. He was seised and possessed of both real and personal estate. Letters of administration were granted to Thomas Neale, his eldest son and heir-at-law.

Two creditors' suits were afterwards instituted for the administration of his estate: the one *Canham v. Neale*, and the other *Cobbold v. Neale*.

On the 5th of June 1858 an order was made in the suit of *Cobbold v. Neale*, for the administration of the estate, and notice of the decree was given to the plaintiff N. C. Canham.

An application was afterwards made to the Court to determine which of the two suits it would be most beneficial for the parties to prosecute, and by an order made in both causes, on the 7th of July 1858, it was ordered that the proceedings in this cause should be stayed, and that the costs of the plaintiff N. C. Canham, up to the time he had notice of the order, dated the 5th of June 1858, in the cause of *Cobbold v. Neale*, including the costs of this application, be taxed, and paid by the defendant Thomas Neale, if he had assets in his hands sufficient for that purpose: but if he had

not, and upon an affidavit being made by Thomas Neale that he had no assets, *the plaintiff N. C. Canham was to be at liberty to add his costs to his debt, and go in and prove his claim and the amount of his taxed costs, under the said order of the 5th of June 1858, and the costs of Thomas Neale, and what he should pay to the plaintiff N. C. Canham for his costs were to be added to his costs in the cause of Cobbold v. Neale, and be allowed him in his accounts in that cause.*

It was now asked to vary the order by substituting in lieu of that part printed in *italics* the following words:—

“Let the plaintiff Noah Clarke Canham, upon establishing his debt in the cause of *Cobbold v. Neale*, be paid his costs of the cause of *Canham v. Neale* up to the present time, including the costs of this application, to be taxed as aforesaid *pari passu* with the costs of the plaintiff in the cause of *Cobbold v. Neale*.”

Mr. Grenside, in support of the motion.—The order made the plaintiff's costs contingent upon there being assets in hand. On the contrary, it ought to have provided imperatively for the payment of the costs incurred in this suit. The plaintiff ought not to be driven to take a composition upon the costs incurred. It was the practice at law, when staying one of two actions, to provide for the full costs incurred in the action which was prosecuted:—

Taylor v. Southgate, 4 Myl. & Cr. 203; s. c. 8 Law J. Rep. (N.S.) Chanc. 137.

Frowd v. Baker, 4 Beav. 76.

Seton on Decrees, 463, *et seq.* 2nd ed.

Mr. Marten, for the defendant.—The parties to the suit of *Cobbold v. Neale* were not before the Court; the order, therefore, could not be entitled in both causes. The application could not be supported.

The MASTER OF THE ROLLS.—The order of the 7th day of July last was right. It was made in the presence of both parties. The plaintiff was not precluded from obtaining payment of his costs, if there were any assets remaining in that suit. The question was, therefore, left open that the

plaintiff might have an opportunity of making his claim in that suit. It would, however, create great difficulty if an order was to be made in such cases directing a personal representative of a testator to pay the costs. The motion, therefore, must be dismissed with costs.

See *West v. Swinburne*, 19 Law J. Rep. (N.S.) Chanc. 81.

Duffort v. Arrowsmith, 7 De Gex, M. & G. 434.

Morshead v. Reynolds, 21 Beav. 638.

The Earl of Portarlington v. Damer, 2 Phill. 262; s. c. 16 Law J. Rep. (N.S.) Chanc. 370.

WOOD, V.C. }

1858. }

June 4; }

July 16. }

WARREN v. RUDALL.

HALL v. WARREN.

Void Devise — Conditional Limitation over.

A testator directed that freehold premises should be given to the inhabitants of B. to found an asylum, and that his executors should call a meeting of the inhabitants to appoint a committee and trustees to carry out the same, but in the event of the said inhabitants not appointing a committee or not willing to carry out the scheme, he willed that all his said property so given to the said asylum should belong to W. H. W. The gift to the charity being void,—Held, that the devise to W. H. W. took effect.

William Hall, by his will, dated the 17th of January 1853, gave all his real and personal estate to William Unsworth and John Atkinson, whom he appointed his executors, and after directing his just debts to be paid, proceeded as follows:—“I will that my freehold house, No. 71, Queen's Road, Bayswater, be given to the inhabitants of Bayswater to found a lying-in assilem for unmarried women, or poor married women, if there is more than three beds to spare. I will that there shall be no paid parson, priest or chaplain, whose services is not given gratis, attend the said assilem. I will that the same be cald Hall's Maternal Assilem for Unmarried whoman. I will that my said executors doo call a meeting of the nabours and en-

habitants of one mile round the said house as soon as convenient, to appoint a com-mity and trustees to carry out the same. I doo appoint my godson William Hall Warren one of the trustees, leaving the enhabitants to make choice of as maney more as they may please; but in the event of the said enhabitants not appointing a commity, or not willing to carry out the said schem, I then will that all my said property so given to said Maternal Retreat or Lying-in Assilem shall absolutely belong to my said godson William Hall Warren, and I will that the deeds of said house be given to said trustee or trustees. I will that the said trustee or trustees be my residuary legatees to this my will." The testator, then, after certain pecuniary legacies, proceeded to give several leasehold and freehold houses to various persons for life, with remainder to his residuary legatees "for the Maternal Retreat namd," and gave his freehold house, No. 4, Douglas Place, Bayswater, to W. H. Warren for his natural life, and after his demise to the trustees of the Retreat; and continued, "But should there bee no such trustees, then I give the same absolutely to the said William Hall Warren."

The testator died on the 23rd of October 1856, and the bill was filed by W. H. Warren and others, for the administration of his estate. A claim was also filed by the heir-at-law and next-of-kin, for the purpose of having it declared that the devises and bequests for founding a lying-in asylum were void, and that the testator had died intestate as to the real and personal estate included in those devises and bequests.

Mr. Rolt and *Mr. De Gex*, for the plaintiff, W. H. Warren, insisted that he was absolutely entitled for his own use and benefit to the houses Nos. 71, Queen's Road and 4, Douglas Place, the gift over taking effect upon the failure of the gift to the charity.

Mr. Osborne, for the heir-at-law and one of the next-of-kin, contended that the gift to the charity being clearly void, the gifts over could not take effect. All, therefore, that W. H. Warren could take was No. 4, Douglas Place.

Mr. Bevir, for others of the next-of-kin.

Mr. Wickens appeared for the Attorney General, but took no part in the argument.

The cases cited were—

Key v. Key, 4 De Gex, M. & G. 73; s. c. 22 Law J. Rep. (N.S.) Chanc. 641.

Spalding v. Spalding, Cro. Car. 185.

Lechmere v. Curtler, 24 Law J. Rep. (N.S.) Chanc. 647.

Ibbetson v. Beckwith, Cas. temp. Talb. 157.

Doe d. Wolfe v. Allcock, 1 B. & Ald. 187.

Marshall v. Hopkins, 15 East, 309.

Manning v. Chambers, 1 De Gex & Sm. 282; s. c. 16 Law J. Rep. (N.S.) Chanc. 245.

Hewet v. Ireland, 1 P. Wms. 426.

Wynne v. Wynne, 2 Keen, 778; s. c. 7 Law J. Rep. (N.S.) Chanc. 45.

The Attorney General v. Whitchurch, 3 Ves. 144.

The Attorney General v. Hinxman, 2 J. & W. 270.

The Attorney General v. Hodgson, 15 Sim. 146; s. c. 15 Law J. Rep. (N.S.) Chanc. 290.

Philpot v. St. George's Hospital, 21 Beav. 134; s. c. 25 Law J. Rep. (N.S.) Chanc. 33.

July 16.—WOOD, V.C.—The intention of the testator seems to me sufficiently clear, looking at the whole frame of the will, that the property should go to his godson absolutely, in the event of its not being accepted by the inhabitants of the parish by the appointment of a committee and trustees; and the question that arises here is, whether the devise for the purpose of founding a hospital being absolutely void under the Mortmain Act, (9 Geo. 2. c. 36), and not merely failing by the non-appointment of trustees, the gift over to the son which was limited not upon a general failure of the charitable purpose, but only upon its failing in a particular way, is to take effect. It has been suggested, that an inquiry should be directed, whether the inhabitants of the parish have accepted the gift or not, and if it should be found that they have not, then that W. H. Warren (the godson) should be declared to be entitled. But it is perfectly immaterial whether there has been any

meeting of the inhabitants or not, the gift being absolutely void. The power of appointing trustees is not a power in gross, but is coupled with the interest which the inhabitants were intended to take, and the interest being out of the way, the power fails with it. In such a case, as a general rule, the ulterior devise does not depend upon the performance or non-performance of the condition, but the gift over is to be considered as taking effect upon the failure generally of the particular trusts. Suppose, for instance, the gift had been to the managing committee of an existing hospital, and, in the event of their not accepting the gift, then over to the godson; and suppose the hospital to be broken up in the testator's lifetime, that would be a case within the principle of those authorities which have decided that an ulterior, executory or substituted gift to arise upon the failure of a prior interest may take effect, although the mode in which that event has happened has not been precisely provided for by the testator; it being in effect a gift in remainder, which is merely accelerated by the failure of the previous gift. This principle was established in *Jones v. Westcomb* (1), in which there was a devise to the testator's wife for her life, and after her death to the child she was then *enceinte* with, but if such child died before twenty-one, then over; the wife not being *enceinte* at the time of the devise, it was held, that the devise over was good, though the contingency never happened. That case was the subject of a great deal of discussion, and the Court of Common Pleas, in *Roe v. Fulham* (2), came to a different conclusion upon the same will from that arrived at by Lord Harcourt, though the Court of King's Bench agreed with him on two occasions—*Andrews v. Fulham* (3), and *Gulliver v. Wickett* (4). The reasoning was very well expounded by Lord Brougham, in *Mackinnon v. Sewell* (5), where he says, "No real difference is made in

the result, for the event contemplated has not happened, but something equivalent has taken place; that is, something which made it impossible that the result could be otherwise than that upon which the executory limitation was made to depend. Almost all the cases are those of double contingencies, the second being of a negative nature, so that the first not happening amounts to the same thing as if both had happened. Thus, a bequest over to A. in case the first takers, the unborn children of B, die before they reach twenty-one, read as a condition, is a bequest to A. if B. has children, and they do not live to twenty-one; and the first or affirmative contingency not happening, it follows of necessity that the second or negative must. If it is read as to its substance and import, and not resolved into its parts, the bequest is in case no child of B. reaches maturity, and of course none can if he have none." Lord Mansfield puts it exceedingly clearly in *Frogmorton v. Holyday* (6), in which *Jones v. Westcomb* was referred to. He says, "A question was pleaded in the days of ancient Rome, by Scævola and Crassus, in the famous cause between *Curius* and *Coponius*; and much agitated in modern times in the Courts of Westminster Hall, in the case of *Jones v. Westcomb*. A man taking for granted that his wife was with child, devised his estate to the child his wife was *enceinte* of, and if such child died under age, then he devised it over. The woman was not with child, and the question was, whether the devisee over should take." And his Lordship, with some little sarcasm, perhaps, says—"The Roman Tribunals at once and the English at last, finally determined that the intent, though not expressed, must be construed to give the estate to the substitute, unless a posthumous child lived to be of age to dispose of it. Consequently, no posthumous child having ever existed, the substitute was entitled." The case before the Roman Tribunal, referred to by Lord Mansfield, is referred to several times by Cicero, in his *De Oratore*, and also in the *Oratio pro Cæcinnâ*, where the following passage occurs:—"Non occurrit unicuique ves-

(1) Prec. in Chanc. 316; s. c. Gilb. Rep. 74; 1 Eq. Cas. Abr. 245, pl. 10; Tudor's L.C. on Real Property, 705.

(2) Willes, 303, 311.

(3) 2 Stra. 1092.

(4) 1 Wils. 105.

(5) 2 Myl. & K. 202; s. c. 3 Law J. Rep. (n.s.) Chanc. 161.

(6) 3 Burr. 1618, 1623.

trūm aliud alii in omni genere exemplum, quod testimonio sit non ex verbis aptum pendere jus, sed verba servire hominum consiliis et auctoritatibus? Ornatè et copiosè L. Crassus, homo longè eloquentissimus, paullo ante quam nos in forum venimus judicio centumvirali hanc sententiam defendit, et facilè, cum contra eum pendentissimus homo Q. Mucius diceret, probavit omnibus, M. Curium, qui hæres institutus esset ita, mortuo posthumo filio, cum filius non modo non mortuus, sed ne natus quidem esset, hæredem esse oportere. Quid? Verbis satis hoc cautum erat? Minimè. Quæ res igitur valuit? Voluntas; quæ si tacitis nobis intelligi posset verbis omnino non uteremur: quia non potest verba reperta sunt, non quæ impediunt, sed quæ indicarent voluntatem." The rules which ought to guide the Court in construing wills were probably never better expressed than in that passage. The question came twice before Lord Hardwicke, once in *Fonereau v. Fonereau* (7), where there was a gift to a son for life, with remainder to his issue, and if all the issue should die, then over. The son died without having had any issue, and Lord Hardwicke held, that the limitation over took effect. But the case I particularly refer to is *Avelyn v. Ward* (8). In that case there was a devise on condition that the devisee should give a release within three months after the testator's decease, and if he should neglect to give such a release, then over; the devisee died in the testator's lifetime; it was held, that this was a conditional limitation, and not a case of condition, and that the devise over took effect. Both *Andrews v. Fulham* and *Jones v. Westcomb* were cited in the argument, and Lord Hardwicke said, "The question will very much turn on this, whether this devise over is to be considered and the contingency on which it is given as a strict condition, or a conditional limitation; for, if the former, it would be very difficult to maintain that the second devisee could have the estate, but upon a strict breach or non-performance. If the condition had been performed, or it became impossible by act of God, that cannot be; but if it

be a conditional limitation, the consideration is different; and I know"—this is the important part—"no case of a remainder or conditional limitation over of a real estate, whether by way of particular estate, so as to leave a proper remainder, or to defeat an absolute fee before by a conditional limitation; but if the precedent limitation, by what means soever, is out of the case, the subsequent limitation takes place." Again, Mr. Fearne, in his *Cases and Opinions*, where the trust was for the first son of D. attaining the age of twenty-five years, he having then no son born, with a limitation over, says, page 288, speaking of the subsequent trusts, "If they may be considered as vested subject to such intervening contingent limitation to the first son of D. attaining twenty-five years of age, supposing it to be good, and that intervention is found to be or becomes void, it seems to be as much out of the way as if it never had taken effect, and were determined, or as if it never had been limited at all."

There can be no possible reason suggested here for the testator desiring that the gift over should take effect in the event of the preceding estate failing in a particular way, and not if it failed in any other way. It is not the case of a simple collateral condition not attached to the estate, in which case the condition must, of course, be strictly performed; it is like the case of a gift to a nonentity, and then a gift over in case the nonentity should not attain twenty-one. The only cases that embarrassed me were *Philpot v. St. George's Hospital* and *The Attorney General v. Hodgson*. *The Attorney General v. Hodgson* was of this nature:—A testator bequeathed the residue of his personal property and effects to trustees, for the establishment of a charitable receptacle for old men, if the same could be done, but if no such institution could be conveniently established, then to be disposed of for certain other charitable purposes. The case was argued on demurrer, and the Vice Chancellor of England said:—"It appears to me that his primary object was the acquisition of a dwelling-place for fifty-four people, and that it was only in the event of that object not being capable of accomplishment that he makes the general disposition over.

(7) 3 Atk. 315.

(8) 1 Ves. 420.

That general disposition over cannot be said to have taken effect. There is no allegation about it. Besides which the testator seems to point at some physical impediment which might disappoint his first purpose." In that case, however, *Grimmett v. Grimmett* (9) was not cited, in which the testator desired his executors to settle and secure by purchase of lands of inheritance or otherwise as they should be advised out of his personal estate, an annuity of 50*l.* for charitable purposes, and the property bequeathed for that purpose was to stand in the names of trustees until the whole could be laid out in the purchase of land to the satisfaction of the governor and trustees. Lord Hardwicke considered that there being two methods of carrying out the will, one lawful and the other unlawful, the method which was lawful should be pursued and take effect. The other case, of *Philpot v. St. George's Hospital*, was in reality decided upon the authority of *The Attorney General v. Hodgson*; and upon the appeal to the House of Lords the question became immaterial. The hesitation I have felt has been caused entirely by these two cases, but I confess I cannot conscientiously bring my mind to the conclusion that was come to in them.

Declare that the plaintiff W. H. Warren is entitled to his own use to the residuary real and personal estate of the testator, including in such residuary estate the several gifts over of the freehold and leasehold messuages therein particularly mentioned to the trustee or trustees of the Maternal Asylum.

M.R. }
 1858. } KING v. CLEAVELAND.
 July 1, 2. }

Legacy—Substitution—Personal Representatives.

A sum of stock was bequeathed to trustees, after the decease of the survivor of two tenants for life, "to pay and apply the stock equally amongst the testator's nephews and nieces then living, or their legal personal representatives, share and share alike."

(9) Ambl. 210.

There were seven nephews and nieces; four were still living; one nephew and niece had died in the lifetime of the testator; the nephew alone had left issue; another nephew survived the testator, and died in the lifetime of the surviving tenant for life, leaving issue. Upon a suit for the administration of the fund,—Held, that it was divisible into seven shares, and that the nephews and nieces living were each entitled to one share, and that the legal personal representatives of each nephew and niece deceased were entitled to one share each.

Samuel Cleaveland, by his will, dated the 3rd of August 1841, made the following bequest:—"I give and bequeath to Richard Francis Cleaveland, [who died in the lifetime of the testator,] and John Tregonwell King [whom he afterwards appointed his executors], and the survivor of them, his heirs, executors and administrators, the sum of 4,000*l.* (part of 7,000*l.* now standing in my name in the 3½*l.* per cent. annuities or funds of this kingdom), upon trust to stand possessed thereof, and to pay and apply the interest and dividends thereof to and for the use and behoof of my brother R. F. Cleaveland and his wife Eliza, and the survivor of them, for his and her natural lives; and after the decease of my said brother and his said wife, then in trust to pay and apply the said sum of 4,000*l.* stock, which is now represented by 4,000*l.* new 3*l.* per cent. stock, equally amongst my nephews and nieces, children of my said brother R. F. Cleaveland and his said wife, then living, or their legal personal representatives, share and share alike."

On the 31st of March 1844 the testator died.

The testator's brother R. F. Cleaveland died on the 7th of January 1849, and his wife died on the 27th of August 1857.

There were issue of the marriage of R. F. Cleaveland and Eliza his wife seven children, nephews and nieces of the testator; four were still living.

Two nephews and one niece were dead: Richard Frederick, who died intestate on the 29th of April 1843, leaving a widow, now Mrs. M'Cleverty, and two children surviving. No administration had been taken out to him.

George, who died on the 8th of January 1855 intestate, leaving a widow and three children surviving; his widow took out letters of administration to him.

The widow and children of each of these nephews were the persons entitled under the Statute of Distributions to their respective personal estates at the time of their death.

Henrietta Maria, the wife of George Foster St. Barbe, died on the 15th of December 1843 without issue.

No settlement was made of the several shares of the fund on these respective marriages.

G. F. St. Barbe took out letters of administration to his wife.

Mr. Wickens, for the plaintiff, the trustee.

Mr. R. Palmer and *Mr. Giffard*, for Mary Ann Geary, widow, a niece of the testator, referred to

Daniel v. Dudley, 11 Sim. 163; s. c. 1 Phill. 1.

Edwards v. Edwards, 15 Beav. 357; 21 Law J. Rep. (N.S.) Chanc. 324.

Ross v. Ross, 2 Coll. 269.

In re Crawford's Trusts, 2 Drew. 230; s. c. 23 Law J. Rep. (N.S.) Chanc. 625.

In re Porter's Trusts, 4 Kay & J. 188; s. c. 27 Law J. Rep. (N.S.) Chanc. 196.

Mr. C. Hall, for Frederick Darby Cleaveland, Samuel Cleaveland and Emily Sandys, widow, two nephews and a niece of the testator, cited

Archer v. Jegon, 8 Sim. 446; s. c. 6 Law J. Rep. (N.S.) Chanc. 340.

Topping v. Howard, 4 De Gex & Sm. 268.

Mr. C. Webster, for Mr. and Mrs. M'Cleverty, and the children of R. F. Cleaveland, deceased, the testator's nephew.

Mr. Selwyn and *Mr. Hobhouse*, for G. F. St. Barbe, referred to

Ive v. King, 16 Beav. 46; s. c. 21 Law J. Rep. (N.S.) Chanc. 560.

Coulthurst v. Carter, 15 Ibid. 421; s. c. 21 Law J. Rep. (N.S.) Chanc. 555.

Holloway v. Radcliffe, 23 Ibid. 163; s. c. 26 Law J. Rep. (N.S.) Chanc. 401.

Mr. Follett, *Mr. Lloyd* and *Mr. Osborne*, for other parties, cited

Maude v. Maude, 22 Beav. 290.

Bullock v. Bennett, 7 De Gex, M. & G. 283; s. c. 1 Kay & J. 315; 24 Law J. Rep. (N.S.) Chanc. 397, 512.

Cranley v. Dixon, 23 Beav. 512; s. c. 26 Law J. Rep. (N.S.) Chanc. 529.

Smith v. Smith, 8 Sim. 353; s. c. 6 Law J. Rep. (N.S.) Chanc. 175.

THE MASTER OF THE ROLLS.—There is nothing in the present case to qualify what was said in *Ive v. King* and *Coulthurst v. Carter*. No person can take by substitution for members of a class, unless the parent could have taken under the terms of the will itself as a member of that class. This does not apply where the gift is to an individual named, because, then, it is expressly intended that the substitution shall take place in order to prevent a lapse. In this case *Coulthurst v. Carter* is more to be considered than *Ive v. King*. *Smith v. Smith*, and *Gray v. Garman* (1) point to this—which is a distinction important to be noticed, as to all these species of limitations—that the persons taking by substitution take not by substitution as members of a class, but as being objects of another separate and distinct class mentioned in the will. This principle is clearly expressed in *Gray v. Garman*, where it is said, "If the entire clause is to be read as containing an original and substantive gift to two classes of legatees, namely, first to brothers and sisters living at the death of the wife, and, secondly, to the issue of brothers and sisters who may be dead at the time of the death of the wife, there is nothing in the description of the second class to prevent the issue of the person dead from taking." So in *Smith v. Smith*, it is obvious that the persons who took did not take by substitution, as has been sometimes erroneously supposed, but as the objects of a separate and distinct class. The words of the gift there are, "unto and amongst all and every my children who might be then living," that was, living at the death of the wife, and there was also a gift to the issue of any of the children who

(1) 2 Hare, 268; s. c. 12 Law J. Rep. (N.S.) Chanc. 269.

should happen to die in the lifetime of the wife. It is clear that there were two classes: one class was the children who survived the wife, and the other class was the issue of children who had died in the lifetime of the wife; it was held, that they were both entitled to take. It was also held, that there was nothing to limit the issue; who were to take with issue of children who had died in the lifetime of the wife, during the period which elapsed between the death of the testator and the division of the fund; but the issue of all the children who died in her lifetime were held entitled. So in *Coulthurst v. Carter* it was held, that the children did not take by way of substitution, but that they took as specified objects of a particular gift. Applying those rules to the present case, the real question is, at what time is the class to be ascertained? Is there one or are there two classes? If there be one class merely of nephews and nieces, and that class is to be ascertained at the death of the testator, unquestionably no representative of any one of those nephews and nieces who have died can take, unless the nephew or niece would have taken: that is, unless the nephew or niece had survived the testator. But if the true construction is, that the nephews and nieces who survived the tenant for life are one class, and that the representatives of the deceased nephews and nieces form another class, then there is nothing to limit the period of the decease of those nephews and nieces to the period which elapsed between the death of the testator and the time of distribution. The view that I take of the case is, that there are two distinct classes. There is a gift both to nephews and nieces who were living at the death of the testator, or to the representatives of such of them as should have died, that is, of nephews and nieces as should have died, share and share alike. These words are not words of limitation; but assuming that they are words of substantive gift, then I hold that they do not apply to the representatives of nephews and nieces then living, but that they apply to the representatives of nephews and nieces who had previously died, if any, in which case it would include the nephews and nieces who were living at the date of the will, and those who died previously to that

period. That would be in accordance with *Coulthurst v. Carter*. The difficulty in these cases is not in stating or ascertaining the principle,—that is well ascertained in all the cases referred to, and they appear consistent and agree on the point,—but the difficulty is, in construing the meaning of the words, “to apply the sum of 4,000*l.* stock equally among my nephews and nieces, children of my brother and his wife *then living*,” (that is, at the death of the last tenant for life) “*or their legal personal representatives*, share and share alike.” I hold that the words, “share and share alike,” coming after the word “representatives,” ought properly to be referred to the last antecedent, which is, “representatives,” and that the word “equally” shews how the nephews and nieces are to take, and that the words “share and share alike” shew in what character the representatives are to take, namely, as the representatives of nephews and nieces. That is a separate and distinct class from those who were living at the death of the tenant for life. The result, therefore, will be, that the fund will be divided into seven shares, instead of four; each nephew and niece still surviving, and the representatives of each nephew and niece deceased will take one of such shares.

M.R. }
Nov. 4. } KING v. CLEAVELAND.

Legacy—Substitution—Personal Representatives—Administrator.

A substitutionary gift to the personal representatives of a niece, one of a class, who had died in the lifetime of the testator, without issue, devolves upon her next-of-kin, and does not pass to her administrator.

Upon the decision (reported in the last case) that the fund was to be divided into seven shares, and that the nephews and nieces then living and the representatives of the nephews and nieces then dead were each entitled to one share, the husband and administrator of the deceased niece who had died without issue claimed her share as her legal personal representative.

Mr. Selwyn and Mr. Hobhouse, for G.

F. St. Barbe, the husband of the deceased niece.

Mr. R. Palmer, Mr. Lloyd, Mr. Follett and Mr. Martelli, for other of the nephews and nieces.

The following cases were cited :—

Dixon v. Dixon, 24 Beav. 129.

Jacobs v. Jacobs, 16 Beav. 557 ; s. c.

22 Law J. Rep. (N.S.) Chanc. 668.

Doody v. Higgins, 2 Kay & J. 729 ; s. c. 25 Law J. Rep. (N.S.) Chanc. 773.

Low v. Smith, 25 Law J. Rep. (N.S.) Chanc. 503.

In re Walton's Estate, 25 Law J. Rep. (N.S.) Chanc. 569.

Hinchliffe v. Westwood, 2 De Gex & Sm. 216 ; s. c. 17 Law J. Rep. (N.S.) Chanc. 167.

THE MASTER OF THE ROLLS.—The words "legal personal representatives" mean "the next-of-kin;" and, therefore, the husband can take only in that character. It is important to distinguish between the two classes of cases in which the words "legal personal representatives" are used; they are used in the primary or in the secondary sense, when the persons who take do so under the administration; no doubt, the question arises whether they take in their character of trustees or beneficially. If the words had been extended beyond the next-of-kin, according to the statute, it would be very material, and the husband would be let in; but if confined, then it is admitted that the husband does not take. When the meaning has been extended, it has been where the word "heirs" is used. The husband, therefore, is excluded.

M.R. }
1858. } *In re NEWBERY.*
July 6, 12. } *WHITE v. WAKLEY.*

Landlord and Tenant—Repairs—Covenant—Implied Liability.

A tenant, under a lease which contained a covenant to repair, and leave in good repair, all buildings and erections then standing or to be erected during the term, built a farm-house, partly on the land demised and partly on the waste adjoining belonging to the lessor. On the decease of the tenant,

upon a claim by the landlord for dilapidations,—Held, that his acquiescence in the act of the tenant prevented his dispossessing him of the premises built on the waste, and that it must be assumed by implication that the covenant to repair extended to the whole building, and that the landlord was entitled in a suit for the administration of the tenant's estate to establish a claim for dilapidations.

By a lease, dated the 21st of July 1798, John Burridge Cholwick demised a messuage and about forty acres of land, called Little Snodwell, to Nicholas Newbery, for ninety-nine years, if the said Nicholas Newbery, Susannah Newbery, and Francis Newbery, deceased, or either of them, should so long happen to live, at the yearly rent of 2*l.*, and a further sum of 2*l.* on the death of each of the said lives. The lease contained a covenant by N. Newbery, for himself, his heirs, executors and administrators, and for every of them, to pay the rent and reservations, and also at his own costs during the term to well and sufficiently repair, uphold, sustain and maintain the demised premises and every part thereof; and all erections, buildings, hedges and fences to be erected and built on the same premises so well and sufficiently repaired, upheld, sustained and maintained, and in good substantial repair in all things whatsoever, at the end or sooner determination of the lease to peaceably and quietly deliver and yield up unto the said J. B. Cholwick, his executors, administrators or assigns, or to such other person who for the time being should be seised of the freehold, reversion and inheritance of the said premises.

On the death of Francis Newbery, William Sandys was seised of the reversion expectant on the determination of the lease.

Nicholas Newbery, in 1808, built a farm-house and buildings partly on the demised lands, and partly on a piece of waste land, part of Langbeer Down adjoining, belonging to the reversioner.

These buildings were out of repair at the expiration of the lease, and a suit having been instituted for the administration of the estate of Francis Newbery, Mr. Sandys claimed a sum of 124*l.* 2*s.* as a debt under the covenant to repair, in respect of the dilapidations; this claim, upon its

being made before the chief clerk, was disallowed, but it was finally adjourned into court.

Mr. Selwyn and *Mr. Sandys* now moved to vary the chief clerk's certificate.—The present claim is resisted, because it is said that a part of the site of the house is outside the lease; a head-rent, however, was paid throughout the lease: so far, therefore, the reversioner had acquiesced in the act of his tenant in building on the waste. The new house was now within the inclosure, and the landlord could not have ejected the tenant from the part not comprised in the lease.

Doe d. Harrison v. Murrell, 8 Car. & P. 134.

Doe d. Lewis v. Rees, 6 Ibid. 610.

Yem v. Edwards, 3 Kay & J. 564; s. c. 26 Law J. Rep. (N.S.) Chanc. 590: 1 De Gex & Jo. 598; 27 Law J. Rep. (N.S.) Chanc. 23.

Bryan d. Child v. Winwood, 1 Taunt. 208.

Doe d. Lloyd v. Jones, 15 Mee. & W. 580; s. c. 16 Law J. Rep. (N.S.) Exch. 58.

Douse v. Earle, 3 Lev. 264.

Mr. Barber, for the plaintiffs, the residuary legatees of F. Newbery.—The question was one of law. It ought to be tried in an action on the covenant. Assuming that the piece of land taken was not a part of the demised premises, still the owner of the soil allowed the tenant to take right of common over the waste; but was it taken on the terms of the lease? No claim was made by either party in respect of it, and a right to the use and occupation could only arise upon a contract. This was but a permission to build and to occupy. It was irrespective of all contract, and the decease of the tenant could give no claim to the landlord. No covenant could be implied against him at law, and no contract could be implied to keep in repair a building erected upon an encroachment; neither was there anything from which it could be said that the term granted by the lease was to extend to this encroachment.

Mr. Follett and *Mr. Hanson*, for the executor, referred to—

Dann v. Spurrier, 7 Ves. 231.

Powell v. Thomas, 6 Hare, 300.

Clare Hall v. Harding, Ibid. 273; s. c. 17 Law J. Rep. (N.S.) Chanc. 301.

Mr. Selwyn, in reply.—If a tenant, after the expiration of his lease, held over, an implication arose that he did so upon the terms contained in his lease. Was there not then such an implied intention between these parties as to make the demised estate liable for these dilapidations?

July 12.—The MASTER OF THE ROLLS.—Must not a contract be implied between the landlord and tenant, that the house erected by the tenant should be considered and held as part of the original demise, although built on land not comprised within the limits of the original lease? There does not appear to have been any agreement in writing between the parties, nor is there any evidence of anything that took place on the subject. There is nothing but the fact, that the landlord allowed the tenant to build, and that the tenant for the time being of the premises under the lease has occupied the house until the termination of the lease, without paying any rent for the house, or any increase of the rent upon the sum reserved by the original demise. In the absence of all agreement, in order to ascertain on what condition the tenant held the house, it will be necessary to consider whether the Court would have allowed the landlord to evict the tenant after he had erected the buildings with the landlord's acquiescence. I have no doubt of the principle laid down in *Dann v. Spurrier* with the limitations established in *The Master, &c. of Clare Hall v. Harding*, and such cases as *Powell v. Thomas*. The Court would have interposed to restrain the landlord from evicting the tenant immediately after the erection of the building: then, to what period would this equity in favour of the tenant extend? The mode of deciding is to consider that there was involved in the permission to build a permission by the landlord to the tenant to occupy the building for the term of the lease. Again, if the landlord, after allowing the occupation of the house for several years without payment of rent, had required rent to be paid for it, this Court, in the absence of

express agreement, would hold that there was an implied agreement that the occupation during the term should be without any additional rent to that previously paid by the tenant. If that is so, is this implied agreement to be one-sided? Can this Court hold, that the tenant is to be at liberty to suffer the house to fall for want of repair, or, if he please, to pull it down during the term and sell the materials? The Court would interfere to prevent this, just as if the building were included in the original lease. But this could only be on the ground of an implied contract between the parties that the house should be treated as part of the premises contained in the lease, and therefore subject to all the covenants and obligations contained in the lease. The dilapidations must be made good out of the estate of the deceased tenant.

M.R. }
1858. } WHITE v. WAKLEY.
July 6. }

Legacy—Specific or General.

*A testator, by his will, stated that he had lent his money to various persons named on their respective notes of hand, and to sundry other persons, whose names and notes would be found among his papers; he then said, "Now my will is, that the monies as aforesaid be disposed of as follows"; the testator then gave legacies to the amount of 9,900*l.* At his death none of the enumerated investments existed:—Held, that the legacies were not specific, but general, legacies.*

Francis Newbery, by his will, dated the 3rd of April 1841, said, "Whereas I am possessed of certain freehold and leasehold property, and also of monies in the hands of several persons hereinafter mentioned, lent to them on their respective notes of hand, payable, with interest, viz., to Messrs. —, &c."; the testator then stated the names of the several persons whose notes he held, and concluded, "To Dutch stock, Stuckey & Co. (who were his bankers), and sundry other persons, whose names and notes of hand will be found amongst my papers," &c. "Now my will is, that the monies as aforesaid be disposed of

as follows." The testator then disposed of his freehold and leasehold property; he also gave several legacies amounting to 9,900*l.*

Several questions were raised upon this will: first, whether the legacies were specific and adeemed, by reason of none of the identical monies mentioned in the will being in existence at the death, the Dutch stock itself having been sold; second, whether the legacies were payable so far as the monies out on new notes of hand, and at the bankers at the time of the death, would extend; and, third, whether they were payable out of the general estate.

Mr. Barber, for the plaintiffs.

Mr. Selwyn and *Mr. Turner*, for the testator's widow, who, though not a party to the suit, appeared under an order for liberty to attend proceedings, insisted that the legacies were not payable, or, if payable, that payment must be made out of the monies invested, and then only so far as monies on notes of hand at the testator's death or at his bankers, would extend.

Cockran v. Cockran, 14 Sim. 248.

Whateley v. Spooner, 3 Kay & J. 542.

The MASTER OF THE ROLLS.—This bears no approach to a gift of specific legacies; they are, therefore, payable out of the general personal estate.

M.R. }
1858. } WHITE v. WAKLEY.
July 6, 15. }

Legacy—Participation—Words of Reference.

*A testator gave 1,000*l.* to his sister Sarah for life, with remainder to her children; he then said, To each of my sisters, M. A., C. and B, I bequeath 500*l.*, and in case of death to either their portions to go to the surviving sisters "above mentioned." C. died in the lifetime of the testator:—Held, that her 500*l.* survived to M. A. and B; and that Sarah was not included in the words "the surviving sisters above mentioned."*

Francis Newbery, among other legacies, gave the following, "I bequeath to my bro-

ther Joseph Newbery the interest of 2,000*l.* during his life, the said sum to be invested in the funds, or on land security, by my executors hereinafter mentioned, and at his decease to be divided between my sisters (except Sarah); to my sister Sarah I bequeath the interest of 1,000*l.* for her life for her sole use, and at her decease equally to her children (if any), if not, to Mrs. Frazer's family. To each of my sisters, viz., Mary Ann, Charlotte and Betsy, I bequeath 500*l.*, making 1,500*l.*, and in case of death to either their portions *to go to the surviving sisters above mentioned.*"

Charlotte died in November 1846, in the lifetime of the testator.

It was now insisted that the words "to the surviving sisters above mentioned" included Sarah; and that the right to participate in the 500*l.* which Charlotte would have taken was not confined solely to Mary Ann and Betsy.

The bill was filed, by James White and Sarah his wife and William Newbery, the two last of whom were the residuary legatees of the testator, against Henry Wakley, the executor of the testator's will, for an administration of the estate.

None of the legatees interested in this question were parties to the suit, neither did it appear that they had obtained any order to attend the proceedings.

Mr. Barber submitted the question to the Court.

July 15.—The MASTER OF THE ROLLS.—The gift of this legacy is in itself complete and confined within its own words. Sarah is, therefore, excluded; she has no right to participate in the gift of the 1,500*l.* This is not a question which has any relation to land.

M.R. }
1858. } *In re* KINGSLEY'S TRUSTS.
July 26, 31. }

Baron and Feme—Legacy to Wife—Protection Order.

A married woman, whose earnings and property were protected against her husband and his creditors, by an order made under

the 20 & 21 Vict. c. 85. s. 21, on account of his desertion of her, will be ordered the payment of a legacy given to her in general terms (1).

This was the petition of Ann Woolley, a married woman, by her next friend. She had been deserted by her husband from the year 1845, without any reasonable cause, and she now prayed that a sum of 414*l.* 16*s.* 1*d.* 3*l.* per cent. reduced annuities might be paid to her as if she were a *feme sole*. The petition prayed in the alternative, that the fund might be settled and the dividends paid to her during her life for her separate use, free from the debts and engagements of her husband, with remainder after her decease for her only child.

Jane Kingsley, by her will, bequeathed to Ann, the wife of Edward Woolley, the sum of 400*l.* 3*l.* per cent. reduced annuities. The testatrix died on the 11th of March 1853, and her will was proved by Charles Kingsley and Robert Wills, her executors.

On the 21st of February 1855, Edward Woolley, the husband, was living at Turee, in New South Wales, and on that day he executed a power of attorney which had been sent out to him, authorizing Messrs. Kingsley and Wills to pay the legacy to a person named in the power. This was subsequently signed by Ann Woolley, but the executors refused to act upon it; and E. Woolley had not since been heard of by his wife.

On the 10th of April 1858, the Justices of the county of Somerset, assembled in Petty Sessions, by virtue of the 20 & 21 Vict. c. 85. s. 21, made an order protecting the earnings and property which Ann Woolley had acquired since 1845, from her husband and his creditors, and it directed that the same should belong to her as if she were a *feme sole*. This order was duly registered in the County Court of Somersetshire, at Taunton.

The petitioner then applied to the executors; they refused to pay either the legacy or the dividends to her, but they paid 380*l.* and 34*l.* 16*s.* 1*d.*, making the 414*l.* 16*s.* 1*d.*, into court, under the Trus-

(1) See 21 & 22 Vict. c. 108.

tees' Relief Act, 10 & 11 Vict. c. 96, in the matter of the trusts of the will of Jane Kingsley deceased, and in their affidavit they stated their belief that Edward Woolley and Ann his wife, or one of them, were the only parties entitled; they also said, that there was one child only of the petitioner living, and that there had been (as the fact was) no settlement or agreement for a settlement made on or subsequent to the marriage.

Mr. Follett and Mr. T. B. Saunders, for the petitioner, referred to
Dunkley v. Dunkley, 2 De Gex, M. & G. 390; s. c. 4 De Gex & Sm. 570.
In re Wright's Trusts, 15 Beav. 367.

Mr. Butler, for the executors, cited
Davison v. Mason, 18 Beav. 540.

The MASTER OF THE ROLLS considered that the petitioner was entitled to the fund, and upon the executors consenting to transfer it to an account, entitled "the account of the legacy given to Ann Woolley, the wife of Edward Woolley," he ordered, that after payment of the costs, the residue should be paid to the petitioner.

[See *Bathe v. the Bank of England*, 27 Law J. Rep. (N.S.) Chanc. 630.]

LORDS JUSTICES.
 July 17, 23, 24, 26; } PRIDE v. FOOKS.
 Nov. 25.

Will, Construction—"Children"—"Issue"—"Without leaving Issue."

T. W., by his will, made in 1805, gave the residue of his real estate and all his personal estate to a trustee in trust for conversion and for accumulation, for the benefit of "such child or children" as his nephews and niece, *Walter, Thomas and Dorothy*, should leave at the time of their respective deceases, in equal third parts; and in case either of his said nephews and niece should die without leaving any children or a child, then such third share should be paid to the children or child of the other or others leaving children or a child, in equal proportions. And in case all his said nephews and niece

should die without "leaving any issue," then he directed that the whole should go to the children of *P. G.*, in equal shares. *Walter, Thomas and Dorothy* all died without leaving any child, but *Dorothy* left grandchildren. The Master of the Rolls decided that the word "children" should be interpreted so as to include grandchildren and remoter issue, and that the property was divisible among the eight grandchildren of *Dorothy* per capita, so that the gift over did not take effect, nor was there an intestacy:—Held, reversing that decision, that the words "child or children" must be read in their strictly proper sense, and did not include grandchildren or remoter issue; that "any issue" could not be read "any such issue," so that the gift over to the children of *P. G.* did not take effect, but that there was an intestacy.

This case came on upon two appeals from a decision of the Master of the Rolls, on the construction of the will of *Thomas Webb*, dated the 3rd of April 1805.

By this will the testator, after giving certain legacies and annuities, and some property to his wife for life, devised a close in *Sherborne* to his nephew *Thomas Pride* for life, with remainder to his first and other sons in tail male; and for default of such issue to the same uses in favour of *Walter Pride* and his sons; and for default of such issue, to the use of his niece *Dorothy*, for life, with remainder to her children, as tenants in common in fee; and for default of such issue to his own right heirs.

The testator then proceeded as follows:—"As to all other my freehold messuages, lands, tenements and hereditaments, and my several leasehold estates, lands and premises, not hereinbefore disposed of, situate in the parish of *Sherborne* aforesaid, or elsewhere, and the sum of 7,000*l.* stock in the 3*l.* per cent. consolidated annuities, and other my monies, securities for money, and personal estate of every denomination whatsoever, I give, devise and bequeath the same and every part thereof unto the said *Thomas Fooks*, to hold to him, his heirs, executors, administrators and assigns, according to the nature of the respective estates; but upon and subject nevertheless to the several trusts, and to

the provisoes and declarations hereinafter mentioned, expressed and declared of and concerning the same; that is to say, in trust that he, the said Thomas Fooks, his heirs, executors or administrators, do and shall, with all convenient speed after my decease, absolutely sell and dispose of all my said estates, lands and premises, to any person or persons willing to purchase the same, either by public auction or private contract, as he or they shall think fit, for the best price that can be obtained, and do and shall, for that purpose, make and execute such deeds and conveyances as may be requisite and proper; and I do hereby declare, that the receipt alone of him, the said Thomas Fooks, or his heirs, executors or administrators, shall be a valid and effectual discharge to any purchaser, without such purchaser looking to the application of the purchase-money by him paid. And it is my will, and I do direct that the said Thomas Fooks, his executors and administrators, do and shall stand possessed of the monies arising from such sale or sales of my said estates and all other monies whatsoever which shall come to his or their hands, subject to the trusts hereinafter declared, that is to say, in trust, in the first place, to pay and discharge all my just debts, funeral and other expenses, the cost of proving this my will, and the several legacies hereby bequeathed, and after such deduction thereout then in trust to place and invest all the residue in the name of him the said Thomas Fooks, his executors or administrators, in the said 3*l.* per cent. consolidated annuities, in addition to the said stock of 7,000*l.* already there. And it is my will, and I do direct the said Thomas Fooks, his executors or administrators, do and shall from time to time receive the interest or dividends arising from the whole of such funded property, and after paying and discharging the said several annuities hereinbefore bequeathed, which I hereby charge thereon, and direct to be paid half-yearly, as such dividends shall become due and be received, invest and place the residue of such dividends and interest in the name of him, the said Thomas Fooks, his executors or administrators, in the said 3*l.* per cent. annuities, in augmentation as well of the said stock of 7,000*l.* already there, as of

the addition or accumulation from time to time to be made thereto by and out of the aforesaid trust estate, which it is my will shall continue to be increased in such manner, and remain vested in the said Thomas Fooks, his executors or administrators, in trust for and for the only benefit of such child or children as they, my said nephews and niece, Walter, Thomas and Dorothy, shall leave at the time of their respective deceases, and to be paid and divided in manner following (that is to say): one third part thereof to the child or children of the said Walter Pride; if but one child only, then the whole to such only child, but if more than one, then unto all such children in equal proportions; and the two remaining third parts thereof, to the child or children of the said Thomas and Dorothy, in like manner. And in case either of my said nephews and niece shall happen to die without leaving any children or a child lawfully begotten, then I direct that such third part shall go and be paid to the children or child of the other or others leaving children or a child, in equal proportions, if more than one; and in case all of them, my said nephews and niece, shall happen to die without leaving any issue lawfully begotten, then I direct that the whole of the residue of my said estate shall go and be paid to the three children of Peter Gapper, late of Sherborne aforesaid, brandy-merchant, deceased, by Jane his wife, the daughter of my now wife, in equal shares and proportions, if all living, or in case of either of them being then dead, to the survivors or survivor, and the issue of such as may be dead, such issue taking *per stirpes* and not *per capita*. And I do hereby authorize and empower my said trustee, the said Thomas Fooks, his executors and administrators, from time to time to apply so much and such part of the income of my said estate as in his or their judgment may be sufficient and proper for the education and maintenance of the children of my said nephews and niece during their minority, and for their future advancement in life."

The testator died in 1808, and his will was proved. He left his two nephews, Walter Pride and Thomas Pride, and his niece, Dorothy Prisk originally Pride and afterwards Worsdale, surviving.

Thomas Pride died in 1824, without ever having had a child.

Walter Pride died in 1854, without leaving a child or remoter issue, his only son, Thomas Webb Pride, having died in his lifetime without issue.

Dorothy (married to Mr. Prisk) died in January 1858, leaving no child, but eight grandchildren. She had had four children, Henrietta Jane, Edward Thomas Henry, both of whom died without having been married, Elizabeth, the wife of Mr. Cottle, and Caroline, the wife of Mr. Fowler.

Mrs. Cottle died in 1827 leaving children, and Mrs. Fowler died in 1845, also leaving children.

The children of Mrs. Cottle and Mrs. Fowler were together eight in number.

The suit was instituted for the purpose of having a determination, whether the gift over to Peter Gapper's children took effect, or whether there was an intestacy, so that the next-of-kin of the testator were entitled, or whether the children of Mrs. Cottle and Mrs. Fowler were entitled.

The cause was heard before the Master of the Rolls, who held that the true construction of the will was, that the word "children" in the early part of the will ought to be read so as to include "grandchildren and remoter issue"; that the gift over did not take effect, nor was there an intestacy, but that the eight children of Mrs. Cottle and Mrs. Fowler were each entitled to one-eighth *per capita* (1).

(1) The Master of the Rolls, in delivering judgment upon the question of construction, spoke as follows:—"Looking at the words of the will as *res integra*, the time having come when the decision respecting these words must be pronounced, and the proper construction put upon them, I am compelled to say that, in my view of the case, the event in which alone the testator intended the gift over to take effect in favour of the Gapper family has not arisen, and that, unless the nephews and niece all died without leaving any issue surviving any one of them, the gift over did not take effect. In the first place, the word 'issue' is *nomen generalissimum*; it includes all issue, and the burden of shewing that it is to be used in a restricted sense lies on them who so contend. It is certainly not to be contested that, when a testator makes a gift of personal estate to certain persons for life, and, after their death, to a particular class of their issue, and then introduces a gift over in case those persons should die without issue, the word 'issue' is, as a general rule, confined to the 'issue' previously spoken of. This is, however, subject to this qualification, that the whole will and the scope and object of the bequest must be

The representatives of the children of Peter Gapper appealed, as did also the next-of-kin of the testator.

The case was argued elaborately during the greater part of four days, and as many of the points of discussion are examined in

looked at, so as to see that this is the real meaning of the testator. It is, I think, a just observation which is made by Sir Richard Kindersley, in the case of *Westwood v. Southey* (1): 'The remaining question is, how does this conclusion affect the construction of the word "issue" in the limitation over? It is true that where there is a legacy to one for life, and after his death to his children, with a gift over if he die without issue, and there is nothing to restrain those words, the words "without issue" are limited to the issue before mentioned. But the ground on which the Court has used violence with the words, and interpolated the word "such," is this, that if there were no restriction on the generality of the words "dying without issue," the limitation over would be void; you refer, therefore, the language of the gift over to that of the preceding gift, in order to limit the general term "issue" to the particular issue before mentioned. But when the dying without issue is either in terms or by the proper construction limited to dying without issue living at the death, there is no reason for interpreting the words as meaning "such issue as before mentioned." I am not aware of any case in which a legacy to one for his life, with remainder to his children, and a gift over if he dies without issue, in the sense of issue living at his death, the limitation has been restricted as if the words had been "such issue as before mentioned." Such a construction might, in fact, wholly defeat the testator's intention; for if the words were construed to mean "such issue," the effect might be this: the tenant for life might have an only child, who might attain twenty-one, marry, and have children and die before the tenant for life, and then the child and the issue of that child would be excluded.' Thus the Vice Chancellor really, in fact, suggested by anticipation the precise case which has arisen in the present case. Here the words are 'leaving any issue.' The failure of issue is, therefore, clearly attributable to the death of the survivor of the nephews and niece. A similar view to that stated by Sir Richard Kindersley is stated by Lord Cottenham in *Ellicombe v. Gompertz* (2); he says: 'Provision is made for certain members of a class answering a particular description, and then a gift over is made upon the failure of the class. If it be clear that the whole of the class were not to take, the gift over, though made to depend upon the failure of the whole class, will be construed to take place upon the failure of that description of the class who were to take; and, on the other hand, if it appears that all the class were intended to take, although some only are enumerated, and the gift over be upon the failure of the whole class, the Court will adopt such a construction as will extend the benefit,

(1) 2 Sim. N.S. 192; s.c. 21 Law J. Rep. (N.S.) Chanc. 473.

(2) 3 M. & Cr. 127.

the judgment of Lord Justice Turner, a slight sketch of them here will suffice.

The Solicitor General, Mr. Selwyn and Mr. Hobhouse, for the representatives of the children of Peter Gapper, while contending that the expression "child or children" ought to be strictly construed and kept to its primary signification, yet argued that the words "without leaving any issue," preceding the gift over to the Gappers, ought to be read "without leaving such issue," so as to avoid an intestacy and give effect to the gift over. They cited—

Westwood v. Southey, 2 Sim. N.S. 192; s. c. 21 Law J. Rep. (N.S.) Chanc. 473.

Doe d. Lyde v. Lyde, 1 Term Rep. 596.

Gale v. Bennet, Ambl. 681; s. c. 2 Jarman on Wills, 362.

Radcliffe v. Buckley, 10 Ves. 195.

Mr. Roundell Palmer, Mr. Greene and

in the best way the law will admit, to the whole class. Of both these propositions the authorities present many examples.' In fact, according to the view of Lord Cottenham, it would seem that the principle on which the Court construes wills of this description is, still to preserve the rule that the gift over is to take effect upon the failure of the class of issue before described, but that it will in some cases restrict the word 'issue' to a particular portion of that class before enumerated, in order to prevent intestacy; while it would in the other case enlarge the previous enumeration of the class to the extent of the whole class after mentioned, on the failure of which alone the gift over is to take effect. In this case, the other parts of the will seem to me to point strongly towards rejecting any limitation of a general description of the word 'issue' to a portion only of that class on the failure of which the gift over is expressed to take effect. In the prior part of the will, which I have stated in detail, when the gift over is limited on the failure of children of the nephews and niece, the word 'such' is introduced before the word 'issue' and this is done on several occasions. This is not omitted in the present residuary bequest, but the word 'any' is introduced and substituted for the word 'such,' as if in contradistinction therewith. In this very sentence also, if the gift over takes effect, it is to the children of Peter Gapper by Jane his wife, and the issue of such as might be dead, such issue taking *per stirpes*. In this clause of the sentence, therefore, it is impossible to restrict 'issue' to children of a child, but it must include all the remoter issue if there were no children to take. There are many cases, particularly in the instances of devisees of real estate, in which the Court has held the word 'children' to be a word of limitation, extending it beyond its more limited meaning, and making the word

Mr. Batten, for some of the next-of-kin of the testator, insisted that the limited construction of the term "child or children" was the proper one, but that "without issue," preceding the gift over to the Gappers, ought not to be construed "such issue," to give effect to that gift over; but on the contrary, that by strictly construing both expressions, as they contended the Court ought to do, an intestacy would be the consequence, which, although unwillingly, the Court was bound from the authorities to pronounce had taken place. The cases cited were—

Moor v. Raisbeck, 12 Sim. 123.

Sanderson v. Bayley, 4 Myl. & Cr. 56; s. c. 8 Law J. Rep. (N.S.) Chanc. 18.

Wythe v. Thurlston, or *Wythe v. Blackman*, Ambl. 555.

Sibley v. Perry, 7 Ves. 522.

Earl of Orford v. Churchill, 3 Ves. & B. 59.

equivalent to 'issue.' I think that in the present case, in the gift of the residue, the testator has shewn his meaning to be that the words 'children' and 'child' are to be extended to grandchildren and to remoter descendants, in the words which follow immediately after the enumeration of the children. It is to be paid to the children or child of the others having children or a child in equal proportions, and in case all die without leaving any issue, then over. I read the word 'issue' as introduced here to shew the intention of the testator to extend the meaning of the word 'children' before specified, and to save the complicated enumeration of grandchildren and great-grandchildren, which would probably have been required to express fully his intention, but which, without such expression, the rules of law give effect to in the case of the word 'issue.' According to its more extended signification, grandchildren certainly would not have taken concurrently with their parents; but if a nephew had died, leaving no children, but having grandchildren, then in my view of the construction of the whole of this clause, the gift over to the Gapper family would not have taken effect, as it was only to take effect in case the nephews and niece all died without leaving any issue. But that event has not occurred, and the gift over therefore does not take effect; but this does not in my opinion create any intestacy, but the meaning expressed by the testator by the use of the word 'issue' makes, in my opinion, the issue of the nephews and niece objects of his bounty, under the description of their children. The will is certainly one of no easy construction; but I think that that is the fair meaning of the words used by the testator, and also that which is most consistent with the rules of construction adopted by this Court in similar cases." His Honour afterwards, upon argument, made a direction that the property should be divided amongst the children of Mrs. Cottle and Mrs. Fowler equally *per capita*.

Cooper v. Pitcher, 4 Hare, 485; s. c. 16 Law J. Rep. (N.S.) Chanc. 24.

Beck v. Burn, 7 Beav. 492; s. c. 13 Law J. Rep. (N.S.) Chanc. 319.

Lee v. Busk, 2 De Gex, M. & G. 810; s. c. 22 Law J. Rep. (N.S.) Chanc. 97.

Gundry v. Pinniger, 1 Ibid. 502; s. c. 21 Law J. Rep. (N.S.) Chanc. 405.

Warburton v. Loveland, cited in *Gundry v. Pinniger*.

Andree v. Ward, and *Greene v. Ward*, 1 Russ. 260; s. c. 4 Law J. Rep. Chanc. 98.

Ranelagh v. Ranelagh, 12 Beav. 200; s. c. 19 Law J. Rep. (N.S.) Chanc. 39.

Morse v. Lord Ormonde, 5 Madd. 99.

Monypenny v. Dering, 7 Hare, 568.

Mr. Teed and *Mr. W. Morris*, for others of the next-of-kin, followed.

Sir Richard Bethell, *Mr. Toller* and *Mr. Erskine*, for the children of Mrs. Fowler; and—

Mr. Follett and *Mr. Tatham*, for the children of Mrs. Cottle, supported the decision of the Master of the Rolls, and after going minutely through the cases cited for the appellants, referred to the following authorities :—

Macgregor v. Macgregor, 2 Coll. 192.

Crooke v. Brooking, 2 Vern. 106.

Royle v. Hamilton, 4 Ves. 437.

Evans v. Jones, 2 Coll. 516.

Dalsell v. Welch, 2 Sim. 319.

Farrant v. Nichols, 9 Beav. 327; s. c. 15 Law J. Rep. (N.S.) Chanc. 259.

Malcolm v. Taylor, 2 Russ. & M. 416.

Ginger v. White, Willes, 348.

Goodright v. Dunham, 1 Dougl. 264.

Wylid v. Lewis, 1 Atk. 432.

Ellicombe v. Gompertz, 3 Myl. & Cr. 127.

Trickey v. Trickey, 3 Myl. & K. 560.

Wylid's case, 6 Rep. 17, b.

Nov. 25.—LORD JUSTICE KNIGHT BRUCE.

—The controversy in this case is as to the true construction of the disposition of the residuary estate of Mr. Thomas Webb, made by his will, dated in the year 1805, which, after granting some annuities and making other gifts to various persons, including the testator's nephew Walter Pride, the testator's nephew, Thomas

Pride, their sister, the testator's niece Dorothy, and his executor, Mr. Thomas Fooks, gave the testator's residuary property, consisting, as it was stated at the bar, and as I assume, of personalty only, in these words.—[His Lordship then read the residuary gift as before set forth, and proceeded]—There was a codicil added in the same year, 1805, which gave an annuity; but neither by that codicil, nor, as I conceive, by any other parts of the will than the portion beginning with the words, "as to all other my freehold messuages," and ending with the words "advancement in life," which I have just been reading, is the interpretation of that part affected adversely to the construction to be presently stated as appearing to me right. The testator died, as I collect, in December 1808, notwithstanding the different statements on that subject, in one at least of the documents before us. I collect also that his wife, living when the will was made, in fact survived him for a short time. He was survived also by his two nephews and niece. The will and codicil were proved at Doctors' Commons in the year 1810 by Mr. Fooks, who proceeded to act in the duties of the executorship and trusteeship accordingly. It has been agreed on all hands that the accumulation directed by the will was by law prohibited from proceeding, and did not proceed, beyond the end of twenty-one years next after the testator's death, a period reached in the year 1829; the present dispute being only as to the title to the Consolidated Bank Annuities which then by accumulation and otherwise constituted his residuary estate, and the income accrued on them since the death of his niece Dorothy, who survived the nephews, Walter and Thomas, and died in the present year 1858. The dividends that became payable during the interval between the end of the twenty-one years and her death, are, I repeat, not in question. The nephew Thomas never had any issue; the nephew Walter had an only child, a son, who died a bachelor after the testator's death, but in Walter's lifetime, so that Walter left no issue. There were children of Dorothy, also, who were living after the testator's death, but all Dorothy's children died in her lifetime, so that she left no child. She left, however, various

grandchildren, some of whom at least are at present in existence. Of the three children whom the will mentions of Peter Gapper, deceased, by his wife Jane, both also mentioned in it, one is still alive, and there is living issue of one of the two others. The fund in dispute is claimed by some of the parties before us as having been given by the will to Dorothy's grandchildren under the designation of Dorothy's children. It is, adversely to that alleged title, claimed as having by force of the will in the events that have taken place become vested in the issue or some of the issue of Peter Gapper, deceased, by his wife Jane. And it is, in opposition to both contentions, claimed to belong, as upon an intestacy, to those who represent the testator's widow, and the persons who were his next-of-kin at his death. There is not any claim made under the will to any share of the residue on behalf of the estate of the nephew Walter, on behalf of the estate of the nephew Thomas, on behalf of the estate of Dorothy, on behalf of the estate of Walter's deceased son, or on behalf of the estate of any deceased child of Dorothy. We were, during the discussion at the bar, informed that there was at least one great-grandchild of Dorothy, who, born in Dorothy's lifetime, survived her. Though this was not stated by way of objection, and the cause was not, I believe, on any side suggested to be defective in point of parties, I felt some doubt whether it was not so, there being no great-grandchild of Dorothy, as I understand, before the Court or represented here. It has, however, seemed to me, and I believe likewise to my learned Brother, not necessary to treat the case as incomplete in that respect, all the counsel having, I repeat, appeared desirous that it should be heard by us in its actual state, being the condition in which it stood when heard by Sir John Romilly, before whom also, as I collect, no such objection was taken. We have, therefore, to declare whether we view the testator as having made an effectual gift of the beneficial interest in his residuary property now in controversy, and if so, in what manner; and accordingly to determine, so far as our opinion is concerned, the meaning to be attributed to the word "child," the word "children,"

and the word "issue," where those three words are used with reference to the progeny of Walter, of Thomas and of Dorothy, respectively, in the disposition which I have just been reading. This and the rest of the composition before us I have repeatedly gone through and considered, not without giving attention to the authorities (more than thirty in number) cited during the argument, and especially to the case of *Wythe v. Blackman* (or *Wythe v. Thurlston*), and those of *Gale v. Bennet*, *Ginger v. White*, *Goodright v. Dunham*, *Morse v. Lord Ormonde*, and *Greene v. Ward*; the decision in which last case pronounced at the Rolls I have, in consequence of a suggestion from Mr. Lee, ascertained to have been affirmed by Lord Lyndhurst when Lord Chancellor, in August 1829. I find mentioned in my note a case of *Key v. Key* (2), recently before this Court, though whether it was in argument referred to I am not sure. I advert to it for the purpose of saying that I continue to take the view which my learned Brother and myself thought right when we disposed of it. The grandchildren of Dorothy contend that the words "without leaving any issue lawfully begotten" shew that, in the events which have happened, they were meant to take (exclusively or otherwise) under the description of "Dorothy's children;" while those who claim under the gift to children or issue of the deceased Peter Gapper, by his wife Jane, insist that the words "issue lawfully begotten," mean "children or child," and that accordingly the gift to them took effect and became vested. Now, since neither of the testator's nephews nor the niece left a child, and since the niece who died the last of them has left grandchildren, and therefore issue, it is clear and manifest that if the dispositions and provisions which the will contain concerning the residuary estate ought to be read and understood according to their strictly popular force or (what in the present instance is the same thing) the ordinary or proper acceptation of the language in which they are expressed, there is a total intestacy, so far as all beneficial interest in it

(2) 4 De Gex, M. & G. 73; s.c. 22 Law J. Rep. (N.S.) Chanc. 641.

is concerned; and the question whether those dispositions and provisions ought to be thus read and understood must, I apprehend, be answered in the affirmative, unless the effect of the entire contents of the testamentary instruments is to forbid such an answer; that is to say, unless from the whole of the two documents, each part being considered with due attention to the rest, and to such extrinsic facts, if any, as ought to be taken into the account, an intention contrary to the intestacy alleged can be collected. But certainly, no help to the contention of either side of alleged residuary legatees is afforded by any extrinsic fact or collateral circumstance. The will treats the nephews and niece as living at the time when it was made; they were so in fact, and having survived the testator, were, of course, also living at the time when the codicil was made. By declining, however, to ascribe to him a wish to die testate as to the beneficial interest in his residuary estate, in case of such events happening as have happened, is there imputed to him any contradiction of himself, or any opposition between one portion and another of his testamentary provisions? It appears to me clearly not. I have been unable to discover, and do not think, *omni considerata scriptura*, that by the instruments together, or by either separately, an intention is exhibited to dispose of the beneficial interest in the residue in the events which have happened. It may be repetition, or the mere utterance of a truism to say, as I venture nevertheless to do, that if a will, taken as a whole, shews that the testator has used in it any word in a sense and with a meaning different from the ordinary or correct interpretation of the word, and shews also what are the sense and meaning attributed to the word by the testator, it must be construed according to that sense and to that meaning. But, as I have in effect already said, the will before us appears to me not to shew any such intention with regard to the word "child," with regard to the word "children," or where the word "issue" occurs in the phrase "dying without leaving any issue lawfully begotten," with regard to the word "issue." Again, all lawyers know that if the contents of a will shew that if a word has been unintentionally omitted, or undesignedly

inserted, and demonstrate what addition by construction, or what rejection by construction will fulfil the intention with which the document is worded, the addition or rejection will by construction be made; but there is, I think, no such state of things here. It may be a slight remark to observe that the testator says here "and in case all of them," and not "but in case all of them," and that the phrase "children or a child," in one instance, occurs so near the phrase "without leaving any issue lawfully begotten" following it, as to be separated from it by only twenty-two words, and the latter phrase, "without leaving any issue lawfully begotten," is separated from the word "children," when first coming after it, by only twenty-one words; while after the expression "three children of Peter Gapper," the word "issue" occurs twice, and the word "children" once. There is, perhaps, more importance in the circumstance that the phrase "without leaving any issue lawfully begotten," contains the word "any," and the fact that wherever the word "issue" is used in those parts of the will which I have not read to-day, it is accompanied—that is to say, immediately preceded—by the word "such"; and though I do not mean to intimate any doubt as to the correctness of the decision in *Morse v. Lord Ormonde*, it does not, as I conceive, govern the present case. There is a well-known class of decisions, which at one time seemed to me might possibly be thought to rule this contest in favour of the Gapper family—I mean that to which we may ascribe *Murray v. Jones* (3), where Sir William Grant says, "The limitation over depends on the failure of that which precedes it; but the testatrix has not taken in all the modes by which it might fail." And he particularly refers to *Jones v. Westcomb* (4). Upon reflection, however, I have become convinced that the will before the Court does not shew an intention that the mere failure after the testator's death of the gift of the residue to the children of Walter, of Thomas, and of Dorothy (howsoever the failure might happen), should necessarily have the effect of conferring on the Gapper

(3) 2 Ves. & B. 313.

(4) 1 Eq. Ca. Abr. 245.

family, by way of substitution, what, in a particular state of circumstances, was meant for those children. And my opinion being that we ought not here to read the word "child" as not meaning merely child in the ordinary familiar sense of that expression when meant to indicate relationship, the word "children" as not meaning merely children in the ordinary and familiar sense of that expression when used to indicate relationship, or the word "issue," where it occurs in the phrase "die without leaving any issue lawfully begotten," as not meaning progeny or offspring in whatever degree, I must hold that, as events have happened, the fund in dispute, which at the end of twenty-one years from the testator's death represented his residuary personal estate, ought to be considered as not disposed of, and be distributed accordingly as upon an intestacy. This interpretation certainly attributes to the testator (who had no issue) an intention to dispose by the will of the capital of his residuary estate in favour of the near relations of his wife, if, and not unless, his two nephews and his niece should all die without leaving any lawful progeny whatsoever, immediate or not immediate; and at the same time an absence of intention to dispose by the will of that capital or any part of it, in favour of any person after the death of the survivor of the two nephews and niece, if it should happen that no one of those three persons should leave a lawful child, and it should also happen that all or any two or one of them should leave lawful progeny. Considering, however, that the will is, so far as its construction is concerned, plain and clear, I really cannot perceive that, while ascribing to the document substantial propriety of expression, I am imputing to the testator a state of mind or view less likely to have belonged to him than the designs, which every one necessarily admits to be exhibited upon the face of the instrument. It is sufficiently obvious that if the will is, as to the property in question (with reference to the events which have actually taken place) incomprehensible, intestacy must be the result. Of course, the two sets of opponents of the proposition of intestacy here cannot both be entitled; but if either, which of them ought to be

considered as being so? I find myself entirely unable to say: the case of one seeming to be quite as good or as bad, and quite as consistent with the rules and idiom of the English language and with probability, as that of the other. Where is the not uncertain gift beneficially of the residue, which alone can prevent the intestacy contended for? Now, without more, I repeat, as it seems to me, when letter and spirit are at variance, the spirit, I assume, ought certainly to prevail. Here, I can discover no spirit that the letter contradicts; by the letter, therefore, I must be guided, and that pronounces for intestacy.

LORD JUSTICE TURNER.—This case has come before us upon two appeals from an order of the Master of the Rolls, by which his Honour has declared that, according to the true construction of the will of Thomas Webb, the testator in the cause, and, in the events which have happened, the testator's residuary estate became divisible, upon the decease of Dorothy Prisk, the niece of the testator, into eight equal shares among the eight grandchildren of Dorothy Prisk living at her death; and has ordered the residuary estate, which is represented by the sum of 33,070*l.* 15*s.* 11*d.*, Bank 3*l.* per cent. annuities standing in trust in the cause, to be divided accordingly. Thomas Webb, the testator in the cause, had, at the date of his will, two nephews, Walter Pride and Thomas Pride, and a niece, Dorothy, who appears at that time to have been the wife of Edward Worsdale, but afterwards became a widow, and married a second husband, whose name was Prisk. By his will, dated in the year 1805, the testator, after making some specific dispositions of certain parts of his real and personal estate, and giving several annuities and legacies, devised a particular estate which is mentioned in the will to his nephew Thomas Pride for life, with remainder to the first and other sons of Thomas Pride in tail male, with remainder to the nephew Walter Pride for life, with remainder to the first and other sons of Walter Pride; and then the will goes on thus:—"And for default of such issue to the issue of his niece Dorothy for her life, and after her decease to the issue of all and every child and children of the said Dorothy lawfully

begotten; and if but one child, then to such only child, his or her heirs and assigns for ever; but if more than one, then unto all such children, their heirs and assigns for ever, as tenants in common and not as joint tenants; and in default of such issue to the issue of the right heirs of me the said Thomas Webb for ever, and to and for no other use whatsoever." Then there follows the disposition of the residuary estate, which has been already fully read by my learned Brother. By a codicil to this will, dated the 24th of November 1805, the testator merely increased an annuity which he had given by the will, and he died on the 17th of December 1808, leaving the two nephews and the niece above mentioned him surviving. The events which happened were, that Thomas Pride, one of the nephews, died in the year 1824, without having had any issue; that Walter Pride, the other nephew, died in the year 1854, having had a child, Thomas Webb Pride, who died in his lifetime, in the year 1820, without having been married; and that Dorothy Prisk, the niece, died on the 5th of January 1858, having had several children by her first husband, Edward Worsdale; all of whom had died in her lifetime, but two of whom had left children, who were living at the time of her decease. These children, eight in number, the grandchildren of Dorothy Prisk, are the persons whom the Master of the Rolls has declared to be entitled to the testator's residuary estate, and amongst whom he has directed it to be divided. The two appeals before us are, as to one of them, by parties who claim under some of the three children of Peter Gapper, on whose behalf it is considered that the words "and in case all of them, my said nephews and niece, shall happen to die without leaving any issue lawfully begotten," ought to be read "and in case all of them, my said nephews and niece, shall happen to die without leaving any such issue lawfully begotten," that is to say, without leaving any children or child living at their deaths; and that this event having happened, they were entitled to the residue; and as to the other of these appeals by parties claiming under the widow or next-of-kin of the testator, on whose behalf it is contended that the limited construction of the words "without

leaving any issue," insisted upon by the other appellants, cannot be maintained, and that there having been issue of Dorothy Prisk living at the time of her decease, the limitation over to the Gappers and their issue could not take effect, and the residuary estate not being otherwise disposed of, belonged to the testator's widow and next-of-kin. On the other hand, the order is supported by the eight grandchildren, in whose favour the Master of the Rolls has decided, and on whose behalf it is contended, that there having been no child of the nephews or of the niece living at their deaths, the dispositions in favour of their children must be construed to extend, and must be applied to their grandchildren, and that the order of the Master of the Rolls ought, therefore, to be maintained. Many authorities were cited in support of each of these conflicting views of the construction of this will; but before referring to the authorities it will be right to examine the words of the will, and to consider what light is thrown upon them by the context, for the rights of these parties must be governed by the intention of the testator, to be collected from the words which he has used; not indeed from a strict observance of the literal force of these words, but from a sound and just interpretation of the meaning to be attached to them. In saying this, I must not be understood to undervalue the weight which is due to authorities. The decisions of the Court regulate the distribution of property out of court, and whatever my individual opinion might be in any particular case, I should think it not only unwise and dangerous, but presumptuous and wrong to act upon it in opposition to any settled rule of construction, or to any established interpretation of any particular expressions or words. It is for convenience only we adopt the course of first examining the words and the context of this will. First, then, as to the residuary disposition. The testator has disposed of the residue thus: he has directed it to be held in trust for such child or children as his two nephews and his niece, Walter, Thomas and Dorothy, should have at the time of their respective deceases, the child or children of each taking one-third; and in case of either of his said nephews and niece dying without leaving any

child or children, he has directed such third part to go to the children or child of the other or others leaving children or a child; and in case all of them, his said nephews and niece, should die without leaving any issue, then he has directed the whole residue to go to the three children of Peter Gapper, in equal shares, if all living, or in case of either of them being then dead, to the survivors or survivor, and the issue of such as might be dead, such issue taking *per stirpes* and not *per capita*; and he has empowered his trustees to apply the income of his estate for the maintenance and education of the children of his nephews and niece during their minority, and for their future advancement in life. There is nothing, it is to be observed, here given to the nephews or niece, or any of them; and if I rightly understand this will, everything was to rest in contingency during their lives, and it was to depend upon the events which might happen who was to take upon their deaths; the will, as I read it, creating as to the residue, not a series of limitations to take effect in succession, but a series of concurrent contingent limitations. The question, therefore, as I view it, is in whose favour were these concurrent limitations created, and on what events were they to depend? Upon these questions, there can, I think, as to the first part of the limitations, be no reasonable doubt. The limitations are plainly in favour of the children living at the deaths of the nephews and niece, and of such children only; and so strongly is this marked, that we find the testator actually preferring the children of one who may have died leaving children, to the more remote issue of any who may have died leaving only more remote issue. Upon the mere words of this part of the disposition, I can see no reasonable ground for doubt. We come then to the ulterior disposition, "in case all the said nephews and niece shall happen to die without leaving any issue;" and here again, upon the mere words of the will, I see as little room for doubt. The word "issue," of course, in its primary sense, embraces all the issue; and this will seems to me to afford the strongest evidence that it was used in that extended sense. How, otherwise, are we to account for the circumstance that the testator having strictly

adhered to the words "children or child" in the earlier part of the disposition, drops these words here, and substitutes for them not the word "issue" only, but the words "any issue," putting the expression as strongly as possible in contrast with that which he has previously used? There is, besides this, further evidence of the sense in which the testator has used the word "issue." The limitations over to the Gappers, in the event of any of them being dead, is expressed to be in favour of their issue, who are to take *per stirpes* and not *per capita*. It is plain that the word "issue" is here used in its ordinary sense. No limited construction can be put upon it, and the word being used in its extended sense in one part of the disposition, it is very difficult to suppose that in the other part of the same disposition it could be intended to be used in its more limited sense. The maintenance clause, too, comes in aid of the interpretation of the word "children" as pointing out the objects for whom the testator intended to provide; and upon the whole, therefore, looking at this case upon the mere words of the will, I am perfectly satisfied that upon the true construction of this disposition, the testator meant to give the residue only to the children of the nephews and niece living at their deaths, and meant to give it over to the Gappers and their issue only upon a failure of all the issue of the nephews and niece living at their deaths. I do not of course suppose that he intended in any event to die intestate as to the residue, but I think that the absence of any provision for the issue of the nephews and niece beyond their children living at their death was overlooked and unprovided for. Passing, therefore, from the words of the residuary disposition to the context of the will, the context seems to me to confirm the construction which I have put upon the words; for, in the anterior part of the will, each of the devises to the sons of Thomas and Walter, and what is more remarkable, the devise to the children of Dorothy is followed by a limitation over, not for the default of issue generally, as in the residuary disposition, but for default of such issue, and the testator has thus shewn that where he intended to limit over upon default of children only, he knew how to

effect that intention. He has used in the one case the words "in default of such issue," in the other case the words "without leaving any issue;" and we cannot, I think, impute to him the same intention in the one case as in the other. Such, then, being the case as it stands upon the words and context of the will, we have next to consider how it stands upon the authorities. And, first, as to the point argued on the part of the grandchildren, and on which the Master of the Rolls decided in their favour, that according to the true construction of this will, the dispositions of the residue in favour of the children of the nephews and niece extend to their grandchildren and other more remote issue; for, although no mention is made, in the judgment or in the order, of the more remote issue, the principle which extends the limitations to the grandchildren must, as I conceive, extend it also to the more remote issue. I can see no ground on which the limitation, if it extends beyond the children, can be confined to the grandchildren, or on which the great-grandchildren mentioned in the course of the argument can be excluded. In the argument on this part of the case, it was not, and, of course, it could not be denied, that the word "children" in its ordinary interpretation does not include grandchildren or other more remote issue; nor was it denied that if there had been a child of either of the nephews or the niece living at the death of any of them, that child must have taken to the exclusion of any grandchildren or more remote issue; but it has been said that as there was no such child, the grandchildren were entitled to take. This proposition is plainly open to this objection, that it makes the construction to be put upon the words of the will dependent upon the events which may happen after the death of the testator. If there be a child, the word "children" is to receive its ordinary interpretation; if there be no child it is to be construed in a more extended sense. It was said, however, that this proposition was supported by authority, and the case of *Gale v. Bennet* was mainly relied on in support of it. We have been furnished with a copy of the will on which the question in that case arose, and it is perhaps not immaterial to observe that the survivorship

between the children, which in the report of the case is stated to have been in the event of the sons dying under twenty-one, was in the event of their dying under twenty-one without issue. In the event, therefore, of a son dying under twenty-one leaving issue, that issue was to take. There is not, as is noticed in Mr. Ambler's report, any entry of this case in the registrar's book, but in the registrar's minute-book of the 14th of December 1768 there is the following entry:—"Declare that the plaintiffs, the grandchildren of Clara Gale, one of the testator's daughters, are entitled as the children of Clara Gale, within the true intent and meaning of the testator's will, to one-third part of the freehold and copyhold estate in question, and to one-third part of one-fourth of the residue of the testator's personal estate." Then there is "an account of rents and profits of freeholds and copyholds since the death of Hester Martin; and let one-third part of what shall be coming on that account be paid to the plaintiffs in equal shares. Account of personal estate and debts, &c. Declare that the clear residue of the testator's personal estate ought to be divided into four equal parts, and that one-fourth part thereof, which was bequeathed to Hester Martin, is now fallen to the plaintiffs, the defendants the Bennetts, and the defendants the Tunketts, each stock being entitled to one-third of such one-fourth. And executors admitting assets—"How that can well be, I do not understand, as it relates to the residue.—"And executors admitting assets, pay one-third of such one-fourth to the plaintiffs in equal shares." And then there was to be "a partition of freeholds and copyholds, and to allot one-third to the plaintiffs, one-third to the defendant Thomas Bennett, and one-third to the defendants the Tunketts." This entry, no doubt, expresses that the grandchildren were entitled as children, but I think more was meant by this than that the grandchildren were to take under the limitation to the children; and the entry, it is to be observed, does not furnish the ground on which that conclusion was arrived at. On referring, however, to the report of the case, it appears that it stood over in order to examine the case of *Wythe v. Blackman*, in which the question had

been whether, upon the particular will then under consideration, children meant issue; and from this it is only reasonable to conclude that that was the question on which the case of *Gale v. Bennet* was considered to depend. I think, therefore, that *Gale v. Bennet* decided no such point as has been contended for on the part of the grandchildren in this case, otherwise than it decided that upon the construction of the will then under consideration children meant issue. It furnishes, therefore, no rule and no authority for the present case, which on this point, as on all other points, must be decided upon the construction of this particular will. And for the reasons which I have already given, I think that upon the construction of this will "children" cannot be held to mean issue. I do not think it necessary to go through the other cases which were cited in this part of the argument, except, indeed, the case of *Crooke v. Brooking*, as to which, it may be observed, that what is alone pertinent to the present case, the words "that if there had been no child, the grandchildren might have taken by the devise to the children," was a *dictum* merely, and is certainly not reconcilable with the ordinary rules of construction; unless, indeed, it was meant to express that the grandchildren might have taken if their parent was dead at the date of the will, leaving no child, but only grandchildren; and even in that point of view it would be difficult to reconcile the *dictum* with the decision in *Moor v. Raisbeck*, and still more difficult to apply it to the present case, in which the limitation to children is so precise and so often repeated. It is sufficient to observe upon these cases that they fall far short of the case of *Gale v. Bennet*. I find myself unable, therefore, to agree in the conclusion in favour of the grandchildren at which the Master of the Rolls has arrived in this case, and am of opinion that the order cannot be supported. We come next to the question raised on the part of the appellants, who represent the Gappers, whether the limitations over in case the nephews and niece shall die without leaving any issue can be construed to mean, in case they shall die without leaving any such issue; or, in other words, without leaving any children or child

living at their deaths. This construction, of course, involves a material alteration in the language of the testator's will, and wholly alters the effect of it. It destroys the pointed contrast between the words "children or child," and the words "any issue," aided in point of construction as these latter words are by the limitations to the issue of the Gappers; but it was said, that the authorities warrant the construction, and certainly some of the cases have gone to a considerable length in support of it; but, on the other hand, there are many cases in which the construction has not prevailed. Amongst the cases on the point, which are almost innumerable, may be placed, on the one side, *Malcolm v. Taylor* and *Ellicombe v. Gompertz*, and on the other, *Andree v. Ward* and *Campbell v. Harding*. If the primary limitations be in favour of children, and be so expressed that they take immediate vested interests, and there be a limitation over in default of issue, it is not difficult to see reasons for construing "default of issue" to mean default of children, for if there be no child, there can be no other issue, and if there be a child, the child will take the whole, and there will be nothing to limit over; but where the primary limitation is so expressed, as that there may be issue who may not take under it, as in the case of gifts to children to vest at twenty-one, it is not so easy to see the reasons on which this construction has prevailed. It is true, that by adopting the construction, the limitations of the will are made to follow in regular order and succession, but it is equally true that the general terms in which the limitations over are expressed, prove that there has been some omission or some mistake on the part of the testator; and the difficulty seems to be to determine what the omission or mistake has been—whether it has been in the gift over not having been limited, or in the primary gift not having been extended. I have carefully read the cases which were cited on the point, and many others bearing upon it, in the hope that I might be enabled to extract from them some definite rule as to the cases in which the limited construction ought to be adopted. But the result has been that, upon the examination of all the cases, I have found that

each case depends upon the construction of the particular instrument on which the question arises, and that no general rule, therefore, can be laid down. The Master of the Rolls, in deciding against the construction contended for by these appellants, seems to have rested much upon the case of *Westwood v. Southey*. I think it unnecessary to give, and do not mean to give, any opinion upon that case. It is sufficient to say that, without reference to that case, I think that the construction contended for cannot be supported in the case before us. This appeal must therefore be dismissed; and the case on the part of the grandchildren also failing, I agree with my learned Brother, that our decision must be in favour of the other appellants, who represent the widow and next-of-kin, upon whose appeal an order must be made, discharging the order of the Master of the Rolls, declaring that in the events which have happened there is an intestacy as to the residue, and directing distribution accordingly; but I think the costs of all parties of both appeals must be paid out of the fund, though not, of course, between solicitor and client, unless all parties consent.

M.R. }
Nov. 5. } JOLIFFE v. TWYFORD.

Devise—Incomplete Buildings—Condition to repair—Implied Direction to complete—Forfeiture—Costs.

A testator by his will settled estates and declared that the same should be forfeited and go over in the event of the party entitled for the time being to possession not repairing a column which he was building, but which he left incomplete at his death. Upon a bill for the administration of the testator's estate,—Held, that the party entitled to possession of the estates was not liable to complete the column, and that no contract could be implied to make the testator's residuary estate liable to the expenses of completing it.

Held, though all the questions except those relating to the column and the payment of costs had been settled by agreement between the parties, that the suit remained an administration suit, and that the costs must

be paid out of the residuary estate of the testator.

John Twyford Joliffe, of Ammerdown Park, in the county of Somerset, by his will, dated the 15th of March 1854, devised and bequeathed all his estates, both freehold, copyhold and leasehold, in the parishes of Holcombe and Midsomer Norton, in the county of Somerset, to the defendant Samuel Twyford and Edward Lovel, since deceased, (whom he also appointed executors of his will,) their heirs, executors, administrators and assigns, upon such trusts and subject to such powers as would best correspond with those expressed and declared concerning the real estates in the county of Somerset, comprised in a settlement dated the 1st of July 1823; and the testator declared, "That if any person made tenant for life or tenant in tail by purchase of the estates by his will devised or bequeathed, and being at the same time in possession of the estates comprised in the settlement of the 1st of July 1823, should neglect to keep in complete repair the column now being erected in Ammerdown Park aforesaid, to the memory of his late father, or to pay the annual sum of 20*l.* to the trustees for the time being of the parish school at Kilersdon, the person so neglecting should thereupon forfeit all the estates taken by him or her under his will," and the devise next in remainder was to take effect as if the person committing the forfeiture had died at the time of the neglect taking place.

The testator then devised and bequeathed his residuary real and personal estate to his said trustees, upon trust to get in his personal estate, and out of his personal estate, if sufficient, or by sale or mortgage of the residuary real estate, to pay his debts and legacies, and after satisfaction thereof, to pay the annual income to arise therefrom unto his brother, the plaintiff, the Rev. Robert Thomas Joliffe, for life, with remainder to his issue, with a limitation over in default of any issue of his brother to his sister, the defendant Mary Ann Joliffe, and her issue, with a limitation over in default of any issue of his sister to the defendant Samuel Twyford, his heirs, executors, administrators and assigns absolutely.

The testator died on the day he made his will.

By the settlement referred to in the will, the Ammerdown Park estate stood limited to uses, by virtue of which, after the death of the testator, who was tenant for life, the plaintiff became tenant for life, with remainder to his issue in tail, and in default of issue then to similar uses for Mary Ann Joliffe for life, with remainder to her issue, and in default thereof then to uses by which a second cousin of the testator and his issue would become entitled thereto.

Neither the plaintiff nor his sister had ever been married.

In 1852 the testator commenced the erection of the column referred to in his will, from a design and model prepared by an architect. It was proposed to be 180 feet high. The testator, however, entered into no contract for the erection of the column, but the work was done under the superintendence of the architect. The testator paid for the materials supplied and for the work done. At the testator's death the column had reached only half its intended height, but a great part of the stone and other materials necessary for its completion had been purchased by the testator and prepared. These had been paid for either by the testator in his lifetime or by his executors after his decease. The plaintiff after the death of the testator continued the work, and he wrote to the executors, referring to the provisions in the will, requiring the column to be kept in repair, and contended that the testator contemplated the completion of the column at the expense of his estate, either by himself in his lifetime or by his executors after his decease, and stated that he had expended 1,000*l.* upon the building and that 1,000*l.* more would be required to complete it. Mr. Lovel, in reply, stated that, in his opinion, the executors would not be justified, under the terms of the clause in the will, in defraying the cost of completing the column out of the testator's estate. There was a further correspondence, but ultimately, with the consent of S. Twyford, a sum of 2,000*l.*, part of the testator's residuary estate, was paid to the plaintiff towards the completion of the column. This sum, however, proved insufficient, and the plaintiff expended a further sum of

1,200*l.*, and completed the column to the full height.

Mr. Lovel died on the 21st of September 1857.

Mr. Twyford would not allow this further sum to be paid out of the testator's residuary estate.

The plaintiff, therefore, filed this bill. It stated that several questions had arisen as to the proper mode of administering the trusts of the testator's will, and that doubts had been suggested as to the fund from which the cost of completing the column should be defrayed, and prayed that the trusts of the will might be carried into execution, that a new trustee might be appointed, and that all necessary accounts, inquiries and directions might be taken, made and given.

The parties afterwards agreed to appoint Mr. Simpson a new trustee of the will, and, among other things, that the question for the consideration of the Court should be confined, first, to the column and the mode of defraying the expenses of completing it, and secondly, to the costs of the suit, whether they related to the column or otherwise, and by whom and in what manner they ought to be borne and paid.

Mr. R. Palmer and *Mr. Eddis*, for the plaintiff, insisted that the direction to maintain and repair the column implied an agreement to complete, and consequently that the testator's estate was charged with the expenses incurred in the completion of the column.

Mr. Lloyd and *Mr. Lewin*, for Mary Ann Joliffe, supported the same view.

Mr. Selwyn and *Mr. W. P. Murray*, for Samuel Twyford, were not heard.

THE MASTER OF THE ROLLS.—I have no doubt upon the construction of this will in regard to the column. To support the plaintiff's claim, you must find in the words of the will a direction to complete the column, either expressed or implied. It has been argued that the words used involve by necessary implication a direction to complete as well as to keep in repair. That, however, would be a stronger implication than this Court would be justified in making. What they are to keep in repair is "the column then in course of

erection." These words are common with respect to tenancies. When a farm is leased to a tenant who covenants to keep the farm in repair under the lease, it does not mean that he is to keep it in complete repair, but it means the repair in which he found it. If he delivers it up in the repair in which he found it, that satisfies the covenant. It is the strongest possible implication to say that to repair a particular thing means that something larger and much more expensive must be made to be kept in repair. If it could be proved that there was no mode of keeping this in repair but by building it 100 feet higher than it stood at the death of the testator, a very different question might have arisen; but it is impossible that any serious evidence on that point could have been given. It is clear that I cannot introduce a direction to complete and keep in repair the column now being erected in Ammerdown Park, for this is a clause of forfeiture, in case that which he left at the time was not kept in complete repair. If the direction to keep in repair involves the completion and keeping in repair, then the direction in the latter part of the clause to pay 20*l.* to the trustees of the parish school must involve the establishment of a school if no school existed in the parish, or the completion of a school if one had been begun but left unfinished by the testator. Two clauses of forfeiture in the same part of the will must bear a similar construction. It is, therefore, impossible to say that there was any obligation on the testator's estate to complete the column, or that the residuary estate was liable for that purpose. On the question of costs, I wish to hear the parties.

Mr. Murray.—The agreement between the parties has put an end to this as an administration suit. Had that not been so, the 2,000*l.* advanced must have been paid into court, as Mr. Twyford had made himself liable for a breach of trust, and this question was still open in the event of there being any issue either of Mr. or Miss Joliffe.

The MASTER OF THE ROLLS.—My impression is, that this is an administration suit which parties have a right to institute if they choose. If it had been established

that the column had been the only question, I should have made the costs follow the event. A general administration, however, was asked for; but assuming that no question existed about the column, if the parties thought fit afterwards to say, we do not want a decree for administration of the estate, we will settle those matters among ourselves, but we cannot agree about the costs, and will leave that to the Court; it can only say that they must follow the ordinary rule, and come out of the estate.

Mr. Murray.—The form of the suit could not controul the discretion of the Court. The throwing the costs of the suit upon the estate would in effect be to make Mr. Twyford pay the greater portion.

The MASTER OF THE ROLLS.—It is a hard case; still I do not see how I can act otherwise. Leave the 2,000*l.* out of the case, how would the matter stand if Mr. Twyford had not paid it, and had kept the plaintiff at arm's length? Had a bill been filed, and without any agreement had the suit been brought on, if the plaintiff had then said, we will waive all the accounts now we have got the question determined, still, the costs would have to come out of the estate. They could not depend upon whether the accounts were taken or waived. The result would still be administration. The costs of the suit, therefore, must be paid in the usual way.

WOOD, V.C. }
Nov. 10. } WILSON v. WILSON.

Legacy—Remoteness—Gift to a Class.

In a gift by will to the present and future children of J. L. who should be living at the decease of the testator's wife, a direction that the shares of daughters should be settled upon themselves for life, with remainders to their children, is not void for remoteness as regards the share of a daughter born in the testator's lifetime, the gift not being to a class, but a separate gift in favour of each child.

John Lawrence, by his will, dated the 13th of November 1832, directed his

executors to appropriate, out of the public stocks of Great Britain of which he should die possessed, such a part as should be equivalent to the sum of 50,000*l.*, and to stand possessed thereof upon trust, during the life of his wife, to pay to her the interest and dividends; and after her decease to raise thereon certain sums; and subject thereto he declared that the said sum of 50,000*l.* should be in trust for the then present and future children of his brother Isaac Lawrence, who should be living at the decease of his, the testator's, wife, and who being a son or sons should then have attained, or thereafter should attain the age of twenty-one years, or who should then be dead or should thereafter die under that age, leaving issue living at his or their decease, or who being a daughter or daughters should then have attained or thereafter should attain that age, or should have been or should thereafter be married, their respective executors, administrators and assigns, to be divided between them, if more than one, in equal shares as tenants in common; and if there should be but one such child, then that the whole thereof should be in trust for that one child, his or her executors, administrators or assigns; and he directed that the shares, legacies or sums of money thereinbefore given in favour of such of the children of his said brother as should be a daughter or daughters should not be paid to them, but be held by his executors or trustees, upon trust to lay out and invest the said several sums of money at interest, and during the respective life of each daughter to pay the interest of her respective legacy to her separate use, without power of anticipation; and after the decease of such daughters respectively, he directed that the respective legacies should be held in trust for all and every the child and children of such respective daughters who should live to attain the age of twenty-one years, or depart this life under that age, leaving issue living at the time of her or their decease or respective deceases, in equal shares as tenants in common.

The testator died in 1833. Mary Lawrence, one of the daughters of Isaac Lawrence, was living at the death of the testator; and in 1835 she married the defendant W. A. Wilson, and there were children of the marriage. A question

having arisen whether the limitations in favour of the children of the daughters of I. Lawrence were not altogether void for remoteness, the present bill was filed, by the children of Mrs. Wilson, praying that those limitations might be declared to be valid.

Mr. Willcock and *Mr. W. Morris*, for the plaintiffs, cited

Storrs v. Benbow, 3 De Gex, M. & G. 390; s. c. 22 Law J. Rep. (N.S.) Chanc. 823.

Vanderplank v. King, 3 Hare, 1; s. c. 12 Law J. Rep. (N.S.) Chanc. 497.

Mr. Daniel and *Mr. Crouch*, for the defendants W. A. Wilson and Mrs. Wilson, contended that the limitations were void for remoteness.

Greenwood v. Roberts, 15 Beav. 92; s. c. 21 Law J. Rep. (N.S.) Chanc. 262.

Griffith v. Pownall, 13 Sim. 393.

Mr. G. L. Russell, for the executors.

Wood, V.C.—The will appears to me to contain an absolute gift, in the first instance, to each of the children of I. Lawrence, just as if the testator had said, "I give to each of the children born or to be born of my brother Isaac Lawrence 10,000*l.*, and I direct the share of each such child, being a daughter, to be settled upon her children." I can conceive no reason why, because some of the children may not be *in esse* at the time of the testator's decease, this direction should not be good in respect of such children as are *in esse*. The share of each child is separate from the shares of the other children. In *Porter v. Fox* (1) and that class of cases, the difficulty arose from the gift being to a class of persons some of whom could take and some could not, and the share of each could not be ascertained. But each child here forms a separate class, and the share of each is separate from the shares of the rest. The limitation, therefore, in favour of the children of Mr. and Mrs. Wilson is valid.

(1) 6 Sim. 485.

M.R. }
Nov. 3. } *In re MAINWARING.*

Trustees, Appointment of—Transfer of Funds.

If the Bank of England is required to act upon an order made in pursuance of the Trustee Acts, the circumstances bringing the case within the acts must appear upon the order of Court.

A petition was presented, under the Trustee Act, 13 & 14 Vict. c. 60, amended by the 15 & 16 Vict. c. 55, for the appointment of two new trustees, and for the transfer of the trust funds to them. One of the trustees was out of the jurisdiction.

The order was made in July last, but, as drawn up, it did not state that it appeared to the Court that the trustee was resident out of the jurisdiction. There was nothing, therefore, from which it could be collected that the case was within the Trustee Acts. The Bank of England objected to its not appearing on the face of the order, that the case came within the Trustee Acts.

Mr. Prendergast now asked that the order might be varied by stating that it appeared to the Court that the trustee was resident out of the jurisdiction.

The MASTER OF THE ROLLS directed that the required recital should be inserted.

See *In re Ellis's Settlement*, 24 Beav. 426.

WOOD, V.C. }
Nov. 12, 13. } WALROND v. WALROND.

Baron and Feme—Agreement for Separation—Specific Performance—Voluntary Deed—Illegal Consideration—Appointment of New Trustees.

By an agreement for a separation under seal B. W., in consideration of the agreements therein contained on the part of his wife J. W., covenanted with a trustee to pay for her separate use an annuity, in addition to the income to which she was entitled under her marriage settlement, and also to permit his daughter H. W. to reside with her; and J. W., who was entitled under her marriage

settlement to an annuity of 400l. to her separate use, without power of anticipation, covenanted with the same trustee, that so long as B. W. should perform his part of the agreement, she would maintain, &c. H. W., and would not allow B. W. to be sued for her debts. Upon demurrer to a bill filed by J. W. for specific performance of the agreement, and for the appointment of a new trustee,—Held, that such a bill could not be sustained, first, because there was no consideration for the agreement on the part of B. W.; secondly, because the stipulation as to the custody of the daughter was illegal; and, thirdly, because there was no trust property of which a new trustee could be appointed; and that to appoint a new trustee would be in effect to order fresh covenants to be entered into with a new covenantee.

A covenant by a married woman having property settled to her separate use, without power of anticipation, is not a sufficient consideration to support an agreement otherwise voluntary.

This was a demurrer to a bill for specific performance of articles of agreement for a separation between husband and wife.

The plaintiff, Lady Janet St. Clair Walrond, stated by her bill that she intermarried with the defendant Bethell Walrond, in November 1829; that prior to such marriage a settlement was executed, whereby, in consideration of the plaintiff's fortune being 10,000l., an annuity of 400l. was secured to be paid, during the joint lives of herself and her husband, to her or her appointees, without power of anticipation, and in default of appointment to her separate use; and that there was issue living at the time of filing the bill two children, viz. Harriott Walrond, who had attained the age of twenty-one years, and Henry Walrond, still an infant. The bill then stated, that "certain articles of agreement under seal, bearing date the 2nd day of May 1850, were made and entered into between the defendant B. Walrond, of the first part, the plaintiff, of the second part, and George Capron, who is a defendant hereto, of the third part; and thereby, after reciting, amongst other things, that the defendant B. Walrond and the plaintiff had agreed to live separate, * * and that upon the treaty for the said separa-

tion, it was contracted and arranged between the said parties thereto, that the defendant B. Walrond and the plaintiff should enter into such agreements as on their respective parts were thereafter contained, it was witnessed, that, in pursuance of the said agreement, and in consideration of the agreement and promises on the part of the plaintiff thereafter contained, he, the defendant B. Walrond, did thereby, for himself, his executors and administrators, promise and agree to and with the defendant George Capron, his executors and administrators, that he, the defendant B. Walrond, should and would, yearly and every year, during the joint lives of himself and the plaintiff, well and truly pay or cause to be paid to the plaintiff, or as she should from time to time appoint, an annuity of 250*l.* for her separate use, and without power of anticipation, in addition to the annual sum to which, under the marriage settlement, she might from time to time become entitled : and further, that he, the defendant B. Walrond, should and would from time to time, and at all times during the separation, permit and suffer the said Harriott Walrond to reside with her mother, the plaintiff, and should and would permit and suffer the plaintiff to have the care, controul, management, education, residence and support of the said Harriott Walrond ; and it was further witnessed that, in pursuance of the thereinbefore-recited agreement, and in consideration of the premises, the plaintiff did thereby, for herself, her executors and administrators, promise and agree to and with the defendant George Capron, his executors and administrators, that so long as the said annuity of 250*l.* should continue to be duly and regularly paid, in pursuance of the agreement and promise for that purpose on the part of the defendant B. Walrond, thereinbefore contained, and so long as the defendant B. Walrond, in pursuance of the further agreement and promise on his part also thereinbefore contained, should permit and suffer the said Harriott Walrond to reside with, and be under the care, controul and management of the plaintiff, she, the plaintiff, should and would maintain, provide for, educate and bring up the said Harriott Walrond, without making any demand or request of the de-

fendant B. Walrond for any further allowance as or for the maintenance or education of the said Harriott Walrond ; and, lastly, that so long as the defendant B. Walrond should continue well and truly to pay, or cause to be paid, the said annuity or yearly sum of 250*l.*, on the days and in the manner thereinbefore stipulated and agreed, she, the plaintiff, should not, nor would permit or allow B. Walrond to be called upon or sued for or in respect of any debt or debts which she might contract, either on her own account or on account of the said Harriott Walrond." The bill then stated, that the articles of agreement were duly executed by the defendant B. Walrond and the plaintiff ; that ever since the execution thereof the plaintiff and the defendant B. Walrond had lived separately ; that Harriott Walrond had resided entirely with the plaintiff, and had been entirely maintained and educated at her cost, and that the plaintiff had on her part done and performed all that by the said articles of agreement she promised and agreed to perform and do, and in addition to paying all the expenses of the maintenance and education of Harriott Walrond, had punctually paid and discharged all her own debts ; that the defendant B. Walrond had from time to time, with the knowledge and consent of the defendant Capron, paid various sums of money on account of the annuity ; but there was now a large arrear due to the plaintiff in respect thereof, which the defendant B. Walrond refused to pay ; and that the defendant Capron declined to take any steps for obtaining payment thereof, and also declined further to act as the trustee of the articles of agreement.

The plaintiff prayed that she might be declared entitled to have the articles of agreement specifically performed, and that the defendant B. Walrond might be decreed specifically to perform the same ; that an account might be taken of what was due in respect of the annuity, and that the defendant B. Walrond might be decreed to pay to the defendant Capron, or to some other trustee to be appointed in his stead, what should be found due ; that if necessary a new trustee might be appointed in Capron's place ; and for general relief.

To this bill the defendant Bethell Walrond demurred for want of equity.

Mr. Rolt and Mr. Jolliffe, in support of the demurrer, argued that the agreement being purely voluntary no bill to enforce it could be sustained.—

Jefferys v. Jefferys, Cr. & Ph. 138.

Guth v. Guth, 3 Bro. C.C. 614.

Wilson v. Wilson, 1 H.L. Cas. 538;
s. c. 5 Ibid. 40; 23 Law J. Rep.
(N.S.) Chanc. 697.

The Court could not appoint a new trustee of such a deed as this, for that would be to order the defendant to enter into fresh covenants with the new trustee; and covenant to allow the daughter to remain in her mother's custody was clearly void—*Vansittart v. Vansittart* (1).

[WOOD, V.C. referred to *Ward v. Audland* (2).]

Mr. H. F. Bristowe, in support of the bill.—The articles being under seal no consideration was necessary; but if so, the covenant by the wife was a sufficient consideration, as it would be binding upon the savings of her separate estate; at all events, if not a sufficient consideration to uphold the deed as against creditors, it was valid as against the husband himself.

Worrall v. Jacob, 3 Mer. 256.

Seagrave v. Seagrave, 13 Ves. 439.

Frampton v. Frampton, 4 Beav. 287.

Ross v. Willoughby, 10 Price, 2.

Augier v. Augier, Prec. in Chanc. 496.

Logan v. Birkett, 1 Myl. & K. 220;

s. c. 2 Law J. Rep. (N.S.) Chanc. 52.

Bateman v. Ross, 1 Dow, 235.

Barrymore v. Ellis, 8 Sim. 1.

The stipulation as to the custody of the daughter is not against public policy, she having attained twenty-one, and so far, therefore, as there was anything illegal in it, the illegality has ceased; but though such a stipulation may be void in itself, it will not render the whole deed invalid, if the other provisions are not against public policy.

Mr. Rolt, in reply, referred to 2 *Rop. H. & W.* 296.

[WOOD, V.C. referred to *Cooke v. Wiggins* (3).]

(1) 4 Kay & J. 62; s. c. 27 Law J. Rep. (N.S.) Chanc. 222, 289.

(2) 8 Sim. 571; s. c. C. P. Cooper, 146.

(3) 10 Ves. 191.

Nov. 13.—WOOD, V.C.—In this case the question on the demurrer is, whether or not, regard being had to the nature of the agreement which has been entered into by the plaintiff and her husband, there being a third party to the agreement, as a trustee, the bill can be sustained, either with respect to the specific relief asked, or with respect to the prayer for general relief. As regards the specific relief asked, I have no hesitation, and no difficulty, in saying that it does not appear to me that any of it can be granted. In the first place, the agreement is a voluntary agreement, being between the defendant, the husband, of the first part, his wife of the second part, and the trustee of the third part, and the only consideration is, not a consideration moving from the trustee in any way, either by way of covenant for indemnity or otherwise, but it is an agreement on the part of the wife, by which she, for herself, her executors and administrators, promises and agrees with the trustee, so long as the annuity shall be paid, that she will perform her covenants therein contained, and maintain Harriott Walrond, one of the issue of the marriage. It is quite plain that any agreement by her, a married woman, was entirely inoperative. The only possibility of suggesting a consideration was that which was urged by Mr. Bristowe, on the footing of the statement in the bill, that there had been a settlement previous to the marriage, by which the wife was entitled to an income for her separate use, but without power of anticipation. Now, although it is perfectly clear that a married woman may deal with respect to her separate property as a feme sole, yet she cannot so deal with respect to property to which she is entitled only without power of anticipation. This difficulty it was attempted to meet by the suggestion that she might hereafter acquire separate property, either by savings out of her existing separate estate or otherwise. But the observation that she might acquire separate property would apply to every feme covert. Every feme covert in the world might acquire separate property, but it would be absurd, on the ground of that possibility, to say that every married woman is therefore able to contract. The

deed is plainly without consideration. There is no appearance of any such consideration as that to which I referred in *Vansittart v. Vansittart*, viz., the abandonment of a right of suit in the ecclesiastical court. That has been recognized in many cases as a consideration sufficient to support a deed of this description. The question in *Vansittart v. Vansittart* was, whether the wife, in her proper person, inasmuch as she was the person suing in the ecclesiastical court, could not be held to be in a condition in which she could contract with reference to her interests in that suit. Here there is nothing whatever in respect of which the married woman can contract. The case is reduced simply to that of a mere voluntary deed. Then the question is, what relief can the Court give on a voluntary deed of this description upon the statement contained in the bill? If property is vested in a trustee under a voluntary instrument, no doubt the Court will operate on that property against the trustee, and will compel him to perform all the trusts in respect of that property which is vested in him. On the other hand, it will do nothing whatever against the author of the trust. It will take no steps whatever to enforce the completion or perfection of a trust on the part of a person who has entered into a voluntary engagement. Hence the only property that can be reached is such portion as is vested in the trustee. In the present instance, there is no property vested in the trustee at all, there is only a covenant on the part of the husband with that trustee. Therefore, when the bill asks that the articles may be specifically performed, and that an account may be taken by and under the direction of the Court as against the defendant, the covenanting party, and also that, if necessary, a proper person may be appointed as a new trustee of the articles of agreement, there is nothing in any one of those prayers that can possibly be decreed. I cannot operate against the covenanting party by decreeing him specifically to perform the agreement, which is merely voluntary; I cannot order him to account; I cannot substitute a trustee in the only mode in which a trustee can be substituted,

which would be by ordering the covenanting party to enter into a new covenant. For the only way in which a new trustee can be appointed is by directing the covenantor to enter into a new covenant, and that, with respect to a voluntary deed, of course, cannot be done. The only difficulty that was suggested to my mind was, with regard to the case of *Seagrave v. Seagrave* before Sir William Grant. There the question was this:—there was a voluntary deed of a similar character, though different in form (being a bond), to this, with a trustee appointed. The bond was enforceable by that trustee, and the trustee concurred with the obligor in destroying the bond, and by that fraud prevented the lady asserting such legal rights as she might have in a court of law. There Sir William Grant first of all considered—and the Court was obliged to enter into the consideration in giving such limited relief—whether there was a reasonable case for taking the instrument in itself to be valid, so that the plaintiff was only prevented from pursuing her right at law by the fraud of her trustee, and he then considered that the only relief which the Court could give was by directing the trustee to allow his name to be used at law. That is the only relief which can possibly be had, and it is the relief which, under the peculiar circumstances of that case, was given by Sir William Grant. It has also occurred to me that there might be other cases, such as a covenant with a trustee in respect of a wife (freed from any other difficulty arising upon this deed) for the maintenance of the wife and children, which in a mere voluntary instrument would not operate against the covenantor, but the Court might, if necessary, direct that the *cestui que trust* should be at liberty to use the name of the trustee upon giving an indemnity. However, independently of the alleged consideration of the deed, which I have not yet considered, the allegations in the bill certainly do not bring the case in any degree up to *Seagrave v. Seagrave* with respect to any fraud or collusion on the part of Mr. Capron, the trustee. The only charges as to Capron are, that the plaintiff has frequently requested him to enforce the payment, but nevertheless he

has neglected or declined to take any steps for the payment of the arrears; that he has acted in the trust, and that some other trustee ought to be appointed. It is not alleged that he colludes with the husband, or that an indemnity has ever been offered him in respect of suing. It may be that he declines because he might be directed to pay the costs of the action if such an action were brought. There is nothing, therefore, which in any degree implicates the trustee in any concurrence with the husband, in order that payment by the husband to the wife of this annuity may be avoided; and to say the least of it, before I could, on the prayer for general relief, overrule the demurrer on the ground that at the hearing the Court would direct that the plaintiff should be at liberty to sue, using the name of Capron and giving him proper indemnity, there must be a very different description of charges from those which are contained in this bill. Further than that, it appears to me that a serious difficulty does arise, even on the legal construction of the instrument, as to whether or not the plaintiff could possibly succeed at law. Although the consideration entirely fails because of the incapacity of the plaintiff to contract, yet, at the same time, the moving cause of the grant of the 250*l.* a year is twofold. It is expressed to be, in the first part of the articles, that they had agreed to live separate and apart, that it was agreed that the defendant and the plaintiff should enter into the agreement after mentioned, and then it says, it is witnessed in pursuance of that agreement, and in consideration of the agreement and promise on the part of the plaintiff thereafter contained, he, the defendant, enters into a covenant with the trustee for the payment of the annuity. Therefore, the moving cause for the payment of the annuity is the agreement, afterwards mentioned, on the part of the wife. There is a further declaration in the deed that Harriott Walrond, whom I must now take to have been an infant at that time, shall be permitted by the husband to reside with her mother, and that the defendant shall also permit the mother to have the care, controul, management, education, residence; and support of the infant child. The mother,

then promises for herself that so long as the annuity shall continue to be duly paid, and so long as the defendant shall also, in pursuance of his further agreement in that behalf, allow the infant to reside and remain with her, she will provide for, educate and bring up the infant, without making any demand on the husband for such maintenance and education. The consideration for the contract is a compound consideration, no doubt, because it is to extend during the life of the wife, which, of course, might extend beyond the infancy of the child; but the whole scheme of the contract, the whole consideration, is the taking by the wife of the child to reside with her, the removing of the child from the controul of the father, and the sole and exclusive superintendence of the management and education of that child. That has been considered, both in the case of *Vansittart v. Vansittart* and in the previous case of *Hope v. Hope* (4), to be such a contract as is void as being contrary to the policy of the law. Although the lady herself is incapable of entering into a contract binding on herself,—and, therefore, the instrument became, as against the husband, voluntary,—yet, on the other hand, it is plain that the whole motive and origin of the grant of 250*l.* per year is, amongst other things, the taking of this child away from the paternal controul for maintenance and support by the wife instead of the husband. It has been argued, however, that the child has grown up, has been educated, and has been maintained, and, therefore, that part of the consideration is dispensed with. I apprehend that the Court cannot so split the consideration as to say that where, in consideration of two things, such as the payment of a sum of money, and an unlawful contract, an annuity is agreed to be paid, and the unlawful contract is determined by subsequent events, the consideration should in some manner or other be split, and apportioned, in order that you may say, “either in whole or in part, I am now entitled to the provision which has here been made.” I apprehend that where the trustee is to

sue at law, the whole deed must be before the Court; and it appears to me, I confess, on the whole, that there would be very great improbability of the trustee succeeding in a contest of this description. The only averment, in truth, that I have in the bill is, that he has refused to sue. There is no averment that he has been offered any indemnity, and there is no difficulty alleged to be in the way of the plaintiff as to using his name. In point of truth, I believe there is no difficulty in her using the name, if the lady should be so advised. I have taken an opportunity of inquiring into it, and I have every reason to believe that she will experience no difficulty in that respect. But, without saying whether that is so or not, I apprehend that on this bill every portion of the specific relief must fail. The only relief that could possibly be granted would be under the prayer for general relief: upon that it might be said, I could give her leave to bring this action upon indemnifying the trustee. But I find that the prayer for general relief is unsupported by any allegation which could authorize me to interfere in that respect. Manifestly, the relief asked by the bill is such as cannot be obtained. The only relief ultimately will be, the bringing of that action, which she can bring just as well without the interference of the Court as with it, and, therefore, I am justified in saying that the right course is to allow the demurrer.

Mr. Bristowe.—The demurrer will be allowed without costs—*Vansittart v. Vansittart*.

Wood, V.C.—I allowed the demurrer there without costs because it was clear upon the face of the bill that a suit had been pending in the ecclesiastical court, and that a compromise had been come to. Here, were I to allow the demurrer without costs, I should be inducing the parties to go into evidence instead of stopping the whole case upon demurrer; a course which would not, I think, be for the benefit of the plaintiff. The demurrer must be allowed, with costs.

STUART, V.C. }
Dec. 4. }

DAVIES V. DAVIES.

Power of Appointment, Execution of—General Devise.

*A father, on his son's marriage, conveyed a certain farm to the use of himself and his wife successively for life, with remainder to the children of the son. A power was reserved to the father by deed or will to charge all or part of the hereditaments thereby settled, with any sum or sums not exceeding 500*l.*, for the portions of his younger children, and to create a term for securing the same. The father, by his will, devised the said farm to his son in fee, charged with the payment of legacies of 200*l.*, 200*l.* and 100*l.* to the testator's three daughters respectively. The will contained no reference to the settlement, and no limitation of any term, nor did the father otherwise exercise the power:—Held, that the will operated as an execution of the power of appointment, of which the father was donee under the settlement.*

By indenture of settlement, dated in April 1835, made on the marriage of John Davies, Peter Davies, the father of the said John Davies, conveyed a certain farm therein described as Glyn Ucha, together with other lands and hereditaments, to the use of himself (Peter Davies) for life, with remainder to his wife for life, with remainder to the children of the said John Davies, as he, the said John Davies, should appoint, with remainder in default of appointment to such children equally; and it was thereby declared, that it should be lawful for the said Peter Davies, by any deed or deeds, "or by his last will and testament, or any codicil or codicils thereto, to subject and charge all or any part of the hereditaments and premises thereby granted and released, with the payment of any sum or sums of money, not exceeding in the whole the sum of 500*l.*, for the portion of all or any one or more of the younger children of the said Peter Davies," as therein mentioned. And the indenture provided that, for the purpose of raising such portion and portions, it should be lawful for the said Peter Davies, by deed, or by his last will and testament, or any

codicil or codicils thereto, to limit and appoint all or any part of the said hereditaments and premises which should be so charged as thereinbefore mentioned, to any person or persons, for any term or terms of years, by way of mortgage, to raise the money so to be charged.

Peter Davies, by his will, dated June 1846, devised the said farm and lands of Glyn Ucha to his son, the said John Davies, in fee, subject, nevertheless, to and charged and chargeable with payment of the legacies of 200*l.* thereafter bequeathed to his daughter Eliza Williams, also the sum of 200*l.* thereafter bequeathed to his daughter Anne Williams, and likewise the sum of 100*l.* thereafter bequeathed to his daughter Catherine Davies; and in a subsequent part of his will he bequeathed the same legacies to his said daughters respectively.

The will contained no reference to the settlement, and no limitation of any term of years, nor did Peter Davies otherwise exercise the power limited to him in the above-mentioned indenture of settlement.

Peter Davies died in 1846, and the said John Davies subsequently paid the said legacies, amounting to 500*l.*, to the respective legatees.

The bill in this cause was filed by the said John Davies, praying that the sum of 500*l.* which he had so paid might be raised by sale or mortgage of part of the hereditaments comprised in his said marriage settlement, and that the same when raised might be paid to him.

Mr. Elmsley and *Mr. Currey*, for the plaintiff. — The power being limited in its operation to a particular class, the provision in the Wills Act, 7 Will. 4. & 1 Vict. c. 26. s. 27, that a general devise or bequest shall operate as an execution of a general power, had no application to the present case. The case, therefore, remained subject to the old law. The will of Peter Davies, though it contained no express reference to the power of which he was donee under his son's marriage settlement, must nevertheless be considered as an execution of that power. The devise of the estate subject to the power failed; and unless the charge by the will of 500*l.* upon the estate were regarded as an exe-

cution of the power, the will would fail altogether, the testator not having any other interest in the estate devised upon which the will could operate.—

Bennett v. Aburrow, 8 Ves. 609.

Curtis v. Kenrick, 9 Sim. 443.

Shelford v. Acland, 26 Law J. Rep. (N.S.) Chanc. 144.

Mr. Freeman and *Mr. C. Barber*, for the defendant, contended that the will was not an execution of the power. No reference was made by it to the power, nor did it create any term of years in the estate in settlement in order to raise the sums forming the subject of the power—*Jones v. Tucker* (1), *Hope v. Hope* (2).

STUART, V.C. held, that the case was governed by that of *Bennett v. Aburrow*, and made a declaration that the sums of 200*l.*, 200*l.* and 100*l.* were well charged by the will upon the hereditaments comprised in the settlement.

M.R. }
1858. } GREAVES v. WILSON.
July 29. }

Judgment—Determinable Lien.

If a mortgagor sells the mortgaged estate, and pays off the mortgagee, the estate in the hands of the purchaser ceases to be affected by a judgment which had been registered against the mortgagee.

The bill in this case was filed for the specific performance of an agreement for the sale of a public-house called "The John Bull," which the plaintiff had purchased at public auction. The decree made on the hearing was, that, the plaintiff waiving all objections of title to the premises, except the concurrence of Edward Sexton, Percy Calvert and William Henry Calvert (who were mortgagees of the property), their executors, administrators and assigns, in the assignment of the lease and premises, declare the plaintiff entitled to a specific performance of the contract (1).

(1) 2 Mer. 533.

(2) 18 Jur. 823.

(1) *Greaves v. Wilson*, 27 Law J. Rep. (N.S.) Chanc. 546.

A draft assignment was forwarded to the defendant's solicitors, and Messrs. Calvert were made parties to the proposed deed. It was, however, ascertained that there was a judgment for 69,000*l.* registered against Messrs. Calvert; the plaintiff therefore required the defendant either to satisfy the judgment, or to give up possession of the premises upon the purchase-money being deposited in the hands of third parties at interest. This was objected to by the defendant, and the conveyance was not completed. The plaintiff then gave notice of motion, asking that the plaintiff might be at liberty to pay the sum of 1,358*l.*, the balance of the purchase-money, into court; and that he might be let into possession of the premises.

Mr. R. Palmer and *Mr. Kay*, in support of the motion.—The estate was to be conveyed to the purchaser free from the mortgage of Messrs. Calvert, who, as mortgagees, claimed a sum of 1,595*l.* 2*s.*; there were, however, judgments against Messrs. Calvert for 69,000*l.*, and as these, by the 1 & 2 Vict. c. 110. s. 13, affected their charge upon the premises, they were an obstacle in the way of completing the purchase, and must be removed—*Harris v. Davison* (2).

Mr. Lloyd and *Mr. Smythe*, for the defendant.—The 1 & 2 Vict. c. 110. s. 13. made a judgment a charge upon all the lands of the debtor, and when registered under the 2 & 3 Vict. c. 11. it was assumed that the charge extended to the land of other parties upon which the judgment debtor had a mortgage. The owners of mortgaged lands, however, were at full liberty to sell their estates; and payment of the mortgage discharged the lands from being taken in execution under any judgment against the mortgagee.—

18 Vict. c. 15. s. 11.

Russell v. M'Culloch, 1 Kay & J. 313.

Shaw v. Neale, 6 H.L. Cas. 581;
s. c. 27 Law J. Rep. (N.S.) Chanc.
444: 20 Beav. 157; 24 Law J.
Rep. (N.S.) Chanc. 563.

Mr. Palmer, in reply.

(2) 15 Sim. 128; s. c. 15 Law J. Rep. (N.S.) Chanc. 255.

The MASTER OF THE ROLLS. — This motion is founded upon a misapprehension. Messrs. Calvert have not become bankrupts. When a mortgagee is paid off, after the passing of the 18 Vict. c. 15. s. 11, the effect of it is to make every conveyance of land determine the right of the judgment creditors, and that whether the mortgage was prior to the act or not: the judgment creditors of the mortgagee, therefore, cannot pursue the lands in the hands of a *bona fide* purchaser; and the judgments against Messrs. Calvert cannot affect the premises in the hands of the purchaser. The motion must be dismissed, with costs.

M.R. }
Nov. 19, 20. } SCHOFIELD v. HEAP.

Legacy—Children—Advances in Satisfaction.

A testator, by his will, made an equal division of his real and personal estate among his children; in the course of fifteen years afterwards he made advances of large sums to some of his daughters on their marriage, and to some of his sons on establishing them in business: to others of his sons and daughters he gave trifling sums only:—Held, that the small sums were intended as free gifts, but that the larger sums being for permanent advancements, were in part satisfaction of the benefits given to them by the will.

If a presumption arises that payments by a testator to his children were made in satisfaction of legacies they would become entitled to under his will, it is not rebutted by their believing such payments to have been gifts, when the belief is unsupported by any testimony of the intention of the testator.

John Heap, by his will, dated the 4th of December 1840, gave and devised all his real estate whatsoever and wheresoever in the county of York, and also all and singular his money, securities for money, book debts, household goods and furniture, stock in trade, goods, cattle, chattels, personal estate and effects whatsoever and wheresoever, unto his eight children, Jonathan, Ruth, Edward, Sarah, John, Agnes, Mark and Frederick, to be equally divided between them, share and share alike. And

in case any of his said children should happen to die under the age of twenty-one years, or before they should become entitled to the possession or receipt of their respective shares of the hereditaments and premises and personal estate thereinbefore given, devised and bequeathed to them, leaving lawful issue him or her surviving, then he gave, devised and bequeathed the share of him or her so dying of and in the said real and personal estate unto the lawful issue of him or her so dying, if more than one, to hold to them, their heirs, executors, administrators and assigns, as tenants in common, and not as joint tenants. But if any of such children so dying should not leave lawful issue him or her surviving, then he gave, devised and bequeathed the share or shares of him, her or them so dying of and in the said real and personal estate unto the survivors of his said children, and the issue of such as might be dead leaving children, such last-mentioned children only taking the share his, her or their respective parent would have been entitled to had he or she been living.

The testator died on the 3rd of February 1855.

The testator's daughter Ruth died on the 21st of February 1852, and this suit was instituted by John Schofield, her husband, on behalf of his six children, against the five sons of the testator, one of whom, "John," was of unsound mind, and the other four of whom had taken out letters of administration, with the will annexed, to the estate and effects of the testator. The bill charged that the testator had both before and after the date of his will, made large payments to or for the benefit of his said children, or some of them, other than Ruth Schofield, the mother of the plaintiffs, and that such payments were of the nature of advances, and ought to be accounted for as part of their respective shares of his real and personal estate: it then prayed for the administration of the personal estate, and that such advances might be taken into account as part of their respective shares of the real and personal estate.

The defendants Jonathan, Edward, Mark and Frederick Heap, by their answer, stated, that during the fourteen years which had elapsed between the making the testator's will and his death, the testator, as

they believed, had occasionally given money to his said children, or some of them respectively, by way of spontaneous favour and kindness and free gift, but not by way of portion or advancement, or in contemplated diminution of any benefit which such children or child might otherwise be entitled to under the provisions of his will; and that in the third schedule thereto they had set forth the several sums so by way of spontaneous favour and kindness and free gift given or advanced by the testator for the benefit of any of his said children, and the times of such gifts: and that they had found no entry or memorandum of the fact, amount or particulars of any such pecuniary gift among the books, papers or writings of the testator which had come to their hands as administrators of the testator, save the particulars of four several sums of 525*l.* 14*s.* 10*d.*, 114*l.* 8*s.* 1*d.*, 53*l.* 3*s.* 5*d.*, and 2*l.* 19*s.* 9*d.*, and which were expressly referred to in the said third schedule: and that such pecuniary gifts were never treated by the testator, or by his said children, or any of them, or intended to be treated or looked upon by the child or children receiving such gifts respectively, as matters of debt or account either as between the testator and such child or children, or as between them and the others of such children.

The third schedule was as follows:—To his daughter Sarah Robinson, on and after her marriage, 600*l.*: To his daughter Agnes Stead, on her marriage, 300*l.*, and various sums since that time, making altogether 580*l.*: To his son Jonathan, at various times small sums amounting (as estimated) to a sum not exceeding 50*l.*: To his sons Mark and Frederick, in 1850 or 1851, on their commencing business together as clothiers, after their dissolution of partnership with the testator, 1,000*l.*: To his sons Mark and Frederick, whilst in business on their own account between 1850 and 1853, various other amounts in money, goods, and in the use of his horses and carts for journeys, amounting altogether to 525*l.* 14*s.* 10*d.* (particulars of which were to be found in the testator's private memorandum books), "but defendants stated, it was always considered that the last-mentioned amount was advanced and allowed to the testator's sons to assist them in commencing business,

as he had always promised to do, and in satisfaction of their share of the stock and effects in their previous partnership with the testator, they not having received any part or share of such stock and effects in 1850, upon such dissolution."

To his son Mark Heap various amounts in money and goods at different times between 1850 and 1853, not exceeding 200*l.*, particulars of part whereof, amounting to 114*l.* 8*s.* 1*d.*, were to be found in the testator's private memorandum books.

To his son Frederick various amounts in money and goods between 1850 and 1855, not exceeding 100*l.*, particulars of parts whereof, amounting to 53*l.* 3*s.* 5*d.*, were to be found in the testator's private memorandum books.

To his son Edward, to pay for wool, 52*l.*, and sundry items appearing in memorandum books against his said son, amounting to 2*l.* 19*s.* 9*d.*, making altogether 54*l.* 19*s.* 9*d.*

On the 29th of July 1856, a decree was made in the cause, directing, amongst other things, an inquiry as to any sums paid by the testator after the date of his will to or for the use of any of his children, and the circumstances under which such payments were made, and whether the same were intended by him to be portions or advancements in life of such children respectively.

The chief clerk found that the several sums mentioned in the schedule to the answer of the defendants were paid by the testator for the benefit of the respective children therein named, under the circumstances therein stated, and that they were not intended by the testator to be portions or advancements in life of any of the said children.

Mr. Bagshawe, sen. and *Mr. Bagshawe, jun.*, for the plaintiffs.—The sums received by the testator's sons and daughters were portions given for their permanent advancement; such was the nature of a marriage portion, and also of sums given to promote or further the sons in business. The testator's accounts, though confused, were sufficient evidence of such an intention. The advances, therefore, must be adjusted and taken in satisfaction of their shares under the will.

Ferris v. Goodburn, 27 Law J. Rep. (N.S.) Chanc. 574.

Lady Thynne v. the Earl of Glengall, 2 H.L. Cas. 131.

Mr. J. Hamilton Humphreys, for John Heap.

Mr. Lloyd and *Mr. Shee*, for the defendants.—The advances made by the testator were free gifts, of which no account could be required. The intention of the testator was apparent from his will, which substituted children for their parents if they died before receiving their shares. Jonathan Heap had received 50*l.* only; his testimony with respect to these payments being gifts was therefore disinterested. It required but trifling circumstances to rebut a presumption of these payments being advances. As to the testator's accounts, it was impossible to collect from them any specific intention.

Nov. 20.—The MASTER OF THE ROLLS.—The evidence in this case amounts to nothing more than this: that the persons who received the several sums of money believed that they were bestowed upon them voluntarily, and by way of gift. The presumption, however, which arises is, that the sums of money were paid to the parties, who were the testator's children, in satisfaction of the provision made for them by the will; but this does not apply to the small sums given by the testator from time to time; they evidently must be considered as gifts, and it has not been contended that they were advancements. The evidence on which I am asked to act does not rebut the presumption which has arisen with respect to the larger sums; they were given to daughters on marriage and to sons upon their being established in business, and they must be considered as having been paid towards the satisfaction of what the children were entitled to under the will. I have not proceeded upon the authority of *Ferris v. Goodburn*, but upon the presumption usually made in cases of advancement which can alone be rebutted by evidence; there is, however, nothing but the statements of the parties who received the benefits. They had full liberty to bring forward such evidence as they thought fit, and there is no ground for allowing the

inquiry to be kept open. I must, therefore, declare that the 600*l.* and 300*l.* given to the daughters Sarah and Agnes, and the 1,000*l.* given to the sons Mark and Frederick, must be taken as advancements made in part satisfaction of their shares in the estate of the testator.

See *Palmer v. Newell*, 20 Beav. 32; s. c. nom. *Benham v. Newell*, 24 Law J. Rep. (N.S.) Chanc. 424; and, on appeal, 25 Law J. Rep. (N.S.) Chanc. 461.

Ex parte Pye, 18 Ves. 140; s. c. 2 Lead. Cas. Eq. 303, 2nd edit.

Davis v. Chambers, 7 De Gex, M. & G. 386.

Kirk v. Eddowes, 3 Hare, 509; s. c. 13 Law J. Rep. (N.S.) Chanc. 402.

STUART, V.C. }
Nov. 18. } EVERSFIELD v. THE MID-
LORDS JUSTICES. } SUSSEX RAILWAY COM-
Dec. 3, 8. } PANY.

Railway Company—Compulsory Power of purchasing Land—Taking of Soil—"Making and maintaining"—"Necessary for such Purposes."

A railway company had compulsory powers to purchase soil for their works, and to purchase such of the lands delineated in the plans, and within the limits of deviation indicated in the plans and books of reference, and to enter upon, take and use such of the said lands as should be necessary for such purposes. They entered upon a small piece of land belonging to A. B., situate within the limits of deviation, and made a contract with him for the purchase of the soil found thereon for the purpose of making an embankment, forming part of the railway works situate at some distance from the other lands of A. B. After this the company determined on the purchase of this small piece of land in fee simple, and gave the required notices for the assessment of its value. It appeared that the company did not want the small piece of land for any other purpose than that of taking the soil for the embankment. On a bill filed by A. B., one of the Vice Chancellors granted an injunction to restrain the company from taking the piece of land; and on appeal (the motion being turned into a

motion for a decree),—Held, that the fee simple of the land was not necessary for the making and maintaining the railway within the meaning of the parliamentary powers of the company, but that the soil alone being wanted, which they might purchase elsewhere under their powers, the injunction must be made perpetual.

This was a motion by the plaintiff, that the defendants, the Mid-Sussex Railway Company, their servants, agents and workmen, might be restrained by the order and injunction of the Court from further proceeding under, or in pursuance of, a notice dated the 27th of September 1858, which had been served upon the plaintiff by the defendants, and from taking any steps to procure the assessment of the purchase-money of the piece of land comprised in such notice, and to carry into effect the compulsory purchase thereof under the powers alleged by the defendants in such notice to have been conferred upon them by their act of parliament.

The facts of the case were the following :—The piece of land referred to in the above-mentioned notice, and which the defendants therein proposed to take under the powers of their act, was within the limits of deviation allowed by the company's act, and belonged to the plaintiff, a farmer, and the owner of a considerable quantity of freehold land in the parish of Horsham. The defendants' line of railway, so far as it abutted upon and passed through the plaintiff's property, was nearly completed, they having already purchased of the plaintiff so much of his land as was necessary for the site of the railway. The land comprised in the notice had, by arrangement with the plaintiff, been previously entered upon by the defendants for the purpose of excavating therefrom soil to a certain depth, to construct the embankment of their railway at a point about half a mile from the land in question. Finding, however, that, unless they were allowed to excavate to a greater depth, they would be unable to obtain from this piece of land sufficient soil for their purposes, the defendants entered into a contract with Mr. Thorpe, the owner of land adjoining to the piece of land in dispute, to convey to him the parcel of land described in the notice after they should have

purchased it under the powers given to them by their act, in consideration of his allowing them to excavate the quantity of soil they should require for their embankment from a field belonging to him.

The plaintiff's bill alleged that, under these circumstances, the notice to treat for the purchase of the said piece of land which had been served upon them was not a *bond fide* exercise of the powers vested in the defendants by their act of parliament, and that the said parcel of land was not required by them for the purposes of their railway within the meaning of the said act, but was required by them merely for the purpose of enabling the company to carry into effect their agreement with Mr. Thorpe.

The prayer of the bill was in the terms of the notice of motion.

The company's act of parliament, 20 & 21 Vict. c. cxxxiii., incorporated with itself the Lands Clauses Consolidation Act, and the Companies Clauses Consolidation Act, and, by the 24th section, after reciting that the plans and sections of the intended line of railway, and of the lands through which it was to pass, had been duly deposited with the clerk of the peace for the county of Sussex, it was enacted that, "subject to the provisions in this act and the said incorporated acts contained, and to the powers of deviation given by the said acts, it should be lawful for the said company to make and maintain the said railway and works on the line and upon the lands delineated in the plans and described in the book of reference, and according to the levels shewn in the said plans and sections, and to enter upon, take and use such of the said lands as should be necessary for such purposes."

The plaintiff moved for an injunction according to the terms of the prayer of his bill, before Stuart, V.C.

Mr. Bacon and *Mr. Eddis* appeared for the plaintiff, citing—

Stamps v. the Birmingham and Stour Valley Railway Company, 2 Phill. 673; s. c. 17 Law J. Rep. (n.s.) Chanc. 431.

Bentinck v. the Norfolk Estuary Company, 26 Law J. Rep. (n.s.) Chanc. 404.

Mr. Malins and *Mr. Waller*, for the defendants.

STUART, V.C. made an order in the terms of the notice of motion.

The company appealed, and by arrangement between the parties and leave of the Court, the motion was turned into a motion for a decree.

Some part of the evidence is referred to in the judgment.

The same counsel appeared on the appeal as on the motion in the court below.

Dec. 8.—LORD JUSTICE KNIGHT BRUCE said that the question which was then under appeal before the Court arose upon a motion for an injunction in this case, which, however, by the consent of both parties, had been converted into a hearing of the cause upon the plaintiff's motion for a decree; and it referred to the right of the defendants, the Mid-Sussex Railway Company, to acquire by purchase from the plaintiff the fee-simple of a very small piece of land near Horsham, which was in itself of very little value to either party, but which, from its having been made the subject of this dispute, had acquired an apparent importance. The question was, whether the land was "necessary" for the purposes of the defendants' railway? If it was, their contention was right; but if it was not, they were wrong. It appeared to be conceded that they had no use for the land, strictly speaking; but that all they required it for was, for the purpose of taking the loam or soil, of converting it into a movable chattel for making or repairing an embankment on their line; which embankment, however, was not upon the land in dispute itself, but elsewhere and at some distance from it. He (Lord Justice Knight Bruce) had come to the conclusion that, in the circumstances, the defendants were entitled to buy the soil at a price which might be determined in the manner pointed out by the act of parliament; but this did not authorize them compulsorily to purchase the fee simple. In these circumstances, therefore, the plaintiff was justified in resisting the pretensions of the defendants; and he had done so, to say the least, with as good reason as the defendants could desire. The

injunction granted by his Honour would, therefore, be continued; and as to the costs of the suit, his Lordship said that he was unable to convince himself that they ought justly to be refused to the plaintiff.

LORD JUSTICE TURNER stated the facts, and observed that the piece of land in question was, no doubt, within the limits of deviation allowed by the company's act of parliament; but still he thought that it was not required or necessary for making the railway itself, or for any purpose connected with that object. The sides of the embankment, for which it was said that the soil constituting the plaintiff's land was necessary, did not reach to the land; and besides this, as the line of railway had been actually laid down already, how could it be maintained that the land would be wanted for any deviation? By the 24th section of the company's act, it was enacted, "That subject to the provisions in this act and the said incorporated acts contained, and to the powers of deviation given by the said acts, it should be lawful for the said company to make and maintain the said railway and works on the line and upon the lands delineated in the plans and described in the book of reference, and according to the levels shewn in the said plans and sections; and to enter upon, take and use such of the said lands as should be necessary for such purposes."

The act, then, did not empower the company to take all the lands, but "such as should be necessary for such purposes"—that is, for making and maintaining the line. It occurred to his Lordship during the argument—and the point had been taken up by counsel—that the expression "necessary" might mean necessary in the judgment of the railway company. No doubt that was so to a certain extent; for any deviation in the line must be left to the judgment of the company, and to that extent the word must have the construction contended for; but it did not follow that it should have the same construction in all cases, and his Lordship was of opinion that it ought not to do so. If it were otherwise, the company would be entitled to take all the lands mentioned in their plans, which the act clearly did not contemplate. And he was the more satisfied that

this was the right view, because it was well established that such acts as the present ought to be construed strictly with regard to the rights of the company. The question therefore was, whether this land was necessary for making or maintaining the railway, not in the judgment of the company, but in the judgment of the Court, on the result of the evidence which had been given before it. It was to be observed that the words were not "to make," but "to make and maintain,"—words which pointed to permanent not temporary usage. He (the Lord Justice) was of opinion that this land was not necessary for "making and maintaining" the line. No witness had gone so far as to say that it was, except the sub-contractor, who, in his first affidavit, merely said that it was "of great importance," but in his second affidavit he went further, and said that it was the cheapest and most convenient land, "and, in fact, necessary" for the company to possess. His Lordship was at a loss to see how it could be necessary; the defendants only wanted the soil, and they had full power to take that under the Railways Clauses Consolidation Act, without purchasing the freehold. He did not mean to say that a piece of land was in no case necessary to a railway company unless their line passed over it, but in this case it was clear that the defendants only wished to sell the land to another person, Mr. Thorpe, so as to make a new and more advantageous contract with him for the soil. The injunction was therefore most properly granted by the Vice Chancellor, and must be made perpetual. As to the costs, his Lordship was not at all satisfied with the conduct of the company. They suggested at first that they wanted the land for "an extraordinary purpose," in order to bring the case within the powers of the act. But this was not their real object. They wanted no station there. Their real purpose was to re-sell the land to Mr. Thorpe, and there was great reason to believe that their motive all along was to rid themselves of the contract with the plaintiff (a disadvantageous one certainly) for buying the soil at 8*d.* a yard. Looking at their affidavits, and at the whole nature of the case, he was of opinion that all the costs of the suit, including the costs of

both motions, must be borne by the railway company. The injunction must be made perpetual.

[IN THE HOUSE OF LORDS.]

1858.
June 4, 7; } ABBOTT v. MIDDLETON.
July 9. } RICKETTS v. CARPENTER.

Devise—Words introduced.

A testator, in 1834, devised a certain sum of money to be secured so as to raise an annuity of 2,000l. for his wife, "and on her decease the sum set apart for such payment to become the property of my son, G. C, so far as he shall receive the interest on the said sum during his life, and on his demise the principal to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters." This son married and had a son during the life of the testator, and died before the testator:—Held, (affirming the decree of the Master of the Rolls, Lord Cranworth and Lord Wensleydale dissentientibus) that this son was entitled to the fund, for that the whole context of the will required that "dying before his mother" must be read "dying without issue before his mother."

Two appeals were presented, each set of appellants having the same interest. No costs were given.

This was an appeal against a decree of the Master of the Rolls.

The facts of the case and the terms of the will, the subject of discussion, have already been given in the report of the case below (1). The testator, by his will, dated the 7th of March 1834, had directed certain property to be so secured as to raise an annuity of 2,000l., which he gave to his wife, Hester Carpenter, for life, "and on her decease the sums set apart for such payment to become the property of my son George Carpenter, now Captain in His Majesty's 41st Regiment of Foot, so far as he shall receive the interest

on the said sum during his life, and on his demise the principal sum to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters." The son George was at that time unmarried, but married a few months after the date of the will and had a son. Having arrived at the rank of Lieutenant-Colonel, he commanded his regiment on the 5th of November 1854 at the Battle of Inkermann, and was there killed. The testator died in January 1855, and his wife some time after him. G. W. Carpenter, the grandson and heir-at-law of the testator, was at the time of his father's death about eighteen years of age; he claimed the property under the bequest in the first part of the will. It was contended, on behalf of the children of the sisters, that the testator's son George having died before his mother, the bequest to him became void, and the property went over to the children of the daughters. A suit was instituted by the trustees under the marriage settlement of one of these children to have the trusts of the will declared. The Master of the Rolls held, that the words "without leaving a child" ought to be introduced after the word "dying," and that the grandson of the testator was entitled to the fund. This was an appeal against that decree.

The Attorney General and Mr. R. Palmer (with whom were Mr. Lloyd, Mr. Goldsmid and Mr. L. Bird), for the appellants, contended that the plain literal meaning of the words in this will must be adhered to, and that there was no authority which would justify the introduction of the words "without leaving a child" into the will. They cited—

Grey v. Pearson, 6 H.L. Cas. 61; s. c. 26 Law J. Rep. (N.S.) Chanc. 473.

Brownsword v. Edwards, 2 Ves. 243.

Doe v. Jessop, 12 East, 288.

Denn v. Bagshaw, 6 Term Rep. 512.

Hodgson v. Ambrose, 1 Dougl. 336, 340.

Holmes v. Cradock, 3 Ves. 317.

Parsons v. Parsons, 5 Ibid. 578.

Shuldham v. Smith, 6 Dow, 22.

(1) 25 Law J. Rep. (N.S.) Chanc. 113.

Spalding v. Spalding, Cro. Car. 185.
Toldervy v. Coll, 1 Mee. & W. 250;
 s. c. 1 You. & C. Exch. 621; 5 Law
 J. Rep. (N.S.) Ex. Eq. 25.
Gundry v. Pinniger, 1 De Gex, M. &
 G. 502; s. c. 21 Law J. Rep. (N.S.)
 Chanc. 405.
Kerr v. Innes, 5 Paton, 320, 422.
Atkins v. Atkins, Cro. Eliz. 248.
Fearne's Cont. Rem. 418.
Doe v. Dacre, 1 Bos. & P. 250.

[LORD BROUGHAM referred to *Langston v. Langston* (2).]

The Solicitor General and *Sir R. Bethell* (with whom was *Mr. C. Hall*), for the respondent, insisted that to read the words in this particular clause as contended for on the other side, would be to defeat what, upon all the rest of the will, was the plain intention of the testator. They commented on the cases already cited, and in addition referred to—

Eden v. Wilson, 4 H.L. Cas. 257.
Hillarsdon v. Lowe, 2 Harc, 355; s. c.
 12 Law J. Rep. (N.S.) Chanc. 321.
Mandeville's case, Co. Lit. 26 b.
Doe v. Micklem, 6 East, 493.
Kirkpatrick v. Kirkpatrick, 13 Ves.
 476.
Lewis v. Rees, 3 Kay & J. 132;
 s. c. 26 Law J. Rep. (N.S.) Chanc.
 101.
King v. Melling, 1 Vent. 225.
Hewet v. Ireland, 1 P. Wms. 426.
Gee v. the Mayor, &c. of Manchester,
 17 Q.B. Rep. 737; s. c. 21 Law J.
 Rep. (N.S.) Q.B. 242.
Home v. Pillans, 2 Myl. & K. 15;
 s. c. 4 Law J. Rep. (N.S.) Chanc. 2.
Edwards v. Edwards, 15 Beav. 357;
 s. c. 21 Law J. Rep. (N.S.) Chanc.
 324.
Malcolm v. Taylor, 2 Russ. & M. 416.
Ellicombe v. Gompertz, 3 Myl. & Cr.
 129.
Morrall v. Sutton, 1 Phill. 533; s. c.
 14 Law J. Rep. (N.S.) Chanc. 266.
Baker v. Tucker, 3 H.L. Cas. 106.

THE LORD CHANCELLOR (LORD CHELMSFORD) said, it was impossible to entertain

doubt as to the testator's real intention, but his judgment here would proceed, not on any conjectural matter of that kind, but on the words of the will itself. He entirely agreed with the rule of construction stated in *Grey v. Pearson*, but that rule was only applicable when the language of the will was clear and unambiguous. In cases where that was not so, Courts of construction had a right to introduce words in case of necessity, as stated by Lord St. Leonards in the passage cited from *Eden v. Wilson*, though, of course, that right was to be cautiously exercised. This was a case in which the intention was so clear that there could be no doubt as to the propriety of exercising it. This was not like a gift to A, and if he should go to Rome, then over, for such an event was wholly collateral to the previous limitations. There was a safe and reasonable principle of construction stated by Lord Brougham in *Home v. Pillans*, that where there was a clear gift, it could only be retracted by plain and unambiguous words. There was no necessity to overrule the case of *Holmes v. Cradock*, because that was one of a class of cases in which an interest was to take effect upon an event which never happened, and as it seemed to him, those cases were all inapplicable to the present. The authority to supply words which would make the whole will intelligible and consistent was stated in a large number of cases. The first was that of *Spalding v. Spalding*, which was adopted in *King v. Melling*, *Kentish v. Newman* (3), *Hewet v. Ireland* and *Doe v. Micklem*. The case of *Targus v. Puget* (4), which was a case on the construction of marriage articles, was a strong authority on the same point. Here, too, the event on which the gift over depended was one which affected the father's life interest only, and did not touch the estate of his children. It appeared to him, therefore, that without going out of the will, but on the contrary from an exact adherence to its obvious intention, the respondent must be held to have taken a vested interest in the capital fund set apart for the benefit of the testator's widow during her life, and that the

(3) 1 P. Wms. 234.

(4) 2 Ves. 194.

decree of the Master of the Rolls must be affirmed.

He ought to add, that Lord Brougham, who heard this case argued at the time of the argument, entertained the same opinion which he, the Lord Chancellor, had now expressed.

LORD CRANWORTH.—The rule had been very distinctly expressed in the case of *Eden v. Wilson*, that you were not unnecessarily to introduce or interpolate words into a will, but you might do so where the plain and obvious intention of the will absolutely required it. Was such a plain and obvious intention to be found in this will? He thought there was not. Every will must be in writing, and, as a necessary consequence, the meaning must be discovered from the writing itself, aided only by such extrinsic evidence as was necessary in order to enable the Court to understand what the testator meant. None was necessary here. The intention that, unless the son survived his mother, the son's children living at his death should take no part of the money set aside to secure the annuity, could not have been more aptly expressed than by the words here used, and the House was not, therefore, at liberty to depart from those words, and to assume that the testator had an intention the opposite of what he had expressed. If the language admitted of two constructions, a Court might reasonably adopt that which would avoid anomalies and contradictions in the construction of the will; but here there was but one construction to be put upon the words used. There had been cases put in argument to shew that a man might have good reason for introducing such a clause into his will, and that being so a Court must be guided by the words used, and must not presume that such a reason did or did not exist. The gift over, by having put upon it the construction which seemed to him the proper one, would not, as had been argued, deprive the widow of the fund in the event of the son dying in her lifetime, for the will was express that the fund was to go over on her decease, which meant not before her decease. The will might be read as if the testator had said, "I give the fund to my son, but if he dies before my wife then I give it over, and I direct that my son's

children shall not take what I have given him absolutely, but that it shall be considered as settled on him for life, and afterwards on any children he may have," and this seemed the fair interpretation of the words which had been used. He had, therefore, come to the conclusion that there was nothing to shew that the words in question were to be construed otherwise than according to their obvious meaning, and that there was nothing on the face of the will to shew that the gift over was only to take effect if the son should have no issue. He had carefully examined all the cases, but the difference of the words in each will was such as to afford little aid in construing any other. The cases of *Malcolm v. Taylor* and *Ellicombe v. Gompertz*, which were discussed by Vice Chancellor Wigram in *Hillersdon v. Lowe*, were cases of what had been called referential construction, and did not apply to a case like the present. Again, in *Spalding v. Spalding*, the construction was necessary, for on no other than that which had been given could all the provisions of the will have been carried into effect. That was again the case in *Home v. Pillans*, and all the cases of that class were very ably disposed of by the Master of the Rolls in *Edwards v. Edwards*. The cases on the construction of marriage articles could afford no guide in construing a will, where the intention of the testator was the chief matter to be considered; whereas, in marriage articles, the Court had always treated a provision for the children as the chief object in view. None of the cases cited appeared to him to render any material assistance in deciding this case, and, therefore, on the short ground that there was no doubt as to the meaning of the words used, considered by themselves, and that there was nothing on the face of the will to point to any other than their ordinary meaning, he was of opinion that the decree of the Court below ought to be reversed.

LORD ST. LEONARDS meant in his construction of this will to abide by the strict rules of law applicable to a case of this kind. He adhered to what he had stated in *Eden v. Wilson*: they were not at liberty to transpose, add or alter without absolute necessity. The intention to be found on the face of the will could alone justify

anything of that kind. To ascertain that, they might place themselves in the situation in which the testator stood. The intention was to be gathered from the whole of the instrument. What was the intention as shewn on the whole of this will? an intention not to be ascertained by conjecture, but by the obvious meaning of the whole context. The property was given to the son's children without any ambiguity, so that if it was to be taken away from them it must be taken away by clear words to that effect. There was no intention shewn to defeat the gift to the issue of the son. Then, if there had been a second gift, and the words were confined to "after the death," that must be considered as "after the death without issue," because of the force of the previous gift, and because in the second gift there was nothing to cut down the previous gift. If the son survived the mother there was no doubt that his children would take: the gift over did not destroy all the interest that had previously been given to them. The testator did not intend that the children of his son should be wholly dependent on their father: he meant to make an absolute positive provision for them, independently of what they might obtain under the gift of the residue to their father. It must be assumed here that the gift was to those children only who were living at the death of their father. But that did not alter the question. The death of their father's mother was immaterial to them, except so far as it was made a condition. Where gifts were intended to be cut down, the words cutting them down were generally introduced by some stronger word than "but," and there must, therefore, be a distinction made between cases where gifts were properly cut down and those where such a result was only to be inferred from imperfect statements of the event on which the testator intended to found the gift over. In this will it seemed to him that the testator intended to cut down the gift to his son's children only in the event of their failing, and of their father predeceasing his mother. He did not mean that the property being once in the son's family it should go over to the children of the sisters, for whom he had already fully provided. It was reasonable that the

property should go over if the son did not live and left no children. The case of *Mandeville* was exactly in point with the present. There the devise was to A. and the heirs of his body; and "if the devisee die, the same lands" to B. in fee, and "the Court held, that the devisee should have an estate tail by the first words, and no estate by the latter words." There was nothing which cut down the first gift. *Atkins v. Atkins* was there referred to, and it was a most important case, for it shewed the strength of the rule not to cut down a previous estate, except upon clear and express words. The cases of *Wallop v. Darby* (5) and *Luxford v. Cheeke* (6) proceeded on the same principle. The case of *Spalding v. Spalding* was exactly like the present, except so far that this was stronger, for there the heirs took through the father: here they took independently of him. And there the decision went upon the whole context of the will. That case had been, as the Lord Chancellor had already observed, adopted and acted upon in numerous instances. There were a good many other cases which also bore upon this question. Perhaps the most important of them was that of *Newburgh v. Newburgh*, of which he believed that the only report existing was to be found in the "Law of Property as administered in this House (7)." That case was very fully argued and very carefully considered. Mr. Buller ran his pen through the word "Gloucester" by mistake, and then the word "counties" was altered into "county"; but this House, upon the construction afforded by the other clauses in that will, decided that the words of the gift must be read as including the Gloucestershire estates. That authority was most important on the question of supplying words to complete a defective description of an event, where the general context shewed what that description had really been intended to be. *Langston v. Langston*, also in this House, bore upon the same point. There, too, an eldest son had been excluded by a mistake in one line of a will; but this House, on the context of the whole will, held him entitled. The case of *Doe v. Micklem* was important. There the words

(5) *Yelv.* 209.(6) 8 *Lev.* 125.(7) *Page* 367.

"after her death" were supplied by construction. Another case, of *Lyon v. Geddes* (8), followed the same rule; and so did *Pearshall v. Simpson* (9). The case of *Malcolm v. Taylor* was a strong case, and he entirely acceded to the doctrine there, that gifts over, where not clearly expressed to defeat previous gifts, must be taken as gifts in succession. He was here under the necessity of adopting a construction which would cut down a previous gift, or he must supply words according to the general intention. He adopted the latter course as that which was the more consonant with principle and authority. He broke in upon no rule and disturbed no settled axiom of law; on the contrary, he had always endeavoured to keep within those rules, at the same time making them binding so as properly to meet the justice of the case. He was of opinion that the decree of the Master of the Rolls should be affirmed.

LORD WENSLEYDALE.—This case was one of many of a similar nature, in which the mind was imperceptibly tempted to swerve from the established rules of construction by the apparent hardship of the case, and the highly probable conjecture that the testator never could have meant what he had expressed. Nothing could be more reasonable than to suppose that he meant in this case that his son's children should take the property after their father's death, whether he died in his mother's lifetime or not. But the rules which were to govern the construction of wills, as well as of all other written instruments, were clearly established, and it was impossible to overrate the importance of adhering to them. It was better, as Mr. Fearne said, that the intentions of twenty testators every week should fail of effect than that the rules should be departed from, upon which the security of titles and the general enjoyment of property so essentially depended. The question, as Sir J. Wigram correctly stated, in his work on the Application of Parol Evidence to the construction of Wills, was, "not what the testator meant, but what is the meaning of his words?" The use of the expression that the intention of the testator was to be the

guide, unaccompanied by the constant explanation that it was to be sought in his words, and a rigorous attention to it, was apt to lead the mind insensibly to speculate upon what the testator might be supposed to have intended to do, instead of strictly attending to the true question, which was, what did that which he had written mean? The will must be expressed in writing, and that writing only was to be considered. It was now universally admitted that, in construing that writing, the rule was to read it in the ordinary and grammatical sense of the words, unless some obvious absurdity or some repugnance or inconsistency with the declared intentions of the writer, to be collected from the whole instrument, followed from it, and then the sense might be modified so as to avoid those consequences, but no further. This rule was, in substance, laid down by Mr. Justice Burton, in *Warburton v. Loveland* (10), and had previously been described by Lord Ellenborough, in *Doe v. Jessop*, as "a rule of common sense as strong as can be." It had been stated as the "cardinal rule," from which, if we departed, we should launch into a sea of difficulties not easy to fathom, by his noble and learned friend when Lord Justice — *Gundry v. Pinniger* (11), and as the "golden rule" when applied to acts of parliament, by Chief Justice Jervis, in *Matteson v. Hart* (12), and by the late Mr. Justice Maule as "the most general of rules, a rule of great utility," in *Guthrie v. Cupper* (13). Many other cases might be cited, but there was no doubt of the generality and excellence of the rule. It was consistent with this rule that words might be supplied or rejected when warranted by the context of the will, but not merely on conjectural hypotheses of the testator's intention. Fairly applying the above rule of construction, he could not feel a doubt as to construing the words of this will. What the testator had written was perfectly clear from beginning to end. He had stated as distinctly as words could state anything, that the capital provided for the payment

(8) 9 East, 170.

(9) 15 Ves. 29.

(10) 1 Hud. & Bro. Irish Q.B. Rep. 648.

(11) 21 Law J. Rep. (N.S.) Chanc. 403.

(12) 14 Com. B. Rep. 385; s. c. 23 Law J. Rep. (N.S.) C.P. 108.

(13) 24 Law J. Rep. (N.S.) C.P. 71.

of the annuity was to go to the children of his daughters if his son died in the mother's lifetime. No other part of the will was repugnant to this. There was no inconsistency in defeating a prior limitation upon a particular contingency. The word "but" had two meanings, but whether it meant in this case "moreover" or "without this," or "except," the meaning of the words supplied was precisely the same. If the son died in the mother's lifetime the fund was to go over to the daughter's children. The addition to that of died "without issue" was mere conjecture. Conjecture must not be resorted to, for though the testator might have intended to give this fund to the son's children, he might also have intended not to give it to them if certain circumstances occurred, and no Court could found its decision on such grounds. If the condition had been that of his son's not going to Rome or to Florence, or anything of that sort, the House would not have supplied words to convert that absolute condition into one of a mixed or contingent kind. These speculations were vain and idle. If the words were, as they were, clear and intelligible, they must not be deprived of effect, unless an inconsistency in them with the context could be made out with equal plainness. Such an inconsistency between the gift to the children and the condition to take it away he could not see. Nor could the words "subject thereto" be introduced, for they were not in the will, and the words, though not so startling at first sight, were as much a material introduction as the words "without issue." There was no authority to introduce any such words. It was a mistake to suppose, as had been suggested, that if the words were read as they stood, the result would be to deprive the mother of her income should the son die in her lifetime, for the word "then" had other meanings besides "at that time," and must receive that meaning which could not defeat the testator's intention to provide an income for his wife. The citation of cases was generally of little use in the construction of wills which depended on the meaning of words in instruments differing much from each other. But they did not justify the introduction of the words into this will. In *Spalding v. Spalding* the context of the

will plainly required such an introduction. That was not so here, and yet that was the leading case on which the argument was founded. In his opinion the will here was clear, the words used were unequivocal, and the whole context did not contradict those words. He thought, therefore, that the decree of the Master of the Rolls ought to be reversed.

Decree of the Court below affirmed.

A discussion followed about costs. There were two sets of appellants, but both were in the same interest.

Their Lordships at first thought of giving costs out of the estate, allowing only for one set of appellants; but it was suggested that if they gave costs as to one set of appellants only, the second appeal must be dismissed with costs; on which it was ordered that there should be no costs.

WOOD, V.C. }
Nov. 10, 11. } BARCLAY v. MASKELYNE.

Legacy—Revocation—Mistake.

A bequest in a will of specific chattels to H,—Held, not to be revoked by a gift of the same chattels by codicil to other legatees, it appearing that the last-mentioned gift was founded on the supposition that the chattels had been by the will bequeathed to C, and that the bequest had lapsed by his death.

Charles Kelsall, by his will, dated the 5th of April 1851, devised and bequeathed his freehold villa and dwelling-house at Hythe, with the garden and appurtenances thereto belonging, and all the household furniture and implements of household, &c., which were then, or should at his death be, in and about his said villa, unto the Hon. Robert Charles Herbert, his heirs, executors and administrators, if he should be living at the testator's death, and if he should be then dead, unto the Hon. William Henry Herbert, his heirs, &c.

On the 1st of May 1855 the testator made a sixth codicil to his will, which, so far as it is material to the present purpose, is as follows:—"This is a codicil to the will of Charles Kelsall, Esq., of Hythe, Southampton, which will is dated

April 4th, 1852. I hereby revoke and cancel the legacy of my villa at Hythe, bequeathed in my will to the Hon. Robert Clive and his heirs, he being lately deceased, and my connexion with his family thereby almost null, which legacy is hereby cancelled. I hereby give and bequeath my aforesaid villa at Hythe, near Southampton, with all its furniture, appurtenances and ornaments, both within and without doors, conjointly to the three sisters, Charlotte, Antonia and Agnes Maskelyne, daughters of A. S. Maskelyne, Esq."

The testator died on the 3rd of January 1857, seised of the villa at Hythe, and the garden and grounds belonging thereto, and of no other real estate.

Robert Charles Herbert was still living, and one of the questions which arose upon the construction of the will and codicils was, whether the bequest to him was revoked by the operation of the sixth codicil.

Mr. Willcock and *Mr. Kay* contended, for the substituted legatees, that there was a clear revocation of the gift to R. C. Herbert, either in direct words, or at all events by the operation of the subsequent inconsistent bequest of the same subject-matter to the three Maskelynes. They referred to—

Re Hough's Estate, 15 Jur. 948; s. c.

20 Law J. Rep. (N.S.) Chanc. 422.

Evans v. Evans, 17 Sim. 107.

Campbell v. French, 3 Ves. 321.

Doe d. Evans v. Evans, 10 Ad. & E. 228; s. c. 8 Law J. Rep. (N.S.) Q.B. 284.

The Attorney General v. Ward, 3 Ves. 327.

Doe d. Hearle v. Hicks, 8 Bing. 475; s. c. 1 Mo. & Sc. 759; 1 Cl. & F. 20; 6 Bligh, N.S. 37.

Mr. Daniel and *Mr. H. F. Bristowe* appeared for the Hon. R. C. Herbert, but were not called upon to argue the case.

WOOD, V.C.—I have had time to consider this point during the argument, both of yesterday and to-day; and though this case may be new in some respects, it is on the general principle that it must be decided. Whatever degree of doubt may

be cast on one's mind as to the intention in the codicil, I think there is not sufficient indication of intention to overcome the clear and certain, and express gift in the will. That is the point one has to try in all these cases, where difficulties arise between a will and a codicil. The great value of the case of *Hearle v. Hicks* consists in the enunciation of the principle by the House of Lords, although the particulars of that case cannot be applied to any other; but there Tindal, C.J., in delivering the opinion of the Judges, commences with that proposition and terminates with it. Each of the Judges had a different reason for coming to a particular conclusion. Tindal, C.J. says, "The general principle upon which this opinion proceeds may be stated thus:—The testator does by his will shew a clear and manifest intention to devise the Plomer Hill Estate to his wife for life, or during her widowhood. If such devise in the will is clear, it is incumbent on those who contend it is not to take effect, by reason of revocation in the codicil, to shew that the intention to revoke is equally clear and free from doubt with the original intention to devise; for if there is only a reasonable doubt whether the clause of revocation was intended to include the particular devise, then such particular devise ought undoubtedly to stand." So that, although I should arrive at the conclusion that there was a reasonable doubt on the codicil, I should not say that it was the intention, under the circumstances, to revoke this gift, if it amounts only to doubt; or whatever reasonable degree of doubt there may be, still, as it is only a doubt, and the devise itself is plain and clear, that devise must stand. "Upon the whole," says the Chief Justice at the conclusion of his address, "although these and, perhaps, other difficulties may be urged against the construction above proposed, we think the *onus probandi* of shewing that the devise to the wife is included in the clause of partial revocation, is cast upon those who claim under such revocation, and that it is not shewn with sufficient certainty that this devise to the wife is included in such clause; on the contrary, that upon the proper construction of this codicil, the intention appears to have been that the devise to the wife

should not be revoked by the codicils." So far as his own mind went, he was not even in a state of doubt, the conclusion to which he came being, that the devise was not revoked. The case here stands thus:—There is a devise, plain, clear and explicit, and also a specific legacy of the furniture, &c. to the Hon. Robert Charles Herbert, with a gift over in the event of his predeceasing the testator. Then the codicil appears to begin with a wrong reference as to the date of the will, because it refers to the will as being dated the 4th of April 1852, the will being in fact dated the 5th of April 1851. The first suggestion is, that there may be another instrument, in which there may have been some gift of this property to the Hon. Robert Clive, which instrument is not forthcoming; and in that case you would have a clear and express gift of the property to the Maskelynes in the subsequent part of the codicil, and it would be perfectly consistent with the revocation of some anterior gift to Robert Clive, which has by some means become inoperative. I think, on this part of the case, dealing with the personalty, I must conclude from the probate that there is a will, with a clear and express gift to Robert Herbert; that there is no evidence before me whatever, except this statement and recital, which of itself cannot establish the fact that there ever was any such will, because none such is forthcoming, and none such is suggested. The letter which Mr. Kay was about to read to me only tells Mr. Clive that he has, by some will or other, made him a gift—it might contain quite as wrong a reference as the codicil itself—and no one has suggested that there was any intermediate will prepared between the date of the will and the date of the codicil. Therefore I think I must take it to be an erroneous reference to the will, and I cannot deal with it in any other way. Then, the way in which the testator revokes the legacy is this:—"I hereby revoke and cancel the legacy of my villa at Hythe, bequeathed in my will to the Hon. Robert Clive and his heirs, he being lately deceased, and my connexion with his family thereby almost null, which legacy is hereby cancelled. I hereby give my aforesaid villa at Hythe" to the other legatees. Mr. Willcock says,

first, here is a clear and express gift to the Maskelynes; and if there is a clear and express gift in a will to A, and a clear and express gift of the same subject-matter in a codicil to B, it passes the property to B, because the later will has effect, the two being inconsistent. That is perfectly true where there is a bequest *simpliciter*; but the question is, whether there is here a bequest *simpliciter* of the villa to the Maskelynes, or whether it is not coupled with that introductory part, which tells you in plain words, that he thinks that by the death of the previous legatee he has now got a clear field for the disposal of his property. One might guess what he would have done if he had known all the facts, by his saying, his connexion with the family is now severed. If those words were out, it would only come to this: a plain case of a gift to A. by will of a specific chattel, and then a codicil saying, "Whereas I have given X. a specific chattel, and X. is now dead, therefore I give all this property to B. instead of X," there being no gift to X. at all, but a gift to A, and A. being alive at the death of the testator. It is almost too clear for argument; it is not the case of a gift of the same chattel to one person by will, and then to another by codicil; but the gift by the codicil is prefaced by the statement that some person is out of the way, and the object of the gift by will being at an end, he now feels himself at liberty to dispose of it to somebody else. You might imagine the case of a gift to John by will, and then by a codicil, after a recital of a gift of the same thing to Henry, and that Henry has displeased the testator, a gift to somebody else. Nobody would contend that the gift to John was displaced, because he only proceeded in mistake. A new gift, standing alone without any preface, would pass to the last legatee; but being prefaced by that which shews clearly that the second legatee is only substituted because the first is out of the way, there being no such person as is referred to as the first donee, it cannot be held to deprive the person who would take under the first instrument, because the testator did not intend to regard the fund as in his own disposition until the legatee was out of the way. I think it is very probable, as Mr. Kay has

suggested, that if it had been told the testator, "You did not give the property to Robert Clive, but to his nephew," he might say, that it was given to the nephew in consideration of his regard and esteem for the uncle; but as the uncle was now dead, and he did not much care about the other members of the family, he revoked the gift. That is all very possible by way of conjecture; but after all, it comes to no more than raising a reasonable doubt, that if every circumstance had been present to his mind, and he had not made, as he has made, a plain and palpable mistake, he might have been induced to make a different disposition of the property from what he has made. I then fall back on the principle laid down in *Hearle v. Hicks*, and it appears to me to be going a great deal too far to say, that a gift to A. is revoked by a subsequent gift to B, prefaced by the recital that the first gift was to X, and that X. is out of the way. At most, I have only entertained a certain degree of doubt as to what might have been the testator's intention; but nothing like that sort of doubt which can make me say, that the plain and distinct gift in the will is revoked.

WOOD, V.C. }
Dec. 3. } PEARETH v. PEARETH.

Demurrer—Supplemental Bill—Change of Solicitor.

After a decree in an administration suit some of the plaintiffs filed a supplemental bill against their co-plaintiffs and the defendants, alleging generally that it was inconvenient that they and their co-plaintiffs should continue to be represented by the same solicitor, and praying that the suit might be carried on between the parties to the supplemental bill in the same manner as it was carried on between the parties to the original suit. On demurrer for want of equity,—Held, that the bill could not be sustained.

This was a demurrer for want of equity.

The plaintiffs, by their supplemental bill, stated that, in February 1856, they, together with certain of the defendants, filed their original bill against the other

defendants for the administration of a testator's estate, and that a decree was made in January 1857 for establishing the will, and carrying the trusts thereof into execution.

The bill then stated, that circumstances had arisen which rendered it inconvenient and undesirable that the plaintiffs in the supplemental suit should continue to be represented in the original suit by the same solicitors as the defendants, the co-plaintiffs in the original suit, and they had accordingly instructed Messrs. Boys & Tweedie to act as their solicitors in the further prosecution of the said suit; and it prayed that the said suit might be carried on and prosecuted between the parties to the supplemental bill in the same manner as it was carried on between the parties to the original suit.

Mr. W. M. James and Mr. E. F. Smith, in support of the demurrer, cited—

Wedderburn v. Wedderburn, 17 Beav. 158.

Winthrop v. Murray, 7 Hare, 150.

Holkirk v. Holkirk, 4 Madd. 51.

Langdale v. Langdale, 13 Ves. 167.

[Wood, V.C. referred to *Ward v. Ward* (1).]

Mr. Rolt and Mr. Osborne, for the plaintiffs.—If there is anything irregular in the bill the proper course would be to move to have it taken off the file, and not to demur to it. There are matters in conflict between the present plaintiffs and their co-plaintiffs in the original suit, which make it necessary that they should be represented by separate solicitors, and this bill has been framed on the precedent of *English v. Baring* (2).

WOOD, V.C. (without hearing a reply).—I do not think the plaintiffs have stated any case upon which the bill can be supported. The bill merely alleges that circumstances have arisen which render it inconvenient and undesirable that the plaintiffs herein should continue to be represented in the said suit by the same soli-

(1) 11 Beav. 159; s. c. 17 Law J. Rep. (N.S.) Chanc. 397.

(2) Before Kindersley, V.C. (not reported), Kinsey, 9 Bloomsbury Place, solicitor.

citors as their co-plaintiffs in that suit, but what those circumstances are is not stated. In *English v. Baring*, which was unopposed, there was an allegation of fraud, and also an averment that the co-plaintiff availed himself of the iniquity. This case appears to me exceedingly wide of any such case as that. Here is no allegation at all, except the general allegation of inconvenience, &c. It is not easy to see how the interests of the co-plaintiffs can become adverse, though of course that may be; and when it happens, that may perhaps be a ground for filing a supplemental bill, but here the grounds are clearly insufficient.

The demurrer will be allowed, and I do not think I ought to encourage such a bill by giving leave to amend.

STUART, V.C.

1858.

March 23, 24,
25, 26.

LORDS JUSTICES
Dec. 4, 11, 13.]

THE ATHENÆUM LIFE INSURANCE COMPANY V. POOLEY.

*Joint-Stock Company, Debentures of—
Fraud—Notice.*

Debentures purporting to be those of a joint-stock company completely registered under stat. 7 & 8 Vict. c. 110. were issued by the directors of the company, pursuant to a resolution passed by a meeting of the shareholders, but which meeting was not an extraordinary general meeting duly convened and constituted according to the provisions of the deed of settlement of the company, and not a meeting, therefore, having power to increase the capital of the company by the issue of debentures or otherwise. The issue was procured by the contrivance of the chairman of the board of directors, and the debentures were given to P, an intimate friend of his, upon terms which were fraudulent as against the shareholders. P. afterwards transferred them to his broker B, to secure the balance of his account current with B, and B. subsequently transferred them to L, who being a customer of B. took them upon his recommendation as an investment at the price alleged by B. to be the price current in the market. L. had no notice at the time of the circumstances under which the debentures had been issued, but

the debentures had on the face of them a false recital, that they were given to P. by the direction and consent of the proportion of shareholders empowered by the deed of settlement to issue them. Having paid the purchase-money to B, L. at once took the transfers from P. to B. and from B. to himself to the office of the company, and on the next day they were returned to him by the secretary, with the seal of the company affixed, and signed by the secretary, by whom the debentures had been also signed on their issue. L. made no inquiry to ascertain the circumstances under which the debentures had been issued; but two half-yearly payments of interest upon the debentures were subsequently made to L. by the directors. Neither these payments nor the circumstances of the issue of the debentures were ever made the subject of a report to a meeting of shareholders until they were ascertained and repudiated by a finance committee appointed by the shareholders to inquire into the affairs of the company. Vice Chancellor Stuart decided that the company were entitled to an injunction restraining L. from proceeding in an action commenced by him against the company to recover the sums made payable upon the debentures:—Held, on appeal, affirming that decision, that the shareholders were not bound by the debentures, and that the purchaser took them subject to the equities of the first obligee; that a person buying debentures of a joint-stock company is bound to ascertain whether they are tainted with fraud or irregularity; and, lastly, that the facts of the assignment having been registered and of interest having been paid made no difference unless the shareholders could be shewn to have acquiesced.

By the deed of settlement constituting the above-mentioned society, being an indenture bearing date the 2nd of May 1851, and expressed to be made between the several persons whose names were or should be thereunto subscribed and seals affixed, except William Lacy Howard, of &c., of the first part, and the said William Lacy Howard of the second part, after provisions in the usual form constituting the said society a joint-stock company within the meaning of the acts of parliament relating to the registration, incorporation and regulation of joint-stock companies, under the name

of the "Athenæum Life Assurance Society," for the carrying on the usual business of life assurance, and of an Annuity, Endowment, Loan and Reversionary Society, at 30, Sackville Street, Piccadilly, in the county of Middlesex, with a capital of 10,000*l.*, in 10,000 transferable shares of 1*l.* each, and fixing the first Wednesday in the month of May in each year for the holding of the ordinary general meetings of the shareholders, and empowering the directors to call extraordinary meetings as they should think fit, or on the written requisition of any five or more shareholders, holding together 100 or more shares, and authorizing the requisitionists to call such meetings if the directors should neglect or refuse to call them, it was by the seventh clause of the said deed provided, that in case at any general meeting, ordinary or extraordinary, fifty shareholders, holding together 500 shares, should not be present and proceed to business within one hour after the time fixed for the meeting, no business should be done, but the meeting, if convened only on special requisition, should stand absolutely dissolved, but in every other case should stand adjourned to that day week, at the same hour and place, and so on from week to week, from day to day, or hour to hour, as often as the same should happen, until at some such meeting the required number of shareholders holding such shares as aforesaid, should be present, and proceed to business within one hour from the time fixed for such meeting. By the twelfth clause it was provided, that it should be competent for any extraordinary general meeting, and no other, and such meeting and no other was thereby empowered by a majority, which should consist of at least two-thirds in number of the shareholders of the society for the time being, or of the holders of policies of the society for life, and for not less than 500*l.*, each on the participating scale, (and on which two annual premiums at the least should have been then paid,) and also of two-thirds in number of the shareholders, and the said qualified holders of policies present personally or by proxy at the meeting, and which shareholders should hold together at least two-thirds of the shares in the capital stock of the society, which for the

time being might have been subscribed for, by any resolution or resolutions to increase at any one time, or from time to time, the capital stock of the society, by the creation of new or additional 1*l.* shares, provided, that such addition to the capital did not exceed in the whole the sum of 990,000*l.*, and also to empower and require the directors to borrow and take up on mortgage of the real estate, or chattels real belonging to the society, or on such other securities as to such meeting might seem fit, any sum or sums of money which such meeting should deem expedient, and which the directors for the time being were not authorized to raise under the power in that behalf thereafter contained (being the power given by the thirty-fifth clause of the deed), not exceeding in the whole the sum of 50,000*l.* By the twentieth clause it was provided, that the common seal of the company should not be affixed to any policies or other documents of the company, except by the order of three directors, signed by them and countersigned by the manager, or, in his absence, by such officer as the directors should appoint. By the twenty-first and twenty-fifth clauses it was provided, that there should not be less than six nor more than twenty-one directors of the society, each of whom should at the time of his election and from thence during his continuance in office, hold at least 100 shares of 1*l.* each, fully paid up in the capital of the society, and that Josiah Bartlett, of &c., Henry Sutton, of &c., and the other persons therein named, should be, and they were thereby appointed the first directors of the society, and that three directors should constitute a board, and be competent to exercise the several powers and authorities thereby conferred on the directors generally. By the thirty-fifth clause it was provided, that the directors should also have full power and authority on behalf of the society to receive, and with the consent of an extraordinary general meeting in the manner thereinbefore provided and hereinbefore mentioned, to borrow, on mortgage or otherwise, and also (at their own absolute discretion), and in the usual and ordinary course of the business of the society, to invest, lay out, or advance at interest on government securities, or on

such personal or other security as they should think fit and advantageous, and they lawfully might, such monies or such parts of the monies and funds of the said society as they should think expedient.

The society was completely registered on the 14th of May 1851, and the above-named Josiah Bartlett was elected chairman of the board of directors.

On the 16th of May 1851 a meeting of the shareholders of the society was held, at which the said Josiah Bartlett presided as chairman, and at which the following resolutions were, amongst others, passed:—

1. "That the capital stock of this society be increased from 10,000*l.* to 100,000*l.*"

3. "That the appointment of Henry Sutton, Esq., as manager, be confirmed, as settled by the board of directors on the 19th of April 1851."

4. "That the directors be hereby empowered to borrow any sum or sums of money, not exceeding in amount the present increased capital of the company, on debentures under the common seal, or on such other security as to the society shall seem fit."

This meeting was attended by less than fifty shareholders, there being then only twenty-nine shareholders who had signed the deed of settlement, of whom several were infants, and no holder of a policy attended it, there being then no such policyholder existing.

In pursuance of the fourth of these resolutions, J. Bartlett and the other three directors of the society caused debentures to be prepared under the common seal of the society, and proceeded to borrow money upon such debentures.

In June 1854 Alexander Gopsell Pooley, a friend of J. Bartlett, was the holder to a considerable amount of Westminster Improvement bonds, issued at 5*l.* per cent. interest, under the powers or provisions of the Westminster Improvement Act, 1845, by the Westminster Improvement Commissioners.

In the months of June and July 1854, J. Bartlett, professing to act upon a report to be made by a committee of directors, called "the finance committee," repeatedly and warmly urged his co-directors to authorize him to purchase Westminster

Improvement bonds for the society, to the extent of 10,000*l.* and at their full value, and represented that, as interest at 5*l.* per cent was then payable on the bonds, they would be a most advantageous investment, and might be turned to useful account by the society, particularly as he could obtain them upon payment of not more than 4,500*l.* in cash to the vendor, who, for the residue of the purchase-money, would be willing to take debentures and shares of the society; and the directors would be able to raise upon the bonds when so purchased a large sum of money, which would enable them to extend their business, by advancing money as loans to parties who would effect policies with them, and thus the payment of 4,500*l.* in cash would enable the society to command a much larger capital.

In further pursuance of this plan, J. Bartlett, on the 14th of July 1854, represented to his co-directors that he had agreed to purchase Westminster Improvement bonds to the extent above mentioned on behalf of the company; and although there had been no resolution of the board authorizing any such purchase or agreement, his co-directors were induced to consent to the same being completed. J. Bartlett thereupon represented to his co-directors that A. G. Pooley was the person from whom he could effect the purchase of the bonds upon terms so advantageous to the society.

His co-directors thereupon, upon the persuasion of the said J. Bartlett, and upon the faith of the truth of his representations, allowed seven debentures of 500*l.* each, bearing date respectively the 19th of July 1854, to be issued under the company's seal in favour of A. G. Pooley; and these debentures, together with shares to the amount of 2,000*l.* in the capital of the society, and a cheque on the society's bankers for 4,500*l.* were delivered to Bartlett for Pooley, in payment of the consideration agreed to be taken by Pooley in payment for the said Westminster Improvement bonds to the amount of 10,000*l.*, which bonds Bartlett undertook to obtain from Pooley, and which he accordingly, a few days afterwards, obtained and brought to the office of the society and deposited with the manager. Each of the debentures

so issued and given to Pooley was in the following form.

"Athenæum Life Insurance Society.

Debenture, No.——. Amount, 500*l*.

"By virtue of the deed of settlement of the Athenæum Life Insurance Society, bearing date the 2nd of May 1851, and registered pursuant to the acts for the registration, incorporation and regulation of joint-stock companies, and by the direction and consent of more than two-thirds of the shareholders of the said company present at a meeting convened for the purpose, the said society, in consideration of 500*l*. advanced to them for the purposes of the society by A. G. Pooley, of &c., do hereby covenant with the said A. G. Pooley, his executors, administrators and assigns, to repay the same to him or them, or as he or they shall direct, on the 23rd of December 1858, with interest thereon in the mean time at the rate of 5*l*. per cent. per annum, to be computed from the 19th of July instant, and payable half-yearly, on the 1st of January and the 1st of July in each year, so long as the said sum of 500*l*. shall remain unpaid to the said A. G. Pooley, his executors, administrators or assigns, by the said society, the first payment of such interest to be made on the 1st of January next; but if at any time before the expiration of the period above mentioned any portion of the said sum of 500*l*. shall be repaid, then such interest shall be payable only on the portion remaining unpaid; and the covenant on the part of the said society to pay such interest is, nevertheless, only on condition that the stipulations following be complied with:—

1. The holder of this debenture is in all cases, when required by the manager, to produce the same to him for inspection;
2. This debenture to be delivered up to the society on repayment of the principal.

"Given under the common seal of the society this 19th day of July 1854.

"J. Bartlett, Chairman.

"Henry Sutton, Manager."

The seal to the debentures was affixed "in the presence of F. G. Tomlins, secretary."

In September 1854 Josiah Bartlett received the Westminster bonds so purchased from the company's office, and had never since returned them, alleging that he had

raised money upon them for the purposes of the company.

On the 29th of December 1855 a meeting of shareholders was held, to investigate the circumstances under which the debentures given to Pooley had been issued, and in January 1856 Bartlett and the other three directors of the company resigned their offices as directors. In October 1854, Alexander Gopsell Pooley transferred the seven debentures to one Ebenezer Ball Brown, a money-dealer and stockbroker, the transfer purporting to have been made in consideration of 3,500*l*.; and on the 7th of December 1854, the said debentures were transferred for value, by Brown, to the defendant Richard Holmes Laurie, to whom interest thereon was paid by the directors, in January and July 1855; but upon Laurie applying for payment of interest in January 1856, the company declined, and had ever since refused to pay such interest. Laurie thereupon commenced an action against them, in the name of Pooley, on the 5th of March 1856. The company thereupon filed the bill in the present suit, alleging that the issuing of the debentures to Pooley was *ultra vires* of the directors, and that the whole was a scheme got up by Bartlett and Pooley for the purpose of defrauding the society; that the debentures were invalid, whether in the hands of Pooley or in those of Laurie, and whether Laurie had or had not notice, at the time of his purchase, of the circumstances under which the debentures had been issued. The bill prayed, under the above-mentioned circumstances, for a declaration that the seven debentures were invalid, and incapable of being enforced against the company, and that they might be given up to be cancelled; for an injunction to restrain Pooley and Laurie from proceeding with the action commenced by or in the name of Pooley against the society; that Pooley and Bartlett, or one of them, might be decreed and ordered to make good to the plaintiff the sum of 4,500*l*. so obtained from the company as aforesaid, with interest at 5*l*. per cent. from the 19th of July 1854; that Pooley and Bartlett, or one of them, might also be decreed and ordered to deliver up to the plaintiff the said 2,000 shares in the capital of the company, or to

make good to the plaintiff the value of such shares; or otherwise that Pooley or Bartlett, or one of them, might be decreed and ordered to restore and replace to the plaintiff the Westminster Improvement bonds, or make good to the plaintiff the full present value of such bonds.

On the 12th of June 1856 an order for an injunction, restraining A. G. Pooley and Laurie, their solicitors, &c. from proceeding with the above-mentioned action in the name of Pooley, and from bringing any other action against the society or the shareholders until the hearing of the cause.

On the 12th of July 1856 an order was made for winding up the affairs of the society, under the provisions of the Winding-up Act.

From the evidence in the cause the following facts were shewn:—On the 19th of July 1854, the market value of Westminster bonds was 800*l.* for every 1,000*l.*; but it was deposed by Pooley that this was only when the bonds were paid for in cash; but that he was constantly selling them at par, when the consideration was given partly in cash and partly in securities. Pooley admitted the receipt of the cheque for 4,500*l.*, which was cashed by the society's bankers on the same day in seven 500*l.* Bank of England notes and other monies. Of these notes one was proved to have been paid, later on the same day, into the private account of Josiah Bartlett, at his bankers'. Pooley shortly afterwards deposited the seven debentures with Ebenezer Ball Brown, to secure money on a running account between himself and Brown, who was at that time his broker. Subsequently, and in December 1854, E. B. Brown was asked by Laurie, for whom he was in the habit of acting as broker, whether he had any good securities upon which he could recommend Laurie to invest a sum of money of about 3,000*l.* Brown thereupon said he himself had some debentures of the Athenæum Life Insurance Society for 500*l.* each, upon which the society paid 5*l.* per cent. interest, and which he could recommend as an eligible investment. Laurie, relying upon this recommendation, on the 7th of December 1854, agreed to purchase of Brown seven of such debentures for 500*l.* each for the sum of 3,220*l.*; and on the same day he paid the said E. B. Brown the said 3,220*l.*, and Brown duly

executed to him a transfer of the seven debentures, and handed the same over to him. Such deed of transfer was then taken and deposited by Laurie at the office of the said society, and was duly registered by Frederick Guest Tomlins, their then secretary. On the 8th day of the same month of December the said transfer was returned to Laurie, with the following memorandum or certificate stamped or written thereon, and signed by the said secretary, that is to say, "Athenæum Life Assurance Society, registered. F. G. Tomlins, Secretary. Dec. 8, 1854."

Beyond this Laurie made no other inquiry as to the validity of the bonds.

No application was ever made by Brown or Laurie to inspect the deed of settlement of the society, either at the office of the society or at the General Registration Office of Joint-Stock Companies. Pooley, however, saw the deed previous to taking the debentures, but looked at it only to ascertain the names of the subscribers, but not to ascertain whether the meeting of the 14th of May 1851 was duly constituted for the purpose of issuing the debentures. It appeared that a balance-sheet had been made out every year for the inspection of the shareholders of the society, except during the year 1855. The books of the society were however balanced in that year, and in them, as so balanced, would appear the account of the above-mentioned transaction of the directors in Westminster Improvement bonds.

The cause now came on for hearing.

Mr. Malins and *Mr. W. D. Lewis*, for the plaintiff, contended that the meeting of May 1851 was not such a meeting as was required by the deed of settlement to sanction the increase of the capital of the society by the issue of debentures. There were not, as the deed required, fifty shareholders at least present at the meeting; but, as shewn by the evidence, not more than ten were there, a number far below two-thirds of the number of shareholders then existing. The meeting, moreover, in passing a resolution to increase the capital by 100,000*l.*, had acted in excess of the power given by the deed to a duly constituted extraordinary general meeting of increasing the capital by 50,000*l.* It had acted in excess of such power also by giv-

ing its debentures to Pooley as the price of Westminster Improvement bonds at par, such bonds being at the time at a large discount in the market. The debentures, moreover, were not in the form required by the deed of settlement. They were not sealed as the deed required; no order for such sealing having been signed in conformity with the provisions of the deed by three directors, and countersigned by the manager of the society. The two directors and the secretary who had signed the debentures were not the authorized agents of the society for issuing such debentures. The whole transaction was the result of a fraudulent scheme formed by Bartlett and Pooley, to palm the Westminster Improvement bonds upon the society upon terms advantageous to Pooley. This was plainly shewn by the circumstance that Bartlett had received one of the 500*l.* Bank of England notes paid by the society's bankers to Pooley. The debentures were, therefore, void *ab initio* as against the shareholders. That being so, the payment of interest upon them in January and July 1855 was insufficient to confirm the issue of them; and no report of such issue had ever been made to and confirmed by any subsequent meeting of shareholders. Of the invalidity of the debentures notice must be presumed as against Pooley, at the time he negotiated the transaction with Bartlett; and Laurie, though personally innocent, could not stand in a better position than Pooley. Deriving title from Pooley, he was affected by all the equities to which Pooley was subject. The recital in the debentures affected every holder with notice of what was necessary for the validity of the debentures, and ought to have put Laurie upon inquiry whether the meeting mentioned in such recital had been duly convened and constituted. As Laurie had neglected to make such inquiry, he had only himself to blame for the loss which he had incurred. They cited—

Ridley v. the Plymouth and Stonehouse Grinding Company, 2 Exch. Rep. 711; s. c. 17 Law J. Rep. (N.S.) Exch. 252.

Smith v. the Hull Plate Glass Company, 11 Com. B. Rep. 897; s. c. 21 Law J. Rep. (N.S.) C.P. 106.

Hill v. the Manchester Waterworks Company, 2 B. & Ad. 544.

Ernest v. Nicholls, 6 H.L. Cas. 401.

Kirk v. Bell, 16 Q.B. Rep. 290.

Greenwood's case, 3 De Gex, M. & G. 459; s. c. 28 Law J. Rep. (N.S.) Chanc. 966.

Mangles v. Dixon, 3 H.L. Cas. 702.

Lett v. Morris, 4 Sim. 607; s. c. 1 Law J. Rep. (N.S.) Chanc. 17.

Coles v. Jones, 2 Vern. 692.

Turton v. Benson, Ibid. 764.

Cator v. Burke, 1 Bro. C.C. 434.

Mr. Bacon, Mr. Craig and Mr. Locock Webb, for the defendant Laurie, submitted that in *Agar v. the Athenæum Life Assurance Society* (1) judgment had been given in favour of a *bond fide* holder for value of debentures of the society, issued in the same form as those above mentioned, the Court of Common Pleas holding that the society was bound by its common seal affixed to the debenture; and they contended that in the face of that decision it was immaterial whether the meeting which had authorized the issue of the debentures was formal or informal, or what was the consideration paid, or what the nature of the transaction which had given rise to such issue. They argued also, that after the registration of the transfer by their duly-authorized officer, and payment of interest upon the debentures to Laurie, the society were estopped from objecting to such debentures, on the ground of their alleged original invalidity.

Mr. De Gex appeared for the defendant Pooley.

Mr. F. O. Haynes, for the defendant Bartlett.

Mr. Malins, in reply, said, that in *Agar's case* the money-consideration given for the debentures had been paid at the office of the society, and that that circumstance was sufficient to distinguish that case from the present.

STUART, V.C. said that, as then advised, he was of opinion that the plaintiff was entitled to an injunction to restrain any action at law. For any relief beyond that he could not see any ground, and if it was asked, he should require to hear counsel upon it.

(1) 4 Jur. N.S. 211; s. c. 27 Law J. Rep. (N.S.) C.P. 95.

Mr. Malins said his client would be satisfied with an order for a perpetual injunction in restraint of further proceedings upon the debentures.

STUART, V.C. said he could not see any case for further relief than that, and having regard to the extraordinary conflict of authority upon the question before him, it was not without great doubt and difficulty that he had arrived at the conclusion that the plaintiff was entitled to any relief at all as to the debentures in question. Those debentures had clearly not been issued in a manner authorized by any provision of the deed of settlement of the society, and therefore not in a manner which could make them binding upon the shareholders as between themselves and the directors. The deed of settlement required that for such a purpose an extraordinary meeting, attended by at least fifty shareholders, should be called. But the issue of the debentures in question had been made pursuant to a resolution purporting to be that of a meeting of shareholders held on the 16th of May 1851, only a fortnight after the society had been completely registered, and when there were not fifty but only twenty-nine shareholders of the society, and of these twenty-nine several were infants, and therefore incapacitated. The society was registered pursuant to the statute 7 & 8 Vict. c. 110. The object of registration under the statute was to enable those who dealt with the society to inform themselves of what the powers of the society enabled them to do, of the amount of the capital of the society, and of the mode of dealing prescribed by the deed of settlement to the directors as necessary in order that their contracts should be binding upon the shareholders. In the judgment of Lord Wensleydale in the case of *Ernest v. Nicholls*, his Lordship, after noticing the provisions of the Registration Act and that the act required the clauses of the deed of settlement to be registered so that all the world might have notice who were the persons authorized to bind the shareholders, had used the following language:—"The stipulations of the deed which restrict and regulate the authority of the directors are obligatory on those who deal with the

company, and the directors can make no contract so as to bind the whole body of the shareholders, for whose protection the rules are made, unless they are strictly complied with. The contract binds the person making it, but no one else." And there were other passages in the report of his judgment to the same effect. If that was to be taken as the law upon the subject, no question could arise upon the present case, for it was clear beyond argument that the debentures were not issued by the directors in pursuance of a general meeting and so as to bind the shareholders. A difficulty, however, was occasioned by the fact, that the Full Court of Appeal in Chancery had, in *Greenwood's case*, taken a different view of the effect of the Registration Act as applied to contracts of directors alleged to be binding upon shareholders. In the report of his judgment in that case, Lord Cranworth was represented as saying, "It is clear that the liability to creditors is not materially affected, and the legislature has not only not exempted the shareholders from their ordinary obligations as partners, but has expressly enacted that they shall remain liable, subject only to a limitation as to three years." Under the embarrassment occasioned to him by this conflict of judicial authority, he (the Vice Chancellor) considered himself bound to follow the view taken by the House of Lords, and to hold in the case before him, that those who purchased in the market the debentures of the society were legally bound to take every reasonable precaution to satisfy themselves of the validity of the documents which they made the subject of their purchase. The case of *Agar v. the Athenæum Life Assurance Society* had also been referred to as an authority against the plaintiffs' case. There it had been held, by the Court of Common Pleas, that, as the debentures of this society, issued in manner above mentioned, recited that money had been borrowed, or at all events paid, for the purposes of the society, and the debentures purported to bind the society, the official manager, as representing the society, was estopped from proving anything contrary to what was recited in the document. *Agar's case*, however, was clearly distinguishable from the present, to

an extent which rendered it altogether without weight as an authority to influence the Court in deciding upon the present case, for if the persons of the name of Agar who advanced their money in that case and paid it to the bankers of the society had been the defendants in a suit in this court, constituted like the present, the Court would have been bound to refuse the official manager, as representing the shareholders of the society, any relief, until he had restored to the defendant Agar that money which they had paid into the hands of the bankers of the society. The question to be decided in the present case, however, was, whether Mr. Laurie, an innocent purchaser of these debentures in the market, was to be prevented from pursuing his legal remedy, if he had one, upon these debentures, on the ground that the shareholders of the society had an equity to be relieved from any obligation in respect of them. A *bona fide* purchaser for value, no doubt, always appeared with a strong case in this court, but it was clear he could be in no better situation than the person against whom he made his demand, when, as in the present case, that person, having been deceived as well as he, was equally innocent with himself. There was a feature, moreover, in this case which did away with much of the difficulty which otherwise might have pressed upon the mind of the Court. Mr. Laurie unquestionably had given value for these debentures, but, having regard to the circumstances under which his purchase was made of Brown, it appeared that Brown must be viewed as the agent of Laurie in the transaction, and that Brown, as regarded the duty of inquiring into the validity of the debentures, was under a stricter obligation than the ordinary law of notice would have imposed upon Mr. Laurie himself. From the account of the transaction between Brown and Laurie, as given in their answers, it nowhere appeared that Brown had made any inquiry whether these debentures had been authorized by an extraordinary general meeting of the society previously advertised and called for the purpose, by which means alone could validity have been given to the debentures. It had been said that Brown was himself a purchaser of the debentures for value.

The *bona fides* of his purchase appeared, however, to be open to suspicion. The debentures had been issued to Pooley, from whom Brown was alleged to have purchased them, by the unauthorized act of the directors, and they purported to be issued in consideration of money advanced by Pooley, when in reality no money had been advanced, but the only consideration paid for the debentures by Pooley consisted of a certain amount of Westminster bonds, which had turned out to be worthless. But it was said that the officer of the society, at the public office of the society, had received notice of a transfer from Pooley to Brown, and subsequently of a transfer from Brown to Laurie, and that, as evidence of such notice, there were affixed to the certificates of transfer the seal of the society and the signature of the secretary, whose name had been also affixed to the debentures; and it was asked, how could any one be protected, if this was not sufficient to protect the right of a purchaser? The answer to this was, that Mr. Brown and Mr. Laurie and everyone dealing in the debentures of this society, must be taken to have known that they could have only been issued under extraordinary powers. Having that notice, they were bound to make inquiries to a reasonable extent, to satisfy themselves that those extraordinary powers had been duly exercised. So far as appeared from the evidence, no such inquiries had been made. All that had been done was to take the purchased debentures to the office of the society in order that the transfer might be registered, and upon that the registration had been made by that very officer whose name was affixed to the debentures themselves, unauthorized as the issue of such debentures had been by the shareholders. Under such circumstances, it was impossible for the Court to consider, in favour of Mr. Laurie, that these debentures were binding as against the shareholders. There must, therefore, be a decree to the effect that the injunction be made perpetual, but the decree to be without prejudice to any proceeding that the defendant Laurie might be advised to take against the directors who signed the debentures, or against Mr. Brown and Mr. Pooley, from whom he had derived his title.

Dec. 4, 11, 13.—From the above decision *Mr. Laurie* appealed.

Mr. Malins and *Mr. W. D. Lewis* supported the decree of the Vice Chancellor, relying, in addition to the cases cited in the court below, on—

Horton v. the Westminster Improvement Commissioners, 7 Exch. Rep. 780; s. c. 21 Law J. Rep. (N.S.) Exch. 297.

Bryson v. the Warwick Canal Company, 4 De Gex, M. & G. 711; s. c. 23 Law J. Rep. (N.S.) Chanc. 138.

The Royal British Bank v. Turquand, 6 El. & B. 327; s. c. 25 Law J. Rep. (N.S.) Q.B. 317.

Mr. Locock Webb (with *Mr. Bacon* and *Mr. Craig*), for the appellant, referred to *Greenwood's case*, 3 De Gex, M. & G. 459; s. c. 23 Law J. Rep. (N.S.) Chanc. 966.

No reply was called for.

Lord Justice Knight Bruce.—It is true that these debentures were irregularly and improperly issued; it is true that the Westminster Improvement bonds were irregularly and improperly received; it is true that the legal validity of the debentures is, at least, questionable; but it is also true, as the evidence strikes my mind, that the debentures were obtained by Mr. Pooley through the fraudulent combination between him and Mr. Bartlett to—I may as well use the word—cheat the company. I am not sure that I should not come to that conclusion independently of the tracing of the 500*l.* note. The tracing of the 500*l.* note into the private account of Mr. Bartlett, at his bankers', on the very day in which it was paid by the cheque drawn on the company's funds by Hopkinson, puts an end to all possibility of doubt. In my opinion, it was a most wicked transaction; and, therefore, if Mr. Pooley were alone concerned in this, no question could arise for a moment. Mr. Laurie appears to have bought the debentures innocently, but very imprudently, and I dare say in the belief that they were good security, and without any notice to him of anything whatever to the contrary. Unfortunately, he has bought what the English law calls "a chose in action," and it is too clearly settled to admit of question or argument that a person buying a chose in action,

which can only be put in suit in the name of the original holder from whom he buys, must abide the case of the person from whom he buys, in whose name it is put in suit at law. Of course, there may be instances of exception, arising from conduct on the part of the alleged debtor, and if in the present case inquiries had been made in the proper quarter, before Mr. Laurie's money had been paid, it is possible he might have stood in a better position; he pays his money first and then does not inquire, but applies to have his assignment registered at the office of the company, and it is registered, and he then receives a dividend or two. Of course, these acts did not induce him to part with his money, for he had done so before; and these acts of confirmation on the part of the company amount to nothing, for they were acts done under the same influence and direction as the other acts were done, and without any knowledge of the real circumstances of the case on the part of those who alone are affected by it, and therefore the right to relief is clear. If the Court were not to interfere, recovery might be had in the name of Mr. Pooley upon these debentures, when they are affected by fraud. It is said, and perhaps accurately, that this is one of those frauds which might be tried at law; especially it might be tried at law now, when equitable defences are allowed, but it is neither the habit nor the duty of this Court upon questions as to which it exercises an original jurisdiction, to abandon or delegate the exercise of that jurisdiction in cases where the facts require it, it being a jurisdiction which it is as competent to exercise in general, and certainly in cases of this description, as any other Court or tribunal. The decree, therefore, appears to me to be plainly right, subject to these observations—one almost merely a point of form—namely, the question whether the latter part of the injunction does not in words go too far. The second remark is, that it may be possibly right to direct an inquiry whether the company had received any benefit from the Westminster Improvement bonds. It is not likely, but perhaps it would be too much to say it would be impossible. The third observation relates to Mr. Pooley's costs. I do

not understand why he was not ordered to pay the costs; and speaking for myself alone, I am disposed to give the costs against him, if, as the matter stands, the course of the Court allows it.

LORD JUSTICE TURNER.—This case has appeared to me to be one of considerable hardship upon the part of Mr. Laurie: I have, therefore, given great attention to the arguments which have been adduced on his behalf, and have thought it right to look into all the evidence which has been laid before the Court in the cause. In the result I really feel no doubt that the decree in this case, so far as it goes, is perfectly right. It appears that these debentures have been held valid at law, Mr. Agar, who advanced 4,000*l.* upon the debentures, having recovered upon them in a court of law: and if the case now before us was in my judgment to be determined upon the validity or invalidity of these debentures at law, I certainly should have required further time to consider the case, with reference to what fell from the Court of Queen's Bench in the case of *The Royal British Bank v. Turquand*, and what fell from one of the learned Lords in the House of Lords in the case of *Ernest v. Nicholls*, where there may, *prima facie*, appear to be some difference between the expressions which fell from the Judges in those two cases. In my opinion, it is unnecessary to decide any question upon the validity or invalidity of these debentures in their original creation. This case seems to me to depend upon the question of the fraudulent issue, and not of the fraudulent creation, of the debentures, because it is plain that though these debentures may have been well created, they may have been fraudulently issued. Now, in that view of the case, the transaction in question stands thus: Mr. Pooley having some Westminster Improvement bonds, the directors of this company agreed to pay him 4,500*l.* in cash, which was the full amount of the cash or nearly the amount of the whole cash which the company had at that time at their bankers, to give him a sum of 3,500*l.* secured, with interest at 5*l.* per cent., by the debentures of the company, payable in the year 1858; and to give him also 2,000 shares in the company, as paid-up shares, upon which 1*l.* per share

was to be taken to have been paid up. And it is an undoubted fact that these Westminster bonds were, at that time, of the value of 8,000*l.* only. Therefore there is a payment of 4,500*l.* in cash, a debt of 3,500*l.* created against the company, and 2,000 shares in the company, allotted to Mr. Pooley for property of the value of 8,000*l.* only. Now it is said that these 2,000 shares were worth nothing. That they are worth nothing now is pretty plain, because what follows upon them is liability and not profit; but what was the value of these 2,000 shares at the time, to be issued to other independent persons who might have taken, or thought it right to take, shares in the company at that time there is nothing whatever to shew; and it cannot, I think, be assumed that there was no value in these 2,000 shares when Pooley agreed to accept them in consideration of the transfer made by him of the Westminster Improvement bonds. Now it is said, however, that this was a transaction within the powers of the directors, which are given them by the deed of constitution of this company, and two clauses in that deed are particularly referred to as having given the directors power to enter into this particular transaction, the first of those clauses being, I think, the 2nd clause, and the other the 35th. By the 2nd clause of the deed, powers are given to the company in these terms: "That the business of the society shall be to make and effect all or any assurances on lives or survivorships, or any contingencies relating to or connected with lives or survivorships which may be effected according to law, and also to grant, purchase, sell and re-sell, endowments or annuities either for lives or for years, or on survivorships, and either immediate or deferred, reversionary or contingent, and also life, reversionary and other personal estates and interests, and to advance money by way of loan on personal security, and generally to carry on the business of life assurance, and of an annuity, loan and reversionary interest society in all their respective branches and departments, or in such of the said branches or departments, to carry on such business respectively." And it is argued, that upon the words "to purchase, sell and re-sell life, reversionary and other personal estates

and interests," power was given to this company to deal in the purchase of Westminster Improvement bonds. It is quite plain to me that the true meaning of those words, "or other personal estates and interests," must be controuled by the general words which follow, "to advance money by way of loan on personal security, and generally to carry on the business of life assurance and of an annuity, endowment, loan and reversionary interest society," within which business will not fall any dealings in Westminster Improvement bonds, or other personal estates and interests. Unless that construction be put upon the deed, it does not seem to me that there is any limit to the powers which it is said this clause would give to the company. They might carry on business according to the argument in any species of dealings in chattels which could possibly be conceived to exist. It is quite plain, I think, that that was not the true construction of the deed. Then, the 35th clause is in these terms: "That the directors also shall have full power and authority, on behalf of the society, to receive and (with the consent of an extraordinary general meeting in the manner hereinbefore provided) to borrow on mortgage, or otherwise, and also (at their own absolute discretion), and in the usual and ordinary course of the business of the society, to invest, lay out, or advance at interest on government securities, or on such personal or other security as they shall think fit and advantageous, and they lawfully may, such monies, or such parts of the monies and funds of the said society as they shall think expedient." And it is said that this gives them a general power to borrow money upon any security. But suppose it to do so, is this a transaction of borrowing money? The only possible way in which it can be treated as a transaction of borrowing money is, that there was a borrowing of 3,500*l.* from Pooley upon the debentures. And that is not the real nature of this transaction. The real nature of this transaction was a purchase from Pooley, by means of the debentures, of the Westminster Improvement bonds. There was no other borrowing of money as connected with that purchase. It was not the case of a loan of money upon security.

Well, then, was it the case of an investment within the meaning of the latter part of the clause—"To invest, lay out, or advance at interest on government securities, or on such personal or other security as they shall think fit and advantageous, and they lawfully may, such monies and such parts of the monies and funds of the said society as they shall think expedient"? Plainly it was not an investment of the monies of the company, for the company had not monies which were required to be invested. It was a transaction of purchase, and not of investment; it was a transaction of purchase, and not of loan: and therefore it in no way falls within the provisions of the clauses either of the 2nd or the 35th sections of the deed. Now it is said, again, that if it was in the power of the directors, the mere circumstance that the directors made a bad bargain in making a purchase of these Westminster Improvement bonds would not avoid it, and I agree that this is so; at least, I think that because of the mere fact of the directors of the company having power to purchase property, and making a bad investment of the property, it could not afterwards probably be said, on the part of the shareholders of the company, that because that investment turned out to be bad, therefore the shareholders were entitled to impeach the transaction. But, still, the whole question results in this: was there or was there not a power to do what was proposed to be done? If it appears that these clauses do not apply, the whole argument on that point falls to the ground, and I think, therefore, that this was not a transaction within the power of the directors of the company. That, however, might not perhaps be sufficient to decide the case, because if not within the power of the directors, still, if the act done were merely one which would be prejudicial as between the directors and the shareholders, it may well be that that is a transaction which may stand as to strangers, following the decision of *The Royal British Bank v. Turquand*, but it cannot stand as to strangers if it was a fraud upon the shareholders of the company. And we must consider, therefore, whether there was or was not in this case any fraud intended or practised upon the shareholders

of the company. And what are the facts? Why, that of this 4,500*l.*, which was paid by the directors of the company for the purchase of those Westminster Improvement bonds on the 16th of July 1854, 500*l.* in the identical notes in which the money is paid is traced to the chairman of the company on the very day on which the payment is made by the company. Now, it is impossible, I think, for any man to conceive that there was not a fraud practised by these directors upon the company; and it seems to me, therefore, that within both the principles of the case of *The Royal British Bank v. Turquand*, and the more extended principles (if they were intended to be more extended) of the case of *Ernest v. Nicholls*, it is impossible that this transaction can stand either at law or in equity. Mr. Bartlett has put in an answer to the amended bill, in which he says that the transaction of the loan was a separate and distinct transaction; but I asked in the course of the argument,—and I heard no answer to the question,—Is it to be believed, or can any man reasonably be called upon to believe, that Mr. Pooley would have made that loan to Mr. Bartlett of the sum of 500*l.*, unless Mr. Pooley had been intended to receive, and as part of the same transaction was to lend Mr. Bartlett 500*l.* for the accommodation of Mr. Bartlett? and if that was the transaction, beyond all question it was a fraud, and a gross fraud, upon the company. The transaction of the loan may be distinct in form, but certainly it cannot, in my judgment, with the evidence before us, be taken as distinct in substance. Well, then, the question resolves itself into this, whether, if the transaction was fraudulent as between Pooley and the company, Mr. Laurie can be in any better position? Now, *prima facie*, he certainly cannot be so, because I take no principle to be better settled than the ordinary principle of this Court, that the assignee of a chose in action must take, subject to all the equities which affect the assignor. Mr. Craig has attempted to draw a distinction between those cases, and says that it depends, in a court of equity, on the question whether inquiry has been made or ought to have been made or not. I cannot find any authority in which any such principle has been laid

down. The principle has been universally recognized, and if we were to break in upon it now, nobody could see the mischief which would be done by breaking in upon the settled law; and the principle is founded upon very good ground, for otherwise, it would be competent, in any case of fraud, for a man, by fraud, to obtain a legal right, and having obtained a legal right, to assign it in equity, which he may well do to a person who has no knowledge of the fraud, and then to say, “Now that third person may bring an action in the name of the original obligee, and bringing that action in the name of the original obligee, a Court of equity ought not to restrain the action. Thereby, of course, the original person who has been defrauded would be made subject to that liability, which had been imposed upon him by reason of the fraud.” That is a principle which I think would be very difficult to maintain. Now, no doubt, notwithstanding the rule may be that the assignee should take, subject to the equities which attach upon the assignor, parties may have so dealt as to have created equities against themselves, and to prevent the rule from applying in this court of the equities which attach upon the assignor being binding upon the assignee. There may have been such dealings between the assignee and the original party liable as may render him liable to the assignee, though he would not have been liable to the assignor. And it is in that view that I have to consider the question, whether the circumstance of this assignment of these debentures having been registered, or of the dividend having been paid upon the debentures, can have any operation as against the shareholders of the company: for, undoubtedly, if these shareholders had stood by and said, “We recognize that transaction,” at the time when the assignment was made; or if they had said, “We paid a dividend, knowing the fraud which has been committed against the company, we, nevertheless, think it better for the company to submit to that demand”; if there were a universal acknowledgment on the part of the shareholders that it was right and better for the interests of the company to submit to the demand than to resist it, then, indeed, these shareholders

may have created an equity against themselves which would prevent them from availing themselves of the ordinary rule of the Court, that an assignee is to be bound by the equity against the assignor. But let us consider these questions separately. Take the case of registration. What more is there in the registration than an entry made by the officers of the company of the fact of the debt having been transferred? That entry is, under the controul of the directors, made by the officers of the company in the books of the company, accessible, no doubt, to the shareholders, but never communicated to the shareholders, not the subject of any report or of any recognition by the shareholders at large. It is a case, therefore, in which the entry of the transfer could be no more binding upon the shareholders of the company than the entry of the debentures themselves. And if the shareholders could not be bound by the entry made by the directors, or under the order of the directors, in the books of the company, of the debentures themselves, neither, as I conceive, can they be bound by the entry of the assignment of the debentures in those books. The directors, if they do not appear to bind the company by granting the debentures, could not have power to bind them simply by entering those debentures in the books of the company. Then, as to the payment of the dividends. It struck me at first that, possibly, some such case as this might have arisen upon the payment of the dividends, that the payments of these dividends might have been reported to the shareholders and affirmed by a general meeting; and I do not mean to say one word as to what the effect of that would have been if it had appeared in the report of the directors that there had been a borrowing of money, and that interest had been paid upon the money so borrowed. I leave that question entirely open. I believe there are decisions upon it, but I am not at the present moment aware what those decisions may be. But, in this case, it is plain that these payments of interest on these debentures were never entered in any report which was made by the directors of this company, and were never, in any way, communicated to the shareholders of the company, for, upon examining the

evidence of Mr. Whitehead, this transaction taking place in July, it is to be collected that the report was made up for the year 1854 only down to the period antecedent to July 1854, and that the transactions of 1854, as to those debentures, would be entered in the accounts of the company for the year 1855. There is no report made by the directors in that year. Then, how does the case stand? Simply thus—that the trustees (for these directors must be considered in the character of trustees) have improperly borrowed money, and have improperly paid interest upon the money so borrowed, without the knowledge of those for whom they were trustees. If the *cestuis que trust* could not be bound by the original loan, neither could they be bound by the payment of the interest upon the money so borrowed. I think, therefore, the decree is right, subject to the question which my learned Brother has suggested, if it is desired to say anything upon it. There is a little difficulty about it.

Mr. Malins (on the question suggested by Lord Justice Knight Bruce, whether the plaintiff should have the costs of the suit against Mr. Pooley,) contended that, as the whole matter was before the Court of appeal on a re-hearing, Mr. Pooley ought to come forward to protect his own interests.

LORD JUSTICE TURNER.—The plaintiff himself does not appeal. It is true that the appeal of one defendant opens the whole case as to that defendant, but I am not sure that it opens it as to the other defendants, so as to subject them to costs. If that were so, it would lead to this consequence, that at every appeal all the parties must appear.

LORD JUSTICE KNIGHT BRUCE.—Speaking in the name of justice, I should like to decide so about the costs. My mind has a singular proclivity towards it, but I am afraid it can hardly be done.

The deposit was ordered to be paid to the plaintiff, but no costs of the appeal were given against the appellant.

KINDERSLEY, V.C. } FAULKNER v. THE
 Nov. 23. } EQUITABLE REVER-
 } SIONARY INTEREST
 } SOCIETY.

Mortgagor and Mortgagee—Particulars of Sale—Depreciatory Condition.

*A testator directed his estates to be sold, and after the decease of his wife gave 14,000*l.* out of the proceeds to different legatees, including 8,000*l.* to be divided between his four nephews, or such of them as should be living at the decease of his wife, but if the fund should not amount to 14,000*l.*, then all the legacies were to be reduced *pari passu*. The four nephews mortgaged their interest in the 8,000*l.*, with a power to the mortgagees to sell upon non-payment of the money, subject to such special conditions as they should think proper. The money not being paid, the mortgagees sold the property by auction, as a sum payable out of the residue, but without stating that it was liable to abatement, and one of the conditions of sale was that if the vendors should be unwilling or unable to satisfy any requisitions made by the purchaser, they should be at liberty to rescind the sale :—* Held, that this condition was not depreciatory ; that the mortgagees were justified in selling under such a restriction ; and that the omission to state in the particulars that the 8,000*l.* was subject to abatement was not a mis-statement calculated to mislead the purchaser.

James Reade, by his will, dated the 10th of August 1844, after certain specific bequests to his wife, gave, devised and bequeathed all his freehold, copyhold and leasehold estates (except the leasehold house thereinbefore bequeathed to his wife), and all personal estate and effects not thereby or otherwise disposed of, unto Thomas Dixon, Henry Blanchard and William Reade, their heirs, executors, administrators and assigns respectively, upon trust to sell or otherwise convert into money his real and personal estates and effects, as they should think most advantageous, and upon trust that his trustees should, in the first place, pay or discharge all his debts, &c., and should invest all which should remain of the said monies, after satisfying the purposes aforesaid, in

their names, and should, subject to an annuity to the testator's brother, John Reade, during his life, pay the dividends, interest and annual produce of the said trust funds, or permit the same to be received by his said wife and her assigns during her life, and should after her decease (subject to the payment of another annuity to his nephew, Richard Reade, for his life, but which annuity never took effect by reason of the death of Richard Reade in the testator's lifetime), by sale or other conversion into money of a sufficient part of the said stocks, funds or securities, levy and raise the sum of 14,000*l.*, and stand possessed thereof upon trust as to 8,000*l.* part thereof, for and to be equally divided between his four nephews, George Reade, William Reade, Redmond Reade and James Reade, the sons of his brother Redmond Reade, or such of them as should be living at the decease of his said wife ; and as to three several further sums of 2,000*l.*, further part of the said 14,000*l.*, in trust for certain other nephews of the said testator ; and the said will contained a declaration that if the residuary trust fund should not be sufficient to satisfy the whole of the said sum of 14,000*l.*, the said sums of 8,000*l.*, 2,000*l.*, 2,000*l.* and 2,000*l.* should abate *pari passu* ; and subject to raising the before-mentioned sums, the testator bequeathed his residuary estate in trust for all his nephews and nieces (except two therein named) who should be living at the death of his wife ; and the testator thereby declared that in case all his said four nephews, the sons of his late brother Redmond, should die in the lifetime of his wife, the said sum of 8,000*l.*, the trusts whereof for the benefit of the said four nephews were thereinbefore declared, should not be raised, but should be merged in his residuary estate.

The testator died on the 5th of November 1852.

On the 8th of June 1853 a policy of assurance was effected by the said four nephews of the testator, George Reade, William Reade, Redmond Reade and James Reade, for the sum of 6,000*l.*, payable to the longest of the lives of them, against the life of Arabella Phillis Reade, the testator's wife, and it was declared by the policy that if all the four nephews

should die in the lifetime of the said A. P. Reade, and the policy should then remain in force, the directors of the assurance company should pay to the said William Reade, his executors, administrators or assigns, within three months after proof of the deaths of all of them, the sum of 6,000*l*.

By an indenture of mortgage, dated the 8th of June 1853, in consideration of the sum of 5,400*l*., the said George Reade, William Reade, Redmond Reade and James Reade, assigned and transferred unto Francis Faulkner and F. Faulkner, their executors, administrators and assigns, among other things, all and every the share and shares, as well original as accruing, to which they were or should become entitled under the will of the said James Reade, the testator, in the principal sum of 8,000*l*., part of the 14,000*l*. therein mentioned, and of and in the stocks, funds and securities, upon which the same should from time to time be invested, and of and in the dividends, interest and annual produce thereafter to accrue due in respect of the same shares or any of them, or any part thereof, and also the said policy of assurance, No. 3,503 in the books of the Metropolitan Life Assurance Company, together with the said sum of 6,000*l*., and all principal and other sums of money which should become due or recoverable upon the said policy, either by way of bonus or otherwise; to hold the same unto the said Francis Faulkner and Frederick Faulkner, their executors, administrators and assigns, subject to a proviso for redemption and re-assignment therein expressed, on payment of the sum of 5,400*l*., with interest at 5*l*. per cent. per annum. And the said G. Reade, W. Reade, R. Reade and J. Reade, for themselves, their heirs, executors and administrators, jointly and severally covenanted to pay the said sum of 5,400*l*., together with interest at the rate aforesaid, in manner therein mentioned. And the said indenture also contained the following clauses: "Provided also, and it is hereby agreed and declared between and by the parties to these presents, that if default shall be made in payment of the said sum of 5,400*l*., or the interest thereof, or any part thereof respectively, contrary to the proviso or agreement for payment of the same, then and in such case it shall be law-

ful for the said Francis Faulkner and Frederick Faulkner, their executors, administrators or assigns, at any time or times thereafter, absolutely to sell and dispose of the same parts or shares, principal and other sums of money, dividends, interest, policy and premises, or any part thereof, either together or in lots, and either by public auction or private contract, to any person or persons who shall be willing to become the purchaser or purchasers of the same, or any part thereof respectively, for the best price or prices in money that can be reasonably obtained for the same, and subject to such special or other conditions of sale as the said Francis Faulkner and Frederick Faulkner, their executors, administrators or assigns, shall think proper, with full power to buy in the same or any of them, at such public auction or auctions, without being answerable for any loss, expense or diminution in price consequent thereon, and to rescind the contract or contracts for sale thereof, and to re-sell the same from time to time; and for the purpose of effecting such sale or sales, disposition or dispositions, to enter into, make and execute all such contracts, agreements, acts, deeds, conveyances, assignments, surrenders and assurances as they, the said Francis Faulkner and Frederick Faulkner, their executors, administrators or assigns, shall think proper. And it is hereby agreed and declared, that all contracts, agreements, acts, deeds, conveyances, assignments, surrenders and assurances which shall or may be entered into, made and executed, either with or without the concurrence of the said G. Reade, W. Reade, R. Reade and J. Reade, or any of them, their or any of their heirs, executors, administrators or assigns, as they, the said Francis Faulkner and Frederick Faulkner, their executors, administrators or assigns, shall think proper, shall, whether the said G. Reade, W. Reade, R. Reade and J. Reade, their or any of their heirs, executors, administrators or assigns, shall or shall not join therein or assent thereto, be to all intents, effects and purposes whatsoever valid and effectual to bind the said G. Reade, W. Reade, R. Reade and J. Reade respectively, their and every of their heirs, executors, administrators and assigns, and all persons claim-

ing and to claim by, from, through, under or in trust for them or any of them; provided, nevertheless, and it is hereby agreed and declared between and by the parties to these presents, that the power of sale and disposition hereinbefore given shall not be exercised by the said Francis Faulkner and Frederick Faulkner, their executors, administrators or assigns, until the expiration of three calendar months from the time when notice in writing requiring payment of the said sum of 5,400*l.* and interest, shall, by the said Francis Faulkner and Frederick Faulkner, their heirs, executors, administrators or assigns, have been given to the said G. Reade, W. Reade, R. Reade and J. Reade, or some or one of them, or some or one of their executors, administrators or assigns, or left at his or their usual or then last or last known place or places of abode; and it is hereby agreed and declared that the receipt or receipts in writing of the said Francis Faulkner and Frederick Faulkner, their executors, administrators or assigns, for any money to arise from the said sale or sales, disposition or dispositions, or which shall be otherwise payable to them under or by virtue of these presents, shall effectually discharge the person or persons to whom the same shall be given from being answerable or accountable for the misapplication or non-application, or from being in anywise bound or concerned to see to the application of the money therein respectively mentioned to be received; and also from being bound or concerned to inquire either as to the necessity or propriety of any sale or sales, disposition or dispositions, which may be made by virtue of these presents, or into the fact of such notice having been given as aforesaid; it being the intent and meaning of all the parties to these presents, that any such sale or disposition shall not be voidable or void by reason of the same having been unnecessary and improper, or for any want of the notice hereinbefore required; but that the remedy, if any, of the said G. Reade, W. Reade, R. Reade and J. Reade, their and every of their executors, administrators or assigns, shall be only for damages against the person or persons exercising such power of sale."

The said indenture also contained a

declaration that the balance of the monies to be produced by any sale or disposition, after payment of the said sum of 5,400*l.* and interest, and the costs and expenses, should be paid to the said G. Reade, W. Reade, R. Reade and J. Reade equally, if they should then be all living, and if not, then to such of them, or the executors, administrators or assigns of such of them as would under the will of the testator have been entitled to receive the said parts or shares and principal monies thereby assigned; and each of them also, the said G. Reade, W. Reade, R. Reade and J. Reade, for himself, his heirs, executors and administrators, covenanted with the said Francis Faulkner and Frederick Faulkner, their heirs, executors, administrators and assigns, for further assurance of the premises to the said Francis Faulkner and Frederick Faulkner, their executors, administrators and assigns.

No part of the principal sum of 5,400*l.* was paid pursuant to the covenant contained in the said mortgage; and on the 28th of January 1856 Francis Faulkner and Frederick Faulkner duly gave to the said G. Reade, W. Reade, R. Reade and J. Reade written notice that they required immediate payment of the sum of 5,400*l.* and interest, and that in the event of the same not being paid at the expiration of three calendar months from the receipt of such notice, the power of sale given by the said indenture would be exercised and put in force by them. The receipt of such notice was duly acknowledged in writing by the said G. Reade and W. Reade, on the 13th of January 1856, and by the said R. Reade and J. Reade on the 8th of February 1856, but no part of the said principal sum was paid pursuant to such notice. On the 14th of July 1857, the sum of 8,000*l.* and the policy of assurance for 6,000*l.* were put accordingly up for sale by the plaintiffs by public auction, the plaintiffs at the same time putting up for sale the interest of the mortgagors in the residuary estate of the said testator, J. Reade, which interest was also included in their mortgage-deed, under certain printed particulars and conditions of sale. The manner in which the property was specified in the particulars of sale is fully set forth in the judgment of

the Vice Chancellor. Amongst the conditions of sale was the following (the ninth):—"That in case any objection or requisition be made in respect of the title or otherwise, which the vendors shall be unwilling or unable to remove or satisfy, the vendors shall be at liberty to rescind the sale on returning the deposit, without interest or costs, notwithstanding any steps taken by them in the mean time to clear up any such objection or comply with any such requisition."

When the sale took place, Mr. J. Clayton, as the agent of the defendants, bid for and became the purchaser of the reversionary sum of 8,000*l.* and of the policy for 6,000*l.*, at the price of 4,310*l.*, and paid the deposit of 862*l.* in part payment of the purchase-money, and also signed an agreement, dated the 14th of July 1857, in conformity with the conditions of sale. The abstract of title was duly delivered within the specified time, and the following requisition was returned by the defendants' solicitors, in the form of an extract from counsel's opinion upon the abstract:—"First, if it is intended that the sale should be effected by the mortgagees of the 8th of June 1853, under the power of sale contained in the mortgage-deed, such power authorizes the mortgagees to sell under special conditions; but, notwithstanding that, I think they have exceeded their authority in selling under such a condition as the ninth, which stipulates that in case any objection or requisition be made in respect of the title or otherwise, which the vendors shall be unwilling to remove or satisfy, the vendors shall be at liberty to rescind the sale. A Court of equity would consider such a condition to have a depreciating effect, and to be an improper condition for mortgagees to sell under, and therefore, I think the concurrence of the mortgagors should be required. Secondly, the particulars of sale do not state that the 8,000*l.*, the reversion in which is offered for sale, is liable to abatement in case the residuary property should not prove sufficient to realize 14,000*l.*, and the purchasers reserve their right to object to complete on that ground."

There were other objections, of a secondary nature, which were not now in question.

On the 27th of July the following answers were sent by the plaintiffs' solicitors to the two before-mentioned requisitions:—"First, it is intended to sell under the power. The sale is with the concurrence of the mortgagors, who will not, however, be parties to the deed. Secondly, the lowest value of the residuary estate is 25,000*l.*"

A correspondence then ensued between the respective solicitors, the result of which was that the present suit was instituted against the purchasers for a specific performance of the contract, and it was alleged that the plaintiffs had been put to considerable expense by the refusal of the defendants to complete the purchase.

It was now agreed between the parties that the only questions to be argued should be those which were raised upon the two requisitions made on behalf of the defendants.

Mr. Anderson and *Mr. Rendall*, on behalf of the plaintiffs, contended that the mortgagees were justified under the terms of their power in introducing the ninth condition of sale; it was not depreciatory, but such as any vendor would insert if selling his own property, and was calculated to avoid litigation and expense. As to the second point, it was submitted that there was no mis-statement nor any statement calculated to mislead. The nature of the charge was sufficiently pointed out, and the purchaser might have concluded that the 8,000*l.* was liable to abatement in case the residuary property did not realize the sum of 14,000*l.*

Mr. Baily and *Mr. G. M. Giffard*, for the defendants, submitted that such a condition as the ninth was depreciatory. The purchaser might raise any objections, and might go on negotiating for a considerable time, and the vendors might be fully able to answer the requisitions made, but at any moment under this condition they might turn round and say, "Though we are able to give you the information and to clear up all doubts about the title, still we are unwilling to do so, and therefore we choose to cancel the agreement." This would evidently have the effect of making purchasers bid less for the property, and the mortgagors might file a bill to upset

the sale on that ground. As to the second point raised, it was also clear that the liability to abatement was not set out in the particulars, and the purchasers were therefore buying a thing which was of less value than what was stated, and consequently, on that ground, they were not bound to complete the purchase.

The following authorities were cited:—

Dart's Vendor and Purchaser, 110, c. 4. s. 5.

Davidson and Wright's Prec. in Conv., 441, 581.

Sweet's Jarm. Conv., 9, 21.

Hobson v. Bell, 2 Beav. 17; s. c. 8 Law J. Rep. (N.S.) Chanc. 241.

Hoy v. Smythies, 22 Beav. 510.

Cholmondeley v. Chilton, 2 J. & W. 182, 190.

M'Culloch v. Gregory, 1 K. & J. 286; s. c. 24 Law J. Rep. (N.S.) Chanc. 246.

Borell v. Dann, 2 Hare, 440, 454.

Abbott v. Darnell, 2 Jur. N.S. 631.

Pyrke v. Waddingham, 10 Hare, 1.

KINDERSLEY, V.C.—This is a bill by the vendors against the purchasers for specific performance, and the parties have agreed that the case shall be dealt with by the Court on this footing,—namely, that no matter should be considered in controversy between them except those arising upon the first two requisitions of counsel upon the abstract; and, therefore, if I am of opinion that neither of the two objections is sufficient, then there is to be a final decree for specific performance. Upon that footing, I proceed to express my opinion upon the two objections. The first objection turns upon the fact, that the sale in question is made by the plaintiffs, not in their character of absolute owners of the property, but as mortgagees under a power, which renders it necessary to consider how far the sale has taken place under such circumstances that the mortgagors cannot impeach the sale after it has been completed. The objection, as stated in the opinion of counsel, obviously turns entirely upon this, that although it is true the vendors have a power of sale, and even a power of sale with special conditions, still the ninth condition is of that nature

that, if the mortgagors, without joining in the sale, afterwards should endeavour to set it aside, they will either succeed in doing so or a doubt arises whether they will succeed, which is quite sufficient for the objection. This objection, therefore, turns upon the rights of third persons, who are not parties to the contract. The nature of the second objection is this, “that the vendors have purported to sell a reversionary interest in 8,000*l.*, and the particulars of sale do not represent what is the fact appearing from the will, that the 8,000*l.* is not only liable to abatement in case the property upon which it is charged should not amount to the value of 8,000*l.*, but they do not disclose the fact that it is liable to abate *pari passu* with three other charges of 2,000*l.* each, so that, if this property should fall short, not of 8,000*l.*, but of 14,000*l.*, there would then be an abatement of the 8,000*l.* The ground of this second objection is of a totally different character from the first objection. It has no reference to the question whether third parties might impeach the sale after it is made, but on the ground that the purchasers have been misled, that is, they were led to suppose they were buying a thing of considerable value without reference to its liability or non-liability to abatement, and they found they had bought something of much less value; and that this was occasioned by the omission of a true or full representation in the particulars of sale. Now, the right of the mortgagors was contingent. There were four of them, brothers, of the name of Reade, and in the event of any one of the four being alive at the death of the testator's widow, who was tenant for life, then that one would have a right to receive 8,000*l.*, with a liability to abate *pari passu* with three other charges, out of the testator's residuary property; therefore, the 8,000*l.* was contingent upon some one or more of those four brothers surviving the widow; and besides that interest they had an interest in the reversion. That is the nature of the second objection.

As to the first objection, the mortgage gave a power of sale which was to arise upon non-payment of the mortgage-money, and after notice had been given that the mortgagees intended to exercise their power

of sale. It is not in controversy but that a proper notice was given in writing requiring payment of the mortgage-money, and also that on non-payment of the money a notice of sale was given three months before the sale. There was then a power of sale, and that power authorized special conditions. The language is this: they are to be at liberty to sell either by public auction or private contract to any person or persons who shall be willing to become the purchaser or purchasers of the same, or any of them or any part thereof respectively, for the best price in money that can be reasonably obtained for the same, and subject to such special or other conditions of sale as they, the mortgagees (that is, the Faulkners), their executors, administrators or assigns, shall think proper, with full power to buy in, and so on; that this sale may take place either with or without the concurrence of the mortgagors, or any of them, and shall, whether the mortgagors shall or shall not join therein or assent thereto, be to all intents and purposes valid and effectual. That is the effect of the clause, and at the end of that portion where it is stipulated that the power of sale shall not be exercised until after three months' notice, come these words:—"It being the intent and meaning of all the parties to these presents that any such sale or disposition shall not be voidable or void by reason of the same having been unnecessary and improper, or for want of the notice hereinbefore required, but that the remedy (if any) of the said G. Reade, W. Reade, Redmond Reade and J. Reade, their and every of their executors, &c. shall be only for damages against the person or persons exercising such power of sale." The mortgagees put up the property for sale under special conditions, and this first objection is, that one of these conditions (the ninth) is such a condition as would render the sale—at least it is doubtful whether it would not—render the sale void against the mortgagors, so that the mortgagors could after the sale file a bill or take proceedings for the purpose of setting aside the sale. Now the ninth condition is this: "In case any objection or requisition be made in respect of the title or otherwise, which the vendors shall be unwilling or unable to remove or satisfy, the vendors shall be at liberty to

rescind the sale on returning the deposit, without interest or costs, notwithstanding any steps taken by them in the mean time to clear up any such objection or comply with any such requisition." It is said that that condition is depreciatory; that is to say, that its tendency is to operate in two ways. First of all, its tendency is to diminish the number of persons who will be willing to bid; and secondly, even to those persons who do come and are willing to bid, it will be an inducement not to give so high a price as they would if such a condition were not imposed. Now that is the way in which the condition is said to be depreciatory. Let us consider for a moment what is the obligation of a mortgagee selling under a power of sale; or, which is the same thing in other words, transposing the two, what are the rights of the mortgagee with respect to a power of sale exercised by him, and more especially when the mortgagor has given to the mortgagee express power to sell upon special or other conditions that the mortgagee may think fit. I am by no means disposed to say this, that any condition, whatever its nature, would be justified under that permission, that is, for the imposition of special conditions; but this I do say, the effect of that clause, in my opinion, is this, that any condition, special or otherwise, which a prudent and reasonable owner of property, if he were the absolute owner and were selling his own property, would impose, is such a condition as is entirely justified by that clause. Even without that clause in the power of sale, authorizing, in express terms, the insertion or imposition of special conditions, what are the relative positions of mortgagor and mortgagee, when the mortgagee is selling? The mortgagee is certainly not a dry trustee; he stands in a different position from a trustee. However, he may be a trustee in some sense, or perhaps, to speak more correctly, may become a trustee; still the mortgagee does not stand in the naked position of a trustee. A mortgagee has his rights; he has a beneficial interest, and that interest is the realizing of his security; in other words, getting paid his mortgage-money, interest and any costs he may incur. That is his right; but this Court will not allow him to

exercise that right without a due consideration of the interest of the mortgagor; and undoubtedly the interest of the mortgagor, which the mortgagee, in my opinion, is bound to attend to, requires that the sale shall take place as beneficially to the mortgagor as if the mortgagor himself were selling the property. The object of the mortgagee is, of course, to realize the utmost amount from the property; but this must be borne in mind—it does not follow, that by certain conditions the effect of which would be that you realize the utmost at the sale, that, therefore, it is necessarily the best for the mortgagor; for the conditions may be such that, after selling for what is a good price, you may incur immense expense and, after all, fail in enforcing the contract, which would be to the detriment of the mortgagor or the person interested in the sale. It does not follow, therefore, because your conditions do in any respect tend to depreciate the sum which may be bidden, that therefore because it is depreciatory in that sense it is a condition which is to the detriment and disadvantage of the mortgagor; because, if such a condition were to the detriment and disadvantage of a mortgagor when a mortgagee is selling under a power of sale, it would be equally to the detriment and disadvantage of an absolute owner selling, and yet we find that when an absolute owner is selling now-a-days, at least now that these matters are much more minutely provided for than they used to be even in our own personal recollection, it is a very ordinary, reasonable, wise, cautious and prudent clause for an absolute owner to introduce when he is selling; and not only is it so much considered a reasonable clause for an absolute owner to introduce, but many leading conveyancers, without saying all, of the first eminence, consider it extremely proper to be introduced when a sale is being made by a mortgagee under the ordinary power of sale. Now, what I have to suggest as the strong impression upon my mind is this, that the question is not simply whether the clause, or any given clause or condition, may tend to diminish either the number of bidders, or the sum which any given bidders, or any set of bidders, might be disposed to bid, and so make a condi-

tion necessarily on that account an improper condition as between mortgagee and mortgagor; but it is this, if it tends to the detriment of the mortgagor, so it would tend to the detriment of an absolute owner, or if it would be prudent in an absolute owner, it is not imprudent as regards a mortgagor. Now, in the sense of being depreciatory, let it be considered for one moment, why is a condition said to be depreciatory? Because, as I have said, it tends either to diminish the probable number of bidders, that is, to deter persons from bidding, or in so far as it tends to deter those who do bid, from bidding up to so high a figure. And why has it that tendency? Because it tends to cripple what would without such condition be the right of the purchaser. If you consider for a moment, every condition which tends to put any fetter upon a purchaser which he would not be subject to without it, is a depreciatory condition. I referred, in the course of the argument, to the other conditions, which are not objected to at all. Those conditions surely are as depreciatory as the condition in question, and more stringent conditions perhaps one scarcely ever saw introduced into conditions of sale. Let us take the fifth. In the ordinary course the purchaser would have a right to require a sixty years' clear title produced. But what says the fifth condition? "Any covenant for production of deeds or documents which the purchaser may be entitled to require, shall be prepared by the solicitors, and at the expense of the purchasers." That would not be the case under ordinary circumstances. It would be at the expense of the vendor. Here is a fetter—a cripple upon the purchaser; but the condition goes on, "all attested and other copies and abstracts of or extracts from deeds, wills, or other documents, and generally all statutory declarations, certificates and documentary or other evidence or information not in the vendors' possession, which may be required by the purchaser, either in verification of the abstract or otherwise, shall be obtained, made and furnished by and at the expense of the purchaser." Just contrast that with the rule of the Court, where there is no condition at all. But what is really the effect of the fifth, and the other conditions? It is not objected

that they are incomplete; no fault is found with them. It is admitted that they are not objectionable. Why? Because they are extremely reasonable; they are such as an absolute owner—who certainly has, as much as these mortgagees have, an object in getting the utmost they can get for the property—would use, and absolute owners are in the habit of introducing such clauses; therefore, although depreciatory—that is, although they have the tendency of depreciation to which I have adverted—they are not on that account clauses which are objectionable, either in the case of an absolute owner trying to get the best price he can, or in the case of a mortgagee who is bound to get the best he can. Now, with regard to this ninth condition, undoubtedly the effect of it is this, that after any amount of negotiation, and after any objections or requisitions, and after any attempts that may have been made to answer those requisitions, the vendors would have the right to say, "Well, you make requisitions; I do not say whether I am able or not, but I am unwilling to satisfy your requisitions, and therefore I rescind the contract." It would give that power; and, no doubt, that is a power which might be exercised most capriciously and absurdly. An absolute owner might, after going on for half-a-year as these parties were going on, writing letters backwards and forwards to their solicitors, in the end say, "Well, now I have got the power to answer your requisitions, I can tell you exactly what you want, but I do not choose to do it." And it might be capriciously and absurdly exercised when the condition was imposed by an absolute owner. But what is the purpose of such a clause when an absolute owner is selling? The great object of an absolute owner, when he is selling the property, is to place the matter in such a manner and form as that he may escape the liability of a Chancery suit. For really, as things have gone, people on selling property have a very fair chance, under ordinary circumstances, of involving themselves in a Chancery suit for specific performance, either by themselves against the purchaser or by the purchaser against themselves. That is the feeling people have; and therefore a vendor casts about, and says, "How shall I escape

this? Not merely because I may, when the Chancery suit is determined, be found not to have a good title—not merely upon that ground, but because, even if I succeed and get a decree for specific performance, and have my title established, beyond the costs I may get from my adversary—if I get them at all—I shall have to pay my own solicitor his extra bill of costs between solicitor and client, which will be a very serious diminution of the purchase-money, besides the vexation and delay which will take place." It is very natural that a vendor should say, "I must try and discover some means of escaping from this liability, risk and chance"; and therefore it is that this clause has been devised. The clause, as originally devised, was this, that when the vendor is unable to answer the requisitions, or to satisfy the objections, then he shall have power to rescind the contract. That was evidently with a view to escape the risk I have mentioned—a suit, and the loss of that which is to the detriment of the vendor or the owner of the property. In practice it is found that your saying you are unable does not shew that you are unable. You may tell the purchaser that you are unable to answer his requisitions, but he has a right to say, "I know you are able; and I insist upon it that you are able, and if you are able, you are bound to do it; and therefore I shall file a bill against you in order to compel you to do it." So that that clause with the word "unable" did not, when it was tried, succeed in accomplishing the object intended. The conveyancers then considered—How shall we mend this? Here is a hole which we must repair in some way; and then they devised the addition of the word "unwilling." And it is the only word, when you come to consider it, which can accomplish the object you have in view; namely, to give the vendor a power of saying, "Rather than involve myself in litigation, rather than run the risk of loss which I shall sustain, even if I succeed, and still more if I fail, I will give up the contract and put an end to it. It is true I shall have incurred a certain amount of expense in the discussion, but it is better for me to lose that which I must lose in any event, whether I enforce the purchase or not, than run any risk." That was

found to be for the advantage, on the whole, of vendors who are absolute owners. Why is it less to the advantage of mortgagees, where the mortgagees are selling under a power of sale? Let it be remembered that if the mortgagee, acting properly, acting as a reasonable owner would do, puts up the property for sale and the sale goes on, and there is a long negotiation, as there has been in this case, which of course increases expense, and then a suit—even if the vendor succeeds in enforcing the contract, the vendor, that is, the mortgagee, would have a right as between himself and the mortgagor to make the purchaser pay all the expenses which were properly incurred in the sale. But if, on the other hand, he does not succeed in enforcing the contract, if he has acted properly, the mortgagor, that is, the mortgaged property, must bear all the expense occasioned by that litigation; and therefore it is for the benefit of the mortgagor, just as much as it is for the benefit of a careful and prudent absolute owner, that such a clause, even though it may be said to have a depreciatory effect, should be introduced. And, indeed, as it has been pointed out in *Hobson v. Bell*, that distinction was drawn—that is, there may be conditions which are depreciatory, but not so depreciatory as to be improper between mortgagor and mortgagee. The tendency (which I quite admit) of this clause is to deter purchasers; its tendency, not its necessary effect—because I believe, in point of fact, it has very little effect,—but admitting that its tendency, giving due meaning to the word “tendency,” is to deter purchasers from bidding so high as they would; admitting that, still it is not so depreciatory as to be improper, provided it is upon the whole a prudent, wise and proper thing, when an absolute owner is selling. *Hobson v. Bell*, I think, tends to shew that if the case be as I have stated, such a condition may be prudent and proper with respect to the sale of property by mortgagees. After all, though that may be the opinion of the Court, still, the principle of the Court is, not to throw a doubt upon the title of the purchaser; and of course that principle I must act upon. And, moreover, I adopt fully and entirely the view which was

taken by Turner, L.J., when Vice Chancellor, in the case of *Pyrke v. Waddingham*. I adopt this principle in order to determine what sort of doubt, or what degree of doubt, is to bring you to the conclusion that the title is doubtful, so that you ought not to enforce it upon the purchaser. Now the question I have to ask myself is this—supposing that this sale is completed, and that after the whole thing is settled, a bill were filed by these four brothers, or by any of them, or by any of the assignees of any of them who have become bankrupt, against the purchaser, on the ground that this condition was an improper condition as regards themselves, have I any doubt whether they would succeed or fail in their object? and whether I think it is a matter of reasonable doubt that any Court will give them relief. What relief would they seek? They would say that they were entitled to recover the property upon paying the mortgage-money. I confess I cannot entertain a doubt upon that subject. I have been very much impressed with the observations that were made by the Master of the Rolls in that case of *Hoy v. Smythies*. I entirely accede to the force of those observations. I have made the same observations myself repeatedly, that I wonder people should go and bid at sales where they are hampered by all sorts of conditions, and perhaps this condition one of them. I confess my own feeling is, that it is a reasonable condition. The great object of this vendor is to avoid litigation; and I am sure that is my object; and therefore, if I make requisitions which he is unwilling to answer, although possibly he may be acting from mere caprice, and after leading me a long dance for six months, he may turn round and say capriciously, “I will not inform you.” I will not suppose that any man would act upon that principle; it is contrary to his interest to do so; he gets nothing by it; and I will not assume it; but I confess my own feelings would be that it was not a very strong objection, or, indeed, any objection at all. I do not think it would deter me from bidding what I thought to be a fair value, even if there were not that consideration. That is my feeling about it, but that may be personal to myself. I do not put that forward

strongly ; but this I do feel, I wonder that people should be willing to bid with such very peculiar and stringent conditions, which, from their peculiarity, make it extremely difficult to put a construction upon them. On the other hand, I have some feeling with regard to this—I wonder that people should go and take shares in a joint-stock bank ; I consider it almost a mark, I was going to say, of insanity ; at all events, if you ask me whether I would allow the property of a ward of Court in chambers to be laid out in such a manner, I should say, most unquestionably not. I may have that feeling ; but the question is, what is felt and thought upon the subject by mankind ? How does it operate ? How do mankind, who look to their own interest, view it ? Now what do we find with regard to this condition ? First of all, it is not uncommon now to introduce it when a sale takes place by a vendor who is absolute owner, whose wish and sole object is to get the best price he can ; that is, to get, when the whole thing is completed, the utmost amount of money into his pocket. And then I find this, that conveyancers of the first eminence, and conveyancers who have not only considered the matter in their practice, but who have deliberately considered the matter with a view to put in print and publish their own views and sentiments of what they find to be, what they know to be the practice, and what they consider to be the right practice—I find that the leading conveyancers, in their published treatises—which, although not authorities for this Court to act upon in its decisions, are entitled to great respect and consideration, as pointing out the practice—consider it to be a reasonable and proper condition to be introduced, when a sale takes place by the mortgagee under a common power of sale without any special clause about conditions. Can I conceive, in that state of things, where these sales have taken place over and over again, and even after this sale had taken place, if a bill were filed by the mortgagor against the purchaser to recover the property, that any Court would give relief ? I confess I cannot bring myself to that conclusion. It appears to me to be a reasonable clause. That it is depreciatory in the sense in which every condition which

restricts or fetters the rights of a purchaser can be considered depreciatory, I admit. But that it is reasonable and proper, and therefore not so depreciatory as to be improper against the mortgagor, I also believe. Therefore, adopting as I have said the principle to its fullest extent as laid down by Turner, L.J., in the case of *Pyrke v. Waddingham*, I ask myself whether I think any Court would give such relief ? I do not think it would.

Now I do not rely upon this, but at the same time I think I may mention this other circumstance, which I think would operate as a special circumstance in the present case to prevent any relief being given, which would be this, upon the question whether it was a proper or an improper condition to introduce as between mortgagor and mortgagee where the mortgagee is selling : we have here one of the mortgagors concurring in this very condition being introduced ; I do not mean to say that would bind the others—I think it would not at all—still it would be a circumstance to shew that one at least of the mortgagors considered it to be a reasonable condition ; but that, as I said before, I do not rely upon, and in the absence of that circumstance I should come to just the same conclusion. Being of that opinion with regard to the objection, it is not necessary that I should go into the question which has been raised, whether that objection has been waived. I am of opinion that it has not been waived ; but whether it has been waived or not, it appears to me that it is not a sufficient objection. Nor do I go into the question whether there has been any concurrence of the other mortgagors. For the same reason I do not go into that. At the same time, if I were asked to express any opinion upon it, I should say, certainly I am of opinion that there has been no concurrence of the mortgagors.

I come now to the other objection, which is of a totally different character. Here, as I have said, the objection is, whether there is anything in the representations made by the particulars to mislead a bidder or to lead this purchaser to suppose that he was bidding for an article which he has not got ; that is, bidding for an article without certain restrictions,

when, in fact, those restrictions do exist. Now, it appears to me that there is really nothing in that objection. The objection is this: it appears by the testator's will, that he gives a sum charged on all his property, real and personal, which he had given to his wife for life, and directs it to be sold, to raise a sum of 14,000*l.* Of that 14,000*l.*, 8,000*l.* is to go to these four Reades, or such of them as should be living at the death of the wife. Then, that left 6,000*l.* of the 14,000*l.*: 2,000*l.* of the 6,000*l.* were given to one, under a similar condition upon the contingency of his surviving the widow; and another 2,000*l.* to another, and another 2,000*l.* to a third, under similar contingencies; and the residue of the property, subject to the charge of those sums, amounting to 14,000*l.*, is given to certain nephews, amongst whom are these four. Now, the only question is as to the 8,000*l.*, which was the subject of the first lot. It is clear, then, upon that, that the 8,000*l.* and the three sums of 2,000*l.* each would, in the absence of any declaration on the part of the testator one way or the other, be chargeable *pari passu*, and if there were a deficiency of the fund, if the fund did not produce 14,000*l.*—which it might not—then the 8,000*l.* and the three sums of 2,000*l.* each would abate *pari passu*, according to that gift. The testator added a clause that they should abate; but if there were no such clause, they would equally abate. I do not apprehend that there can be the least doubt upon the construction of the will in that respect. There was nothing whatever in the will to make the 8,000*l.*—I mean independent of the direction that they should abate—payable in priority; but at all events, the testator said that they should abate *pro rata* in case the fund did not produce 14,000*l.* Now, let us see what is the effect of the representation made by the particulars of sale—that is, do the particulars of sale so describe the property as to lead any one fairly to conclude that the 8,000*l.* as put up for sale was 8,000*l.* not liable to abatement *pari passu* with the three sums of 2,000*l.* each? If they do, then would come the question, Were you, the purchaser, misled? The purchaser here, I must bear in mind, is a company, and of course a company acting

carefully, a reversionary interest society acting carefully and deliberately in all their purchases, acting under the advice of most competent persons, both legal and what I may call financial, of a person accustomed to the business of an actuary, and acting under the most careful deliberation and the best advice—but does their solicitor, or anybody on their part, who of course advises them; does their actuary, does any one of their directors, does their managing director or their managing person, suggest that when he looked at these particulars he thought that what was put up for sale was 8,000*l.* not liable to abatement with the three other sums? There is not a word to such an effect. Still I must look to see whether the words used are calculated to mislead. Now, first of all, in what may be called the title-page of the particulars and conditions of sale, there is this description of the property: "Important reversions on the death of a lady in her sixty-seventh year." Now, if you stop there, you would say these reversions are not contingent at all. But, of course, you must look to the will; you must not conclude that they are not contingent; you must read the whole of the particulars of sale. Then the title-page goes on: "Particulars and conditions of a sale of a reversion to a certain sum of 8,000*l.*, and to a sum of about 4,000*l.*, payable on the decease of a lady in her sixty-seventh year, which will be sold by auction," and so on, at such a place. Now, here we have a reversion to a certain sum of 8,000*l.*, and to a sum of about 4,000*l.* What is that sum of about 4,000*l.*? Clearly, upon the face of the particulars, it is this: as I have said, the four mortgagors, the four Reades, and some other nephews of the testator, are entitled among them to his residuary property, upon a certain contingency,—that of their surviving the widow. Now, taking the number of nephews—I do not mean to say it is set out in the particulars of sale, because the number of nephews is not set out—but taking the number of nephews, they estimate the chance of these four nephews to be 4,000*l.* No doubt it was roughly taken in this way: "Here is property worth 24,000*l.* or 25,000*l.*, and here is 14,000*l.* of charges; that would leave 10,000*l.*; and here are

ten nephews, and if each survive he will have about 1,000*l.* Here are four selling their chance, and that amounts in a rough way to 4,000*l.*" Understand me; I am not saying that all that is set out, but that is obviously what it amounts to. Let me see what is meant by "a certain sum of 8,000*l.* and a sum of about 4,000*l.*" Certainly it does not mean that it is not liable to contingency at all, because it says in the next line but one, contingent upon one of four younger lives surviving her, that is the lady of sixty-seven; so that it does not mean it is not contingent; but what does it mean? It means that whereas the 8,000*l.* is a fixed sum, the 4,000*l.*, which is the other lot, is not a fixed sum; that it is an uncertain sum; it is a share of residue which is uncertain, and that is the meaning of the word "certain" in the first page. But now let us come to the particulars themselves. Lot No. 1. is described thus:—"A reversionary absolute sum of 8,000*l.* cash." Now, there it is called an absolute sum, not a certain sum. Absolute does not mean that it is not liable to contingency, because it is expressed to be liable to contingency. Then, what is meant by absolute? It is meant that it is a fixed sum; it is a fixed sum in contradistinction to the second lot, which is uncertain and not fixed, because it is a share in residue which is not only liable to charges, but liable to expenses, costs, and so on. "A reversionary absolute sum of 8,000*l.* cash, payable on the decease of a lady in her sixty-seventh year, less the legacy duty, in case (here is the contingency enunciated) four persons, aged respectively forty-two, thirty-six, thirty-eight and twenty-seven, or any of them, shall survive her." Then we come to this: "This sum of 8,000*l.* is charged by the will of the late James Reade, Esq., of Berkeley Street, Portman Square, on the property mentioned below in favour of his four nephews named in his will, together with a policy of assurance that was to secure a certain sum in the event of all or one of the four surviving the widow." Then, according to this title-page, one would not have known how the 8,000*l.* was created, how it was secured upon the property. It might have been under any unknown circumstances; but here we have the fact that it is a charge under a gentleman's will, and it is a charge

on the property which is mentioned below. There is no mention there of any other charge; and if that were all, and there were nothing more in the particulars, undoubtedly it would have represented that there was 8,000*l.* chargeable upon this property; and no mention being made of any other charge, it would be fair to conclude upon the reading of this, that it was 8,000*l.*, and if the property amounted to 8,000*l.* you will get paid; but in the second lot of the very reversionary interest of these four persons in the residue of the property subject to this charge we have a further description. Lot 2 is described as "the contingent shares of the same four persons in the produce of the residuary property of the above-named testator. The property is not divisible until the death of the widow of the testator, now in her sixty-seventh year. It consists of the several particulars mentioned below." Then it goes on to say what the property is subject to. The property is subject, besides the life interest of the testator's widow, to the two following contingent charges: first, the above sum of 8,000*l.*, payable in the event above referred to; and, secondly, three other sums of 2,000*l.*, payable in case any of the children of the testator's brother John Reade, of whom there are four now living, shall survive the widow of the testator; making 14,000*l.*, and which sum, that is, 14,000*l.*, is a first charge upon the testator's estate." What is represented there is this, that this property, this lot 2, which we are now selling, is the contingent share of these four persons in the residue, after satisfying that charge of 14,000*l.*, which consists of four portions, a charge of 8,000*l.* and a charge of 2,000*l.*, and two other charges of 2,000*l.* each. What is the effect of that? Is it that the 8,000*l.* is to be paid in priority to each of the 2,000*l.*, or one of the 2,000*l.* to be paid in priority to another of the 2,000*l.*? Anybody reading this would come to the conclusion, as the advisers of this Reversionary Interest Society did come to the conclusion, that they were buying that charge of 8,000*l.* subject and liable to abatement *pari passu*, and having no priority over the three sums of 2,000*l.* each. Then it goes on to describe the property which is the subject of this charge, that is, amounting to 14,000*l.*, and the residue of which constitutes lot 2.

There is a freehold and copyhold house, and there are various shares in divers railway companies; and there is a small sum of 3*l.* per cent. annuities. Now, I confess it does appear to me, that it is impossible to suggest that there is anything upon the face of these conditions to mislead anybody, or to lead any one not only to the conclusion but to the suspicion that it was meant to be represented that the 8,000*l.* was prior in point of charge to the sums of 2,000*l.* each. It is true that the particulars do not set out the clause in the will which expressly provides that there should be no priority, but an abatement *pari passu* in the event of the property not producing 14,000*l.* It does not set out that, it is true; but it sets out that which produces precisely the same effect. It sets out that here is, by the testator's will, property which is described now as consisting of such and such particulars, which is charged with 8,000*l.* and three sums of 2,000*l.* each, making 14,000*l.*, and that 14,000*l.* the first charge; and then, subject to that, they are selling the second lot, the shares of these four persons. Under these circumstances, I am of opinion that the second objection is not maintainable; and therefore the decree must be prefaced with what is stated to be the agreement between the parties, upon which I have undertaken to express my opinion upon the two points. The decree must be for specific performance, and for the payment of the residue of the purchase-money, with the consequential directions as regards costs. It appears to me, without imputing anything wrong to the purchasers, who are, of course, desirous of having a complete title, that they have raised objections which are not tenable, and I think I am bound to make them pay the general costs of the suit.

His Honour afterwards said, that the portion of the costs occasioned by the evidence as to the value of the testator's property, and by the contention raised as to the loss of interest, should be paid by the plaintiffs as not being strictly necessary for the decision of the question between the parties.

M.R. } *In re* THE HAMPSTEAD JUNC-
Nov. 13, 24. } TION RAILWAY COMPANY.
 } *Ex parte* THE DEAN AND
 } CHAPTER OF WESTMINSTER.

Lands Clauses Consolidation Act—Corporation Lands—Dividends—Purchase-Money.

A railway company, under the compulsory powers of the Lands Clauses Consolidation Act, took lands belonging to a corporation, which were then let on lease. The value of the reversion was alone assessed, it being understood that rents were to be paid to the corporation during the existence of the leases. Upon a petition by the corporation, asking for the investment of the purchase-money,—Held, that the purchase was made as of property in possession, and that the dividends were payable to the corporation, and ought not to be accumulated up to the falling in of the reversion.

The Hampstead Junction Railway Company was incorporated by the 16 & 17 Vict. c. ccxxii.; it included the powers of the Lands Clauses Consolidation Act, 1845. The term for making the railway was also extended by the 19 & 20 Vict. c. lii.

The company required, for the purposes of the railway, several pieces of land in the parish of St. John's, Hampstead, of which the Dean and Chapter of Westminster were seised in fee, one containing 8 a. 0 r. 32 p.; this (*inter alia*) was demised by an indenture dated the 26th of December 1808, to Thomas Roberts, for three lives, and the life of the longest liver of them, at a yearly rent of 1*l.* 12*s.* Another piece contained 1 a. 3 r. 3 p.; and this, on the 13th of October 1855, they agreed to demise, with other lands, to Henry Davidson, for ninety-nine years, at an aggregate yearly rent of 23*l.* 10*s.*

The dean and chapter and the company, in consequence of differences as to the value, appointed an arbitrator to determine the amount to be paid by the company for the absolute purchase of the land, and as compensation for damage or injury likely to be sustained by the execution of the works, as well as by the severance of the land from the other parts of the estate.

The arbitrator assessed and awarded, to be paid by the company, 3,300*l.* for the

absolute purchase of the 8a. Or. 32p., subject to the lease, and 105*l.* for the 1a. 3r. 3p., subject to the lease agreed to be granted. He also awarded 3,700*l.* as the amount to be paid to the dean and chapter for compensation for damage and severance in respect of the 8a. Or. 32p. He also stated that he had fixed the several sums on the principle that the respective leasees were to continue paying to the dean and chapter the whole of the rents reserved by the leases during the remainder of the terms existing therein.

The railway company paid into court the sum of 7,105*l.*, the amount of the sums awarded, and also a sum of 529*l.* 1s. 3d. for interest on the purchase-money.

The dean and chapter, by their petition, now asked that the 529*l.* 1s. 3d. might be paid to them, and that the 7,105*l.* might be invested, and that the dividends accruing thereon, from time to time, might be paid to them.

Mr. R. Palmer, for the dean and chapter, in support of the petition, referred to *Ex parte the Dean and Chapter of Gloucester* (1).

Mr. Speed, for the company. — The petitioners are to receive the whole reserved rent during the continuance of the leases; it would seem, therefore, that the dividends to accrue from the sums to be invested ought to be accumulated until the expiration of the existing terms.

Nov. 24.—THE MASTER OF THE ROLLS.

—I must consider the value of the property to have been computed as if the purchase was made of property in possession; and adopting the principle of those cases which hold that where the reversion is taken by the railway company the person entitled to the reversion shall only take so much of the rents and so much of the dividends as correspond to the amount which they would have received if the matter had remained unconverted, and also that the rest is to accumulate for the purpose of making payments at the end of the term of what would have been the absolute value of the property, I am of opinion that this is not a case of that description, but that it is a case where,

(1) 19 Law J. Rep. (N.S.) Chanc. 400.

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having regard to the agreements that were entered into for letting the property on building leases, and obtaining the surrender for that purpose, it must be treated as property bought in possession, and, consequently, that the Dean and Chapter of Westminster are entitled to the dividends upon this fund. I concur in the cases, and do not mean in any respect to disturb them by what I now state.

KINDERLEY, V.C. } THORNER v. WILSON.
Nov. 8.

Annuity—Upon what Property chargeable—Mixed Fund for Payment of Debts—Charitable Devise.

*A testator devised certain estates in fee, subject nevertheless, and he thereby charged the same estates with the payment of an annuity of 80*l.* a year. He also devised other estates to trustees upon trust to sell and apply the proceeds arising from such sale, together with his personal estate, which he bequeathed to them, in discharge of his debts and legacies; and if any surplus should remain, the testator directed the same to be paid to the then minister of a Catholic chapel, to whom he gave and bequeathed the same:—Held, that the annuity of 80*l.* was a charge upon the corpus of the estates; that the fund for payment of debts and legacies was a mixed fund; and that the devise of the surplus of the proceeds arising from the sale of the property to the Catholic minister was void under the Statute of Mortmain.*

A question was raised in this case upon the construction of the will of John Mount, dated the 30th of December 1843. The testator being seised and possessed of freehold, copyhold and leasehold estates, and also of personal property, gave to his wife Margaret the use of the dwelling-house in which he then resided, together with the furniture and appurtenances, for her natural life; and after her decease he gave and devised the same to the then minister of the Roman Catholic Chapel at Lawkland, in the parish of Clapham, in the West Riding of the county of York, and his successors, ministers of the same chapel, for ever, as an addition to the sti-

pend of such chapel. And he gave and devised to Thomas Wilkinson, minister of the Roman Catholic Chapel at Kendal, and to his successors for ever, all those his estates called Stock's Mill, with the cottages adjoining, Small Tree, with the cottages adjoining, and Red Tree, with the cottages adjoining (except the close of land thereafter devised to William Allen), with one Mossdale, in Craka Moss, all situate in the township of Skelsmere, in the parish of Kendal, in the county of Westmoreland; also one other Mossdale in Doate's Moss, in the parish of Arton, subject, nevertheless, and he thereby charged the same estates with the payment of 80*l.* a year to his said wife, for her natural life, which was to be in lieu and satisfaction of all dower which she might be entitled to out of his estates; and he directed that the same should be paid to her by two equal half-yearly payments on the days therein mentioned; with power of distress. He also gave to the officiating minister of the said Roman Catholic Chapel at Kendal, for and during the term of seven years next after his decease, the rents and profits of all those the said testator's two allotments, called "Lord's Allotment" and "Commissioner's Allotment," situate in the said township of Skelsmere. He gave and devised unto Richard Wilson, of Kendal aforesaid, gentleman, and William Ellison, of Sizer, in the said county of Westmoreland, gentleman, all that his estate called "Bowstone," situate in the parish of Strickland Kettle, in the said county of Westmoreland; and also the said two allotments, called "Lord's Allotment" and "Commissioner's Allotment," subject to the said term therein of seven years; to hold the same, with the appurtenances, unto them the said Richard Wilson and William Ellison, and the survivor of them, their or his heirs and assigns for ever, upon the trusts following, (that is to say,) upon trust that they the said Richard Wilson and William Ellison, and the survivor of them, or the heirs of such survivor, should absolutely sell and dispose of the same premises at such time and manner as therein mentioned, and should apply the money arising from such sale or sales, together with his personal estate, which he thereby bequeathed to

them, in satisfaction and discharge of his just debts, funeral and testamentary expenses, and the legacies thereafter by him bequeathed, and if any surplus should remain, the said testator ordered and directed the same to be paid to the then minister of the Roman Catholic Chapel at Kendal aforesaid, to whom he gave and bequeathed the same, and who he thereby declared should be his residuary legatee.

The testator died in December 1843, leaving the plaintiff, his sister, and heiress-at-law and sole next-of-kin, him surviving. The bill prayed that it might be declared that the gifts to the Roman Catholic priests were void, and that the trustees who had taken possession of the estates might be ordered to give them up to the plaintiff, and for an account and receiver.

The case came on for argument on the 26th of April 1855, (reported in 24 *Law J. Rep.* (N.S.) Chanc. 667), when the Vice Chancellor decided that the three gifts to Catholic priests, that is to say, the devise of the dwelling-house to the then minister of the Roman Catholic Chapel at Lawkland, his successors, ministers of the same chapel, for ever, as an addition to the stipend of such chapel; and the devise to T. Wilkinson, minister of the Roman Catholic Chapel at Kendal, and to his successors, for ever; and the gift to the officiating minister of the chapel at Kendal, of the rents and profits of two estates for seven years next after his decease, were all void under the Statute of Mortmain, as being intended solely for the benefit of the church and not of the individuals; but as regarded the residuary devise, His Honour said, it was useless to express an opinion until the accounts had been taken. That question was, therefore, reserved; and the accounts having now been taken, the matter came on again for argument, upon the questions, whether the annuity of 80*l.* per annum to the testator's wife was a charge upon the *corpus* of the estate, whether the money applicable to the payment of debts and legacies was a mixed fund, and whether the gift of the surplus of the proceeds arising from the sale of the estates to the then minister of the Roman Catholic Chapel at Kendal was a good beneficial gift to such minister.

Mr. Glasse and *Mr. Sidney Smith* appeared for the plaintiff; and cited *Foster v. Smith* (1).

Mr. Anderson appeared for one of the defendants.

Mr. Wickens, for the Crown, cited *Roberts v. Walker* (2) and *Boughton v. Boughton* (3).

Mr. Shapter and *Mr. Wakefield*, for the representatives of the minister of the Roman Catholic Chapel at Kendal, cited *Cable v. Cable* (4).

KINDERSLEY, V.C.—With respect to the gift to the then minister of the Roman Catholic Chapel at Kendal, it is clearly a devise to a charity. There are previous gifts of the same nature, which I have already decided to be void under the Statute of Mortmain, and I see no reason to question the correctness of that decision. The testator has devised his Bowstone estate and other property, subject to the term of seven years, to trustees, upon trust to sell the same and apply the proceeds, together with his personal estate, in discharge of his debts, testamentary expenses and legacies, and if any surplus should remain, the testator directed the same to be paid to the then minister of the Roman Catholic Chapel at Kendal, to whom he gave and bequeathed the same, and the testator makes him his residuary legatee. Can there be any doubt that the intention was to benefit the minister, that is, the chapel, by giving so much to the person who should be the then minister thereof? The question, whether there is a charitable gift, depends not merely on the fact that there is a gift to an individual described as the minister, but upon the question whether the testator designates the individual, or gives the legacy to the person who happens to fill the office. A gift to a minister—*quâ* minister—is a charitable bequest. Instances were put in the course of the argument of a gift to the Court of Chancery, to the Attorney General, or to the Queen. But those instances do not apply, for they are not and cannot be charitable objects. But

here I think the intention clearly was to benefit the minister and chapel; and it was not a personal bequest, with a mere description of the individual. Had there been a gift of 1,000*l.* to the person now minister, &c., that would have been different; as the testator might not be acquainted with his name, and could only describe him by his office. It may be observed, also, that the surplus cannot be realized until seven years after the testator's death; that, I think, renders the case still more conclusive. As to the trust for sale, I am of opinion that the testator meant to make a mixed fund, and not a fund in aid of the personalty. He gave the estate to be sold, and then proceeded thus:—"And should apply the money arising from such sale or sales, together with his personal estate," &c.; that is, he constituted a mixed fund, composed of the two classes of property. There must, therefore, be an ascertainment and apportionment of those classes. Then, as to the charge of the 80*l.* annuity. If the testator had given real estate and charged it absolutely, without adverting to the rents and profits, either with a gross or an annual sum, that would have been a charge upon the *corpus*. If the testator had been told that the rents would more than produce that sum, he might have said, "Well, then, pay it out of the rent;" but as the case stands, the gift is an absolute gift of the estate, charged with so much, and the person who takes the devise must take it so charged.

LORDS JUSTICES. }
Jan. 12. } BRANDON v. BRANDON.

Principal and Surety—Right of Surety to have the Shares of the Receiver, a Party to the Cause, applied in discharge of Payments made by him—Mortgage to Surety.

B. B. was entitled as heir-at-law to shares in the estate of *S. B.*, under administration in this court. He also became entitled, by purchase from parties interested, to other shares. He was appointed receiver of the rents, and gave the usual security. *B. B.* became a defaulter, and his sureties were compelled to pay the full amount of their recognizances, which was not sufficient to satisfy the deficiency. One of the Vice

(1) 1 Ph. 629; s. c. 15 Law J. Rep. (N.S.) Chanc. 183.

(2) 1 Russ. & M. 752.

(3) 1 H.L. Cas. 406.

(4) 16 Beav. 507.

Chancellors decided that, inasmuch as the parties to the suit other than B. B. were entitled to say that B. B. should take nothing until they were paid in full their shares, and as the money paid in by the sureties was applicable to make good those shares as far as it would go, the sureties had an equity to be re-couped all they had paid out of the shares of B. B. after these shares had made good all that remained due to the other parties after exhausting the money paid in by the sureties. B. B. had executed a mortgage to the sureties of all his shares as heir-at-law, but "not the shares he had purchased." He became bankrupt, and his assignees sold these shares, and the Vice Chancellor decided that the purchaser from the assignees could not stand in a better position than the assignees, who took only subject to the same equity as B. B.:—Held, on appeal, that the decision was correct, the mortgage making no difference in the rights of the sureties.

This was an appeal from a decision of Vice Chancellor Kindersley, made on the 27th of March 1857, on further directions, and on two petitions in the above-named cause, and eleven other causes arising out of the same.

The appeal was presented by Mr. Glover, a surety for William Barnard John Brandon (hereinafter in this report called Barnard Brandon), the receiver in the cause and a party interested under the will of Samuel Brandon, the testator in the cause, the administration of whose estate was the object of the original suit. The appeal was against one clause of a voluminous decree, and the question raised will appear from the following abridgment of the judgment of the Vice Chancellor. After disposing of other parts of the case, his Honour proceeded to say:—"The question I have now to dispose of is of a novel kind, not novel with respect to the general principles upon which the question has been argued, but with respect to the application of those principles. The question is as between the assignees in bankruptcy of Barnard Brandon, the receiver in the cause, and his surety Mr. Glover. Barnard Brandon, the receiver, was entitled as heir-at-law of the testator to real estate undisposed of by the will,

and to certain shares and interests of parties who were interested under the will. In April 1839 Barnard Brandon was discharged from being receiver, and an account was directed of the monies in his hands, to whom the same belongs, and in what manner and to whom the same ought to be paid, or for whom the same ought to be invested. In January 1840 Barnard Brandon became bankrupt. In pursuance of the order of 1839, the Master made his report, not satisfying all the inquiries, but finding that 6,277*l.* 16*s.* 5*d.* was due from the receiver. Upon that report a petition was presented in July 1840, by the parties beneficially interested, for the sureties to pay in the amount found due, and a cross-petition by the sureties was presented, on the ground that, as Barnard Brandon was himself interested in some portion of that balance, the sureties, though they might be liable to pay what was necessary to satisfy the interests of the parties other than Barnard Brandon, ought not to be liable to make good that portion of the balance which would be beneficial to Barnard Brandon. On these petitions coming on in November 1840, an order was made on that against the sureties: they were ordered to pay in 4,415*l.* 2*s.* 7*d.*," which they subsequently did, and ultimately the amount arrived at 4,700*l.* paid by the sureties.

In order to simplify this statement, it may be right to say that Mr. Glover, one of the sureties, became solely entitled to or interested in respect of the whole 4,700*l.* paid in. The amount of the recognizances executed by each of the sureties was 4,762*l.* Mr. Barnard Brandon, on the 3rd of September 1830, had executed bonds to each surety to indemnify him from all losses by reason of his suretyship. On the 4th of June 1839 Mr. Barnard Brandon executed a mortgage to the sureties, which recited, among other things, the bonds of indemnity to them, the mortgagor's title to certain leasehold estates, his title to certain of the testator's real estates not devised by the will, and his title to certain shares under the will; that there was due from him as receiver about 5,000*l.*, which the sureties were liable to pay, and then reciting, "And whereas the said Barnard Brandon being minded and

lious to indemnify and save harmless the said, &c. (sureties, Mr. Glover among them), and each of them, from and against all losses, costs, charges, damages and expenses to arise or be occasioned from or by reason of their having entered into the before-mentioned recognizances, hath consented and agreed to convey, assign and assure unto the said (sureties), their heirs, executors, administrators and assigns, all the freehold estates and parts and shares thereof to which the said Barnard Brandon is or may be entitled at law or in equity as heir-at-law of the said Samuel Brandon, but not any such shares or interests as the said Barnard Brandon may have acquired by purchase, and his share and interest in the rents and profits thereof; and also the said factory and premises held by the said Barnard Brandon under the said indenture, &c., and the engines, machinery, fixtures, utensils and things therein or thereupon, upon the trusts," &c. after declared.

The deed then witnessed, that Barnard Brandon conveyed "all and singular the messuages, lands, tenements and hereditaments of freehold nature or tenure, and parts or shares of messuages, lands, tenements and hereditaments of freehold nature or tenure of which he, the said Barnard Brandon, is or may be seised, or to which he is or may be entitled as the heir-at-law of the said Samuel Brandon, but not otherwise," to hold the same upon the trusts after declared. And it was further witnessed, that he assigned the leasehold premises and plant, machinery and fixtures upon the same trusts. The trusts were for sale at the discretion of the sureties, and after payment of the expenses of sale to retain and reimburse themselves "all such monies respectively as they respectively, or any of them, shall or may have paid under or by reason of the said suretyship, with interest," &c., and all sums they may have to pay by reason of their having executed the said recognizances. "Provided also, &c. that the total amount of the money secured, or to be ultimately recoverable upon this deed or security, shall not exceed the sum of 5,000*l*." The judgment of the Vice Chancellor then proceeded as follows:—"In the year 1843 the assignees of Barnard Brandon put up the interests of Barnard Brandon for sale in six lots, and

at that sale one of the lots was purchased by Mr. Glover himself, the surety, and afterwards the other lots were sold to other individuals, and among them to two solicitors, who were the solicitors to parties in the cause." * * "The sureties are ordered to bring in, in addition to the 4,415*l*. 2*s*. 7*d*., that which will make it up the full amount of the penalty of their recognizance, 4,760*l*. They will, therefore, have paid in the whole they were liable to pay, and that sum is a sum which will not satisfy the rights and interests of the parties other than Barnard Brandon. If Barnard Brandon, or the assignees of Barnard Brandon, or the purchasers from those assignees, would be entitled to any portion of the money actually paid in by the sureties, I should consider that the sureties had a direct and original equity against Barnard Brandon himself, and against Barnard Brandon's assignees, and against the purchaser of Barnard Brandon's interest, to get back so much of the 4,700*l*. as appears to belong to Barnard Brandon. But that is not the case. The question now raised and to be determined, is this:—have the sureties an original and direct right against those shares irrespective of the right which they may have to stand in the shoes of what are called the creditors, according to the common equity as between surety and principal. I think there is no such clear and original right. If a surety pays the debt of his principal he has no lien upon any particular property belonging to that principal. He may bring an action to recover and may obtain judgment against any property of the principal, but he has no equity whatever by the mere fact of his paying that which the principal ought to have paid, and for which the surety was merely a surety. Now, in this case, Barnard Brandon—and I will view the matter as if Barnard Brandon had never become bankrupt, and as if these shares had never been sold by his assignees—is entitled to certain interests, and it appears to me that as Barnard Brandon has no interest in the particular sum of 4,700*l*. paid in by the sureties, there is no right in the surety by any direct or original equity to come upon the property which Barnard Brandon is

entitled to, although it consists of his shares and interest in property which is administered in this suit. The next question then is, has he the right? Has he a right to apply to this case the well-known common principle, that when a surety pays the debt of his principal he has a right to require that the creditors to whom he makes the payment shall give him the benefit of all those securities of which the creditor might have availed himself as against the principal debtor? That principle is a well-known principle, and has appeared to be so clearly just, that, by a very recent act of parliament (1) more force has been given to it by making it available, even in those cases where the surety has not taken the precaution of protecting himself as a surety before the passing of that act might have done. But now, by that act, a surety may (I may say under all circumstances, speaking generally) have the benefit of those equities, of those securities, which the creditor was entitled to. That principle being a clear principle,

(1) 19 & 20 Vict. c. 97.—This statute was referred to by the counsel for the sureties in consequence of the argument of the counsel for the purchasers from Barnard Brandon's assignee, that there was no principal debtor in the present case. The act is entitled 'An act to amend the laws of England and Ireland affecting trade and commerce,' and the 5th section enacts as follows:—"Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: Provided always, that no co-surety, co-contractor, or co-debtor, shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

founded on natural justice, recognized by the act of parliament which I have referred to, is it applicable to the present occasion? I think it is. I think that the surety has that right. What is the position of things? The surety is the surety for the due accounting of the receiver. It is true that he is not a surety giving a security directly to the parties beneficially interested, but the Court in taking possession of the property by its receiver requires recognizances to be given by the sureties, in order to secure to the parties beneficially interested that which the receiver may himself fail to make good, and it is only for the benefit of the parties interested that, in appointing a receiver, the Court requires recognizances from sureties at all. The suretyship, therefore, is for the benefit of the parties beneficially interested. The parties beneficially interested, then, supposing there were no sureties at all, or supposing the sureties had become bankrupt or insolvent and nothing could be got from them, have a right, as it appears to me, by the common equity administered in suits, to say, that Barnard Brandon shall not receive anything in respect of these shares until he has made good his deficiency as a receiver, there being a balance of 6,000*l.* or so due from him, and he being entitled to shares of the property, shall not receive anything in respect of his shares until that deficiency is made good; or, in other words, there is an equity with parties beneficially interested in those shares in which the surety has no beneficial interest, to make the shares of Barnard Brandon applicable to make good the receiver's deficiency. That appears to me to be a clear equity, in fact, a security which is possessed by the persons beneficially interested. The surety now makes good to those parties, by payment into court to the extent of his recognizances, that which he was surety for, and it appears to me that I should be crippling the effect of that general equitable principle if I did not apply it to this case. It appears to me that, although, if the fund paid into court by the sureties is not sufficient to satisfy the claims of the persons beneficially interested, other than Barnard Brandon, the persons beneficially interested have a right, before the sureties can get

anything, to be re-couped all that is coming to them, so far as the money of the sureties will suffice to pay this debt (the liability of the receiver), they are entitled, subject to the prior equity of the parties beneficially interested, to the extent of full satisfaction of their claim, to stand in their shoes as against the shares of Barnard Brandon, assuming as I have been hitherto assuming that Barnard Brandon was still here, and that he had never become bankrupt. Does that equity apply as against the assignees in bankruptcy of Barnard Brandon? I think it certainly does. I think that the assignees in bankruptcy can stand in no better position than Barnard Brandon himself, and that, whatever equity Barnard Brandon's shares would be liable to in his hands, they remain liable to in the hands of his assignees. Then comes the question, whether the persons who purchased the interests of Barnard Brandon from the assignees stand in a better position than the assignees themselves. It appears to me that they do not. I think that persons who purchase the interest of a person who claims a certain share or interest in a fund administered in a suit in this court, whether they purchase direct from him or from his assignees in bankruptcy, do not stand in any better position than he himself would have stood in. In fact, Barnard Brandon's interest is entirely equitable, as the interests of all the parties are. They are purely equitable. It is not like the case of a person acquiring a legal interest on payment of a valuable consideration without notice of an equity; he may be entitled to stand in a better position than a person having a beneficial interest. But here all the interests are simply equities. It was originally an equitable interest in a fund to be administered in this suit. The interest of Barnard Brandon is liable to an equity as regards the other persons beneficially interested, and I think, as the sureties stand in the place of those persons, the sureties are entitled to those equities; it passes to the assignees liable to that equity, and it appears to me that the parties purchasing from the assignees are liable to the same equity (2)."

(2) The 74th clause of the order consequential on the decision was as follows:—"It is declared

From the foregoing decision of the Vice Chancellor the purchasers of three lots at the sale by the assignees appealed, the other lots having been purchased by Mr. Glover, the surety, himself; he being also, as before stated, solely interested in the fund paid into court in discharge of the recognizances.

Mr. Baily and *Mr. Hardy*, for the appellants, relied upon the fact that in the mortgage of 1839 the security as to the property in the suit was expressly limited to the shares of Barnard Brandon as heir-at-law of the testator; and, further, that there was other property of Barnard Brandon included, shewing beyond contest that both the receiver and his sureties were content with the mortgage security in lieu of any right or title they might have through any equity of the other persons beneficially interested under the will. It was, in fact, an abandonment and relinquishment of the general right of a surety in favour of a particular security. They also insisted that, as there had been several occasions on which the claim the sureties

that, after making good to the other parties interested in the said testator's estate, the whole deficiency and loss occasioned by his default as receiver, the shares and interests in the said testator's estate to which the said William Barnard John Brandon is so entitled as aforesaid, are (subject, nevertheless, as provided by the 11th clause of this order) liable as between his sureties and the purchasers of such shares and interests respectively to make good to the said sureties, as the sureties of the late receiver William Barnard John Brandon, the said sum of 4,415*l.* 2*s.* 7*d.*, paid by them into the Bank, to the credit of the nine first above-mentioned causes, on the 5th day of April 1841, with interest thereon from that date, at 4*l.* per cent. per annum, and the said sum of 346*l.* 17*s.* 5*d.*, when so paid in, as thereby directed, with interest thereon after the rate aforesaid, from the day of such payment into the Bank, and any costs properly incurred by them as such sureties, but that the freehold shares which the said William Barnard John Brandon took as the said testator's heir-at-law, and the rents which have accrued due thereon since the 23rd day of April 1839 (after satisfying certain costs), are by force of the said indentures of mortgage of the 3rd and 4th days of June 1839, first applicable towards making good the sums which the said sureties are so entitled to be re-couped as aforesaid, and that any deficiency after the application of such freehold shares ought to be made good from and out of the shares to which the said William Barnard John Brandon became entitled as purchaser, rateably and according to the values of such several purchased shares respectively at the date thereof."

now made might have been urged, they must be taken to have acquiesced in this view of a substituted security. Clause 74. of the order of the Vice Chancellor was all that was appealed from.

LORD JUSTICE KNIGHT BRUCE.—The appellants raise the question, what is the effect of the mortgage? or rather they say that the taking of a specific security is an abandonment of the general right of a surety.

LORD JUSTICE TURNER.—The cases as to the rights of sureties do not depend on contract.

Mr. Glasse and *Mr. Cracknall* supported the order of the Vice Chancellor.

LORD JUSTICE KNIGHT BRUCE.—I do not see where there is any contract of relinquishment by the sureties, nor do I see what there is in their conduct to shew any acquiescence. A surety may have a right to two securities, one specific and the other general. The appeal seems to me to wholly fail.

LORD JUSTICE TURNER.—The sole question on this appeal is, whether certain shares in the testator's property purchased by his heir-at-law, who was the receiver in the cause, are liable to the sureties of the receiver to make good sums which they are liable to pay, in consequence of the default made by the receiver, in the account passed by him, he not having paid the balances into court. Now, these purchased shares have been declared to be liable to the parties in the cause for portions of that balance due from the receiver for which the sureties are not liable, their recognizances not extending to the full amount which was due from the receiver; and from that part of the decree there is no appeal. We must, therefore, consider that these shares were liable for the sums due from the receiver to those parties. The sureties have paid to those parties portions of the sums which were due to them, and the consequence is, that the sureties must be entitled to stand in the place of the parties for the amount which they have paid to them, and therefore we must consider that upon this decree, *prima facie*, the sureties would be entitled to the right against these shares

of the estate. Then, it is said, supposing the sureties to have had that right, they have taken security upon some shares which descended to the heir-at-law, and have excluded from that security the shares which were purchased by the heir-at-law; it is to be inferred from that, that they meant to abandon any security which they might have upon the purchased shares: in fact, to take it upon the descended shares. But it is to be observed, that the sureties having paid the money would have a right; they had not at that time paid the money—when they had they would have a right as against the purchaser. To hold that deed to operate as a release of that right is, I think, going much too far, when we consider that there are not to be found in the deed any words whatever which could purport to release that right if the sureties were called upon to pay. It is very possible at the time of the execution of the deed the parties might have thought that the purchased shares could not ultimately be made liable, and the receiver may have objected to include in the security the purchased shares, and therefore the parties may have meant to leave the shares upon that deed, subject to such priorities as the law would ultimately create upon them; and I do not think that, from the mere fact of the purchased shares being excluded from the security, it can be held that they were exempted from the general liability which the law imposes on them. It seems, therefore, that this decree is perfectly right, and that the appeal must be dismissed.

After some discussion on the form of the order, it was drawn up as follows:—Vary clause 74. by declaring that all the other property included in the mortgage of 1839, as well as the shares of the receiver, Barnard Brandon, as testator's heir-at-law, included therein, is subject to the same liability as those shares are thereby declared liable to. The costs of the respondent, by arrangement, were ordered to be paid by the deposit, and the remainder of them out of the purchased shares.

L.C. }
 Nov. 4, 5, } WARE v. THE REGENT'S CANAL
 6, 15. } COMPANY.

Statute — Construction — Injunction — Canal Company.

By an act obtained by the Regent's Canal Company they were empowered to make and maintain an enlargement of a certain reservoir in the lines and upon the lands delineated in the plans of such enlargement, deposited with the clerk of the peace, shewing the lines, with a section shewing the levels thereof:—Held, that the sections, as well as the plans, were incorporated in the act, and prescribed a vertical as well as a lateral limit within which the works were to be kept.

By act of parliament a canal company were empowered to construct a reservoir, raising the water to a certain height. If by exercising their powers to the extreme limit, the effect would have been to cover with water other lands than those the company had taken,—semble, that the landowner might compel the company to purchase these lands, if the company's compulsory powers have not expired; but that if the compulsory powers have expired, the company will be restrained by injunction.

Where, however, a company having power by act of parliament to raise an embankment to a certain height exceeds that height, a neighbouring landowner is not, on account of the possibility of injury to his lands, entitled to an injunction against the company; but the right to such injunction is in the Attorney General on behalf of the public.

This was an appeal, by the plaintiff, from a decision of the Master of the Rolls, who had dismissed the bill without prejudice to any action which the plaintiff might be advised to bring.

The defendants, who were incorporated for the purpose of making the Regent's Canal, were in 1851 desirous of enlarging a reservoir belonging to them, which was constructed across the valley of the Brent, penning back its waters; there being an overfall which discharged the water rising above a certain height. The requisite notice was accordingly given, and the plans and sections were deposited with the clerk of the peace. These plans and sections indicated the

difference between the then line of top water and the intended line, the latter being 35 feet 9 inches. After the act had been obtained, the company proceeded under it to take some lands of the plaintiff's, who was a lessee of land at Hendon, and the price was settled by arbitration, by which also the plaintiff was awarded a sum for the damages to be sustained by the execution of the works, not including, however, any damage which might arise from flooding land belonging to the plaintiff and not taken by the company. In 1853 the reservoir was completed, the top of the embankment having been made 2 feet 6 inches higher than was shewn in the deposited sections; and the overfall having been constructed so that by means of moveable stop planks inserted in grooves the top-water level might be raised to the height of 36 feet 9 inches above the datum line. The evidence shewed that if the water was kept up in the reservoir 35 feet 2½ inches above the datum line, it did not flow over any of the plaintiff's land not comprised in the notice to purchase; but that if raised to 35 feet 9 inches it would. On one occasion, at least, the defendants used the stop planks and raised the water to its maximum height, when a portion of the plaintiff's land was slightly flooded, but to what extent by reason of the company's acts, and how far in a natural manner owing to the peculiar character of the valley, was not clear from the evidence. At other times there were occasional floods, as to the cause of which the evidence was conflicting. The bill prayed for an injunction to restrain the company from permitting the embankment to remain as constructed, or of any greater height than shewn in the deposited plan and section; and also from permitting the overfall to continue as constructed, or so as to admit of the top-water level being raised to more than 35 feet 9 inches above the level of the datum line.

*Sir R. Bethell, Mr. Lloyd and Mr. T. Stevens, for the plaintiff, the appellant.—*This Court is called upon to interfere by injunction in consequence of the defendants having exceeded the powers conferred upon them by their act of parliament. The principles upon which the Court acts in such cases are stated by

Lord Cottenham, in *Frewin v. Lewis* (1), where he says (p. 254):—"So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this Court will not interfere. The Court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority. That distinction, which is very obvious, sufficiently explains all the grounds on which this Court ever interferes with the acts of bodies constituted as these Commissioners are. Many cases have come judicially before me in which I have been called upon to act upon this principle; more especially in the instance of railway companies, canal companies, and other bodies incorporated by acts of parliament, as to which, while the Court avoids interfering with that which they do, while keeping within the limits of their jurisdiction, it takes care to confine them within those limits; and if, under pretence of an authority which the law does give them to a certain extent, they go beyond the line of their authority, and infringe or violate the rights of others, they become, like all other individuals, amenable to the jurisdiction of this Court by injunction." It was the right of the Court to interfere to prevent the consequences of unskilful operations. The 68th section of the Lands Clauses Consolidation Act was not applicable where the thing done was in transgression or excess of the parliamentary authority. If the thing done had been rightfully and skilfully done, any damage sustained must be sought for at law; but if the thing was done unskilfully, the party complaining had a right to come to this Court and have it restrained.—

Broadbent v. the Imperial Gas Company,
7 De Gex, M. & G. 436; s. c. 26
Law J. Rep. (N.S.) Chanc. 276.

(1) 4 Myl. & Cr. 249.

Dawson v. Paver, 5 Hare, 415; s. c. 16
Law J. Rep. (N.S.) Chanc. 274.

Coats v. the Clarence Railway Company, 1 Russ. & M. 181; s. c. 8 Law
J. Rep. Chanc. 72.

The evidence establishes that the parliamentary limit as to the embankment and the reservoir was intentionally exceeded, and that in consequence permanent injury was caused to the plaintiff by flooding his lands—*Blakemore v. the Glamorganshire Canal Navigation* (2). They referred also to—

Robinson v. Lord Byron, 1 Bro. C.C. 588.

Lane v. Newdigate, 10 Ves. 192.

The Grocers Company v. Donne, 3 Bing.
N.C. 34; s. c. 5 Law J. Rep. (N.S.)
C.P. 307.

The Queen v. the Caledonian Railway Company, 16 Q.B. Rep. 19; s. c.
20 Law J. Rep. (N.S.) Q.B. 147.

The North Union Railway Company v. the Bolton and Preston Railway Company, 3 Rail. Cas. 345.

Mr. R. Palmer, Mr. Follett and Mr. Wickens, for the defendants.—It could not have been the intention of the legislature to preclude the exercise of a reasonable judgment as to deviations from the plans and sections in the execution of the works—*The North British Railway Company v. Tod* (3). The Court will not interfere to prevent an eventual or contingent nuisance—*Lord Ripon v. Hobart* (4). They also referred to—

Graham v. the Birkenhead, Lancashire, &c. Railway Company, 2 Mac. & G.
146.

Lee v. Milner, 2 You. & C. 611.

The Warden, &c. of Dover Harbour v. the South-Eastern Railway Company,
9 Hare, 489, 493; s. c. 21 Law J.
Rep. (N.S.) Chanc. 886.

Stainton v. Woolrych, 23 Beav. 225;
s. c. 26 Law J. Rep. (N.S.) Chanc.
300.

Cromford, &c. Railway Company v. the Stockport, &c. Railway Company, 1 De Gex & Jo. 326.

(2) 1 Myl. & K. 154, 162; s. c. 2 Law J. Rep.
(N.S.) Chanc. 95.

(3) 12 Cl. & F. 722, 731.

(4) 3 Myl. & K. 169; s. c. 3 Law J. Rep. (N.S.)
Chanc. 145.

Sir R. Bethell, in reply.—There were three grounds of injunction for the preservation of property: first, in the case of nuisance, where the remedy at law was insufficient; second, where there was danger of destruction of property, as in the powder-mill case—*Crowder v. Tinkler* (5); third, where it was necessary to restrain corporations within the exercise of the powers conferred upon them—*Frewin v. Lewis*. There might be a contract by the legislature on behalf of the public and also on behalf of individuals; and the test as to the latter was the necessity of their consent to the act proposed to be passed.

Nov. 15. — The LORD CHANCELLOR (after fully stating the facts) said—The defendants contend that they are not bound to adhere to the level shewn on the section, and that they are only limited to the line of lateral deviation indicated on the plan. In support of their argument, they rely principally on *The North British Railway Company v. Tod*, in which the House of Lords decided that the plans deposited under the Standing Orders prior to the introduction of the bill were not to be regarded, except so far as the representations they contained were incorporated in and made part of the act of parliament. This being the law thus finally settled, the question in each case as to the obligatory character of the plans and sections, is either wholly or in part dependent on the construction of the act authorizing the execution of the works. By the 4th section of the Regent's Canal Act the company are empowered to make and maintain an enlargement of the reservoir in the lines and upon the lands delineated in the plans of such enlargement, deposited with the clerk of the peace, shewing the lines, with a section shewing the levels thereof. It must be borne in mind that in conferring powers for constructing the reservoir or for keeping up a head of water, the most important circumstance with regard to owners of adjoining land is the height to which the water is to be penned or kept up. When the legislature, therefore, permits a work to be done on a plan, and describes the

plan as shewing the lines, with a section shewing the levels, it appears to me to be a clear indication that the works are to be executed on the lines and according to the levels which the promoters of the undertaking have themselves proposed in their deposited plans and sections. It was said, on the part of the defendants, that it never could have been the intention of parliament to anticipate the judgment of the engineer as to the works which, in the course of construction, might be found to be necessary; that this would require an extent of scientific investigation to which parliament was incompetent; and that, therefore, the usual course was to refer in general terms to the plans and sections, so as to leave a latitude of deviation in the execution of works to meet the exigencies that might arise. In answer to this reasoning, it is to be observed that the plans and sections are always the result of scientific judgment applied previously; that the investigations before parliamentary committees proceed on the proof by engineers of the sufficiency of their plans for the proposed works, and those plans are required to be deposited with the clerk of the peace, in order that they may be inspected by parties interested, who are thus enabled to ascertain by scientific witnesses how far they are intended to be affected by the proposed works. There is always, therefore, a presumption of intention on the part of the legislature that the works should be executed according to the deposited plans; otherwise the parties interested, instead of being informed, would only be deceived by what they represented. None of the cases militate against the construction which I am disposed to adopt. In *The North British Railway Company v. Tod*, the language of the plaintiffs' railway act was very nearly similar to the 4th section of the Regent's Canal Act; but the Railways Clauses Consolidation Act incorporated into the main part of the railway act, in the 11th section, contains a provision that "in making the railway, it shall not be lawful to deviate from the levels of the railway as referred to the common datum line described in the section approved of by parliament, and as marked on the same, to any extent exceeding in

any place 5 feet," without consent. There was no doubt that the levels were to be observed according to the deposited plans and sections, but the whole question turned upon what was the meaning of the word "levels," as used in the act; and the House of Lords came to the conclusion that the legislature, by the term "level," intended to refer not to the surface line, but to the datum line, and to the line of railway to be measured and ascertained with reference to its distance from the datum line. The case of *The Queen v. the Caledonian Railway Company* is distinguishable from the present. There, a railway company, before applying for a bill, deposited with the clerk of the peace plans and sections of the proposed line, and cross-sections, shewing the manner in which the roads were to be carried over the line by a bridge, and also indicating the proposed inclination of the altered line of road. The deviation act incorporated the Railways Clauses Consolidation Act, and one of its clauses enacted, "that it should be lawful for the company to construct the bridge for carrying the railway over any roads or for carrying any roads over the railway, of the heights and spans and in the manner shewn in the section deposited." The whole question turned upon the words, "in the manner shewn in the section." The Court was clearly of opinion that there was no obligation beyond the heights and spans of the bridge, as delineated in the plans; that these were mentioned in the enactment, but nothing was said as to the widths and inclinations of the roads. There appears, then, to be no authority to prevent me from coming to the conclusion that the sections as well as the plans are incorporated in the Regent's Canal Act, and prescribe a vertical as well as a lateral limit within which the works are to be kept. The sections then being incorporated in the act, the company became empowered to raise the water to a permanent height of 35 feet 9 inches above the datum line, but not beyond. In arguing against the obligatory effect of the section, the defendants were compelled to concede that they were not at liberty to raise the water even to the height of 35 feet 9 inches, if it would have the effect of flooding more lands than

the company had taken under their act; but holding as I do that the legislature has conferred on the company the power of raising water to this height, the question arises, what would be the rights and liabilities of the company, if, on their going to the extreme limit of their powers, the effect would be to cover other lands than those they have taken, but which they have power to take under the act? If this had taken place during the period when the compulsory powers of the company could have been exercised, I apprehend the plaintiff might have obtained relief through the aid of a Court of equity, and have compelled the company to purchase these additional lands; but if lands they had no power to take are permanently flooded there can be no doubt that the owner might have obtained an injunction to restrain the permanent taking and occupation of his land. If, therefore, I found upon the evidence that the company had permanently submerged any lands of the plaintiff, beyond those they have purchased, as it is now too late for them to take additional lands, I should feel bound to grant an injunction to restrain the company from taking and using what they were not entitled thus to appropriate to themselves; but I find no evidence at all of any such permanent overflowing of any part of the lands of the plaintiff. Instances were given of occasional floods that spread over the plaintiff's lands, but I have great difficulty upon the evidence in attributing these floods to the defendants' reservoir in a manner unauthorized by their powers. If any damage had resulted to the plaintiff's land from the excess of their powers by the company, although the plaintiff might maintain an action at law, I should not hesitate to grant an injunction to restrain the excess of the powers of the act of parliament if the damage had resulted from an imperfect or defective execution of works. Granting such a case to have been made by the bill, I should have been unwilling myself to assume the responsibility of deciding such a case, and should have left the plaintiff to law; but if the damage to the plaintiff's lands was the inevitable result of the proper execution of the works, causing an occasional flooding, in contra-

distinction to a permanent submerging, he must be left to his remedies under the 68th section of the Railways Clauses Consolidation Act, which would apply to this case according to *Broadbent v. the Imperial Gas Company*. But the plaintiff insists on his right to an injunction, on the ground that the defendants have violated the act of parliament by raising their embankment higher than the maximum height, and also by having constructed the overfall in such manner as to be capable of raising the water above the level indicated in the section, and he contends that this of itself gives him a right to an injunction, even if he should be unable to shew that he has sustained injury, by the transgression of the prescribed limits. But I cannot consider that such an abstract right belongs to the public, who happen to be within the range of possibility of injury, which must be always an uncertain and indefinite criterion. Where there has been an exercise of powers in excess, or beyond the powers given by an act of parliament, I apprehend that no one but the Attorney General, on behalf of the public, has a right to apply to this Court to check the exorbitance of the party in the exercise of the powers confided to him by the legislature. If an individual sustained no damage, and there is no reason to apprehend that he will sustain damage, notwithstanding his being nearer to the possible cause of injury than the rest of the public, he has no peculiar position or claim to entitle him to become the redresser of a public grievance, or to complain of the disregard of the provisions of an act of parliament. The language of Lord Eldon in *Blakemore v. the Glamorgan-shire Canal Company*, certainly appears to sustain the proposition of the plaintiff to its fullest extent, but I adopt the interpretation of that language by Baron Alderson in *Lee v. Milner*, and with him I say that these acts "ought to be treated as conditional powers given by parliament to take the lands of the different proprietors through whose estates the works are to proceed. Each landowner, therefore, has a right to have the powers strictly and literally carried into effect as regards his own land, and also to require that no variation shall be made to his pre-

judice in the carrying into effect the bargain between the undertakers and any one else." The words "to his prejudice" may mean not only to his possible but actual prejudice; and Lord Eldon himself seems to have qualified and explained the generality of his own language by one of the issues in *Blakemore v. the Glamorgan-shire Canal Company*. I do not think, therefore, that I ought to interfere by injunction, unless the plaintiff satisfies me that the excess in the height of the works has occasioned damage, or is likely to produce damage which cannot be otherwise redressed. Now, the only permanent excess of height is to be found in the embankment, which has been made 2 feet 6 inches higher than is represented in the parliamentary section. The defendants' evidence states that the existing height of the embankment is absolutely required for the security of life and property, having regard to the height which the Regent's Canal Act empowers them to put water in the reservoir. I cannot see how the height of the embankment *per se* can injuriously affect the plaintiff, the arrangements at the overfall being the only means by which the defendants can raise the level of the water. These were brought into operation in March 1855. If the plaintiff had come immediately after the flooding of his lands by thus raising the water by means of the overfall, he might possibly have had some ground to ask the Court to interfere for his protection, not merely against the threatened mischief, but against mischief actually produced, with the means and opportunity of repetition; but I have no evidence to satisfy me that there has been at any time since either an user or any intention to use the works so as to prejudice the plaintiff. On the contrary, the weight of the evidence inclines me to the opinion that the company have always kept the water down to 32 feet. Upon the question whether I am to grant the injunction, I cannot help being influenced by the delay that has occurred, although not amounting to absolute proof of acquiescence.

Appeal dismissed, with costs.

WOOD, V.C. }
 Nov. 12, 13, 15; } JONES v. PEPPERCORNE.
 Dec. 3. }

Broker—Deposit of Securities—General Lien—Evidence—Custom of Brokers.

Bonds, payable to bearer, and passing by delivery only, were deposited with bankers for safe custody, and the bankers afterwards fraudulently deposited them with their brokers as a security for money advanced, and became bankrupt :—Held, that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers, and not merely for the advance made upon the security of those particular bonds.

Semble—The Court will take judicial notice of the custom of brokers as part of the general custom of merchants.

The facts of this case are stated in the judgment.

The Solicitor General and Mr. Martineau appeared for the plaintiffs ; and

Mr. Rolt, Mr. Speed and Mr. W. W. Cooper, for the several defendants.

Dec. 3.—WOOD, V.C. — In this case the bill is filed on behalf of a number of proprietors of certain Dutch bonds, which, or bonds of a similar description, were deposited in the banking-house of Messrs. Strahan & Co. for safe custody. The question that arises is, whether or not a large number of those bonds, having been sent by Strahan & Co. to their brokers, the Messrs. Peppercorne, with the direction to raise money to the extent of 25,000*l.*, and the bonds themselves having realized a greater amount than that, the bondholders are entitled to say that the surplus shall be paid over to them, irrespective of a balance which is alleged by the Peppercornes to be due to them in respect of their business transactions with the bankers. That is the point to which this case is entirely reduced, because the question with reference to the matters of account between the bankers, to which a great portion of the bill is directed, especially as regards a certain sum of 2,000*l.*, is not ripe for discussion ; and more especially as the defendants, having taken the

view that it is a matter of account, have not entered into any evidence on that particular point.

The facts are shortly these :—Messrs. Strahan & Co. had deposited certain securities for the raising of money with their brokers, some of which were their own securities, and some belonged to other people. The course of dealing with regard to securities upon which money was to be raised from time to time by their brokers, seems to have been this : they sent securities of different characters, sometimes India bonds, sometimes Exchequer bills ; and on those securities money was to be raised. The practice, according to the whole evidence, not disputed on either side, was, that with regard to particular securities of this description, the advance was supposed to be made till the next settling day in the Stock Exchange, and if the money were not paid, or if further time were not granted, it was then competent to the broker to sell the securities so deposited, in order to realize the advance so made. With regard to the transaction, also, there is no dispute upon this point, that as between Messrs. Peppercorne and Messrs. Strahan & Co., although Messrs. Peppercorne from time to time procured these advances from other quarters upon the security of the bonds, yet they stood in the relation of principals on all occasions as between themselves and Strahan & Co. The advance was taken as an advance from them to Strahan & Co., and received by Strahan & Co. as such. It is also in evidence that on certain occasions, when Messrs. Peppercorne conceived they had a greater amount in hand than necessary for their security, they returned the surplus securities, whatever they might be, and were content with retaining those securities which would exactly realize the particular amount to be raised. It further appears that these bonds were pledged by Strahan & Co. exactly as if they were their own property, although it is quite true they belonged to their clients. It was a fraud which they were committing in so dealing with the property ; but at the same time, as between themselves and Messrs. Peppercorne, it is not suggested that the latter were aware of the bonds being other than the property of the bankers them-

selves, or that they were in any way bound to deal with them as if they belonged to other persons than the bankers.

Then, as regards the particular transaction in question, it is shortly and correctly stated in the bill to be this—I should mention that these bonds were payable to bearer:—On the 2nd of May 1854 Messrs. Strahan & Co. deposited with Messrs. Peppercorne 108 bonds for 108,000 guilders, being part of 588 bonds mentioned in the bill as a security for 5,000*l.*, and on the 6th of March 1855 they deposited the remaining 480 bonds for 480,000 guilders; and it appears from a document which is in evidence, that on the occasion of this second deposit Messrs. Peppercorne were instructed by a letter from Messrs. Strahan & Co., of the 5th of March 1855, to “raise 25,000*l.* on 500 Dutch bonds, 2½.”

Now, with regard to the authority of Messrs. Peppercorne to deal with this property, it was stated that they sold some of those bonds at a time when they were not justified in selling them. In reference to that, there is an entry in the books of Messrs. Peppercorne, from which it appears that they continued the accommodation in respect of this transaction to the 31st of May, whereas some of the bonds were sold before that period; and further, that interest was charged in respect of the debt, that is to say, of the advance which they had undertaken to make, at a time when some of the bonds were sold, and then that interest ought not to have been charged. The bill does not seek any remedy in respect of that; it is merely introduced with reference to the general lien now claimed. The bill does not seek to avoid any of these transactions; but they are brought forward in aid simply of the argument that the Messrs. Peppercorne were not at liberty to deal with these bonds except for the particular and specific purpose for which they were deposited. The transaction, then, is simply reduced to this. The bankers send securities to a broker for the purpose of having money raised upon them, and, I think, upon the evidence in this case, with full power in the brokers to sell them at the time when the money ought to become payable, namely, either at the settling day, or at such other time as the parties by agree-

ment have arranged; and having sold those securities, they are to reimburse themselves, of course, their lien; the question being, whether, if the securities are more than enough for that purpose, they are entitled to retain those which remain for the purpose of their general balance. I ought also, perhaps, to mention as a part of the transaction that there were two modes of dealing between the banker and the broker. There was in respect of the general account a daily arrangement and settling, apparently on account of shares bought and sold and the commission upon those shares so bought and sold by the brokers for Strahan & Co., the brokers understanding with reference to all these transactions that they were solely for the advantage of the bank. They went daily to Strahan & Co., who, no doubt, would have large dealings while they were in credit, in respect of purchases and investments desired to be made by their several customers. They went daily to take their instructions and the accounts were settled and balanced day by day, so far as that part of the transaction went, and the commission upon the whole thing charged with respect to those transactions. Besides that, there is one other fact, and one other fact only, to notice, which is, that these loans on securities would bear different rates of interest in respect of the particular security being or not being such as the broker approved of in respect of the advances to be made. This, however, does not touch the question of the general lien, as, to what is to be done after the special purpose is answered for which the security was deposited; whether, having these securities, and there being more than enough to answer the special purpose, the surplus is subject to the general lien, for nobody disputes in this case that the property was available for the payment of the special debt that had been contracted. Now, the case referred to in the course of the argument, and which may be said to comprise the whole of the law upon that subject, because every authority of importance is cited in that case, is *Brandao v. Barnett* (1), in which the question was simply this—a person deposited Exchequer bills with

his own bankers, keeping them in a box of which they had the key ; being obliged from time to time to have those Exchequer bills exchanged for other like bills, he handed them over to the bankers for the mere purpose of having them so exchanged, and the conclusion of fact that the Court arrived at was, that that intent was fully understood by the bankers. Even upon that state of facts, it appears that there was considerable difference of opinion in the courts below, the Court of Queen's Bench having decided against the lien, and the Court of Exchequer Chamber in favour of it. The point there raised was, putting the case exceedingly high, that if there be, for any purpose of business, securities deposited in the ordinary course of business with a banker, then he has upon those securities so deposited with him a lien for the balance of his general account; and the circumstance in that case of the Exchequer bills being delivered for the purpose of obtaining other Exchequer bills in the place of them was of itself a dealing with the Exchequer bills in the ordinary course of business of bankers for their customers; and therefore the lien attached before the duty of returning them to the box for the purpose of being locked up. The House of Lords came to the conclusion, that they were handed over for the sole specific and special purpose of being exchanged for other Exchequer bills and returned to the box, and that being the case, they were never in the hands of the bankers but for that particular purpose; and that particular and special purpose of putting them back in the box would clearly have placed them as much out of the controul of the bankers as they were when originally in the box; that it was a mere substitution of the one for the other, the necessary consequence of that particular security requiring the change to be made, just as if the bankers had been the messenger or any other person chosen to attend and obtain the new Exchequer bills and return them to the box; and in a case of that description it was impossible the lien could be sustained. It does not appear to me that the present case goes to anything like the length of the circumstances of that case. Here the brokers were in the habit of making advances to the bankers in

respect of securities deposited with them, and I have the evidence of a large number of very eminent brokers as to what the course of dealing in such transactions is. The evidence given by Mr. Mortimer, the broker to the Court of Chancery, is this:— he says, “ Where lenders or other brokers hold securities deposited by the same borrowers at several times and on distinct occasions, and choose to close their account, or their account is closed by circumstances, such as the borrower stopping payment, the lenders have a lien upon all the borrower's securities in their possession, until the balance due to them from the borrower on every account is paid, and they have the right to sell a sufficient portion of the securities to cover any such balance. In fact, all securities in the hands of lenders at the time of closing an account are applicable, not only to the particular sum advanced at the time of the deposit of particular securities, but to whatever balance may be due from the borrower to the lenders at the time that the account is closed.” Similar evidence is given by every one of the eminent brokers who are called; and, indeed, it would appear that the Court would require no evidence of the practice of brokers in this respect, considering it as settled. I think some expressions with regard to the general lien on business transacted with brokers will be found in the authorities upon the custom of bankers, and I confess I have never felt any doubt or difficulty on the case before me. The transaction is simply this. The shares are sent to the brokers with the direction to raise so much money; and they get the money. That appears to be the ordinary transaction with the broker: a common business transaction, not like buying and selling shares, on which he charges a commission, but a business in which brokers are in the habit of largely engaging as a part of their general business. Being so sent, no doubt, in this case,—I will say no doubt, because it is not a question which arises here,—the broker, in the first place, does that which he is directed to do; and he might hold these shares, as I understand the evidence, until he acquired a right to sell them, which right he does not acquire until the settling day, or such other day as may be given.

The question still remains, when he sells them, is he bound to sell simply as many as will raise the particular sum in question, or, having them deposited in his hands for the general business, is he not entitled to a general lien for whatever balance may be due to him? When the shares are deposited with him nobody can tell what may be the exact amount required of those shares; they are perpetually fluctuating in price; and although there is evidence that, according to the natural course of dealing, the broker, when he found he had more than enough for the purpose, from time to time would send back the securities, one cannot infer from that that he did waive, in respect of other transactions, his right to insist on the general lien. The whole of the shares being deposited, nobody knowing what the exact number required may be, on account of the fluctuating value of the property, I apprehend all those shares are deposited in the first instance for the purpose of having the specific object attained, and there is nothing to prevent the general lien attaching. The doctrine laid down by Lord Campbell in *Brandao v. Barnett* is clearly this, that the special contract is only exclusive of the general lien when it is inconsistent with it. If there is any specific contract in respect of a chattel which is inconsistent with the general lien on the chattel, then, of course, the doctrine of general lien is excluded; and so it might possibly be, if before the right to sell accrued, the banker tendered the whole money; some question might arise as to whether there was not a special contract there, implying that the shares were to be returned in the event of the money being replaced. The question would still be open, whether there would not be a right on the part of the lender to say, something more must be done before the shares are returned; but at the same time, after the shares have become due nothing of that kind can arise inconsistent with the general lien, because the two things are perfectly consistent, that you shall be bound to apply the property according to the special contract in raising the money, and you shall have a lien on the surplus in respect of your general balance.

All the authorities are stated in *Brandao*
NEW SERIES, XXVIII.—CHANC.

v. Barnett, and one of the strongest possible character, which was a good deal referred to in the course of the argument, and as to which no dissent was expressed, was *Davis v. Bousher* (2). There the customer was in the habit of depositing bills and acceptances of various customers with the bankers, in order to have money advanced on them. The bankers looked at the bills, and if they liked the security they made an advance in respect of the acceptances; if they did not like them they declined the advance. And this occurred: a large parcel of bills was sent: on some they advanced, and on others they declined to make any advance; yet the Court held, in that case, that they were entitled to a lien on those in respect of which they had not advanced for any deficiency upon those on which they had advanced. That is, perhaps, the strongest case in favour of this lien. Then, again, there was a case of *Bolland v. Bygraves* referred to in *Brandao v. Barnett*, where Lord Tentarden at Nisi Prius laid down the rule to be, that a banker who stands in this relation to a customer has a lien on any security which may be placed for any purpose in his hands. It was attempted by the counsel to extend it to bills locked up in a box, which the Court thought was pressing it much further than the nature of the case warranted; but I can have no doubt that it must apply to securities placed as these were for the purpose of having the money raised.

The Solicitor General relied a good deal on the difficulty this would cause in business transactions, if, where a customer requests his bankers to sell stock or shares for him, on the bankers placing them in the hands of brokers for sale, they are entitled to treat them as subject to their general lien against the bankers; but this is an inconvenience which might arise in all matters where confidence has to be reposed. In this particular case the Peppercornes themselves say they occasionally raised money by again depositing these shares with other people; and a third or fourth deposit of that kind may occur, the general lien of the depositee arising in each case; and no doubt all this is an inconvenience.

nience which may arise from the confidence which one person has to repose in another. Whether, if Strahan & Co., in dealing with their brokers, had said, "We are instructed by our customers to sell these shares; sell them for us," the general lien could have been asserted, is another question. The broker there would take with the knowledge that they were the property of a third person, and not of the bankers; but so long as persons do leave it with bankers to deal with property as they think fit, and bankers have to deal with it as their own, I can only regard it, as between the two persons in litigation before me, as being the property of the brokers, and they have in the property so deposited every right which they would have in an ordinary case of securities left with them for the purposes of an advance, and on the margin of which securities, after satisfying the advance, they must plainly have their general lien. Therefore, the decree I propose to make is this:—Declare that the defendants, the Peppercornes, are entitled to retain the surplus proceeds arising from the sale of the 588 Dutch bonds in the pleadings mentioned, after payment of the money advanced by them on the security of such bonds, in satisfaction of such money, if any, as may be due to them on the result of the account hereinafter directed of the general dealings and transactions between the defendants and the firm of Strahan, Paul & Bates. Direct an account of the monies received by the same defendants in respect of the sales of the said Dutch bonds, also an account of what was due to them for principal monies and interest in respect of monies advanced by them on the security of bonds, and let the same be deducted from the amount of the proceeds of the sale. Also an account of what, if anything, was due on the balance of the account of the general dealings and transactions with the firm of Strahan, Paul & Bates at the time of the bankruptcy of the last-mentioned firm. Upon further directions these accounts will be dealt with. Then, in taking such accounts no settled accounts to be disturbed—that I think right with reference to the daily dealings, whatever the effect of it may be,—with liberty to either side to surcharge and falsify, and liberty to

apply. I do not think it necessary, at present, to deal with the question of the particular costs of the plaintiffs making out their title. My impression is, that the plaintiffs will ultimately have to pay their own costs of making out their title as the owners of these bonds; but, as the whole matter must come back again on further directions, I shall reserve them for the present.

STUART, V.C. }
Jan. 31. } LISTER v. BELL.

Practice—Abandoned Summons, Costs of.

Where a summons, taken out at chambers, was adjourned into court, and then abandoned by the plaintiff, the defendant was held entitled to the taxed costs of such summons.

Mr. Malins (with whom was *Mr. Wood*) applied, on behalf of the defendant, for the costs actually incurred relating to a summons which had been taken out at chambers, by the plaintiff, for a special jury in this case, under the statute 21 & 22 Vict. c. 27, and which summons had been adjourned into court, but had been abandoned by the plaintiff.

Mr. Bacon said he had received instructions in the cause, although he was not instructed to appear on the present motion, and suggested that it was not the practice of the Court to give the costs actually incurred of an abandoned summons.

STUART, V.C.—If a summons comes on in chambers, and is abandoned, justice and the course of practice require that the person summoned to chambers should, when the summons against him is abandoned, be indemnified in respect of the costs of that proceeding. When the summons is adjourned into court the same practice must prevail. As to abandoned motions there was a general order, which has not yet been extended to abandoned summonses. By a general order of Lord Eldon's (5th of August 1818), it is prescribed that, if affidavits have been filed in support of a motion which is abandoned, the costs shall be taxed and paid to the other side by the party giving the notice of motion and not moving; but neither 40s. nor any other

sum has been fixed by the practice of the Court as the costs of an abandoned summons. Lord Eldon's order of the 5th of August 1818 (1), was intended to prevent a party who had been put to great expense being sent away with 40s. as an indemnity for that expense. If, therefore, I find a summons abandoned in chambers, or abandoned in court, I can understand no other practice, and I have heard of no authority for any other course of practice, than that a person summoned to oppose a summons, and being told, after he has incurred considerable expense in preparing to oppose it, that it is abandoned, must have his taxed costs. I do not know why I heard anything stated about the nature of the summons, because that has nothing to do with it. If I found a case made that required me to summon a jury, I might, in the exercise of my discretion, if I thought it necessary, summon a jury, or take any other means that the legislature has armed me with, to endeavour to do justice between the parties. The legislature, which has prescribed these means of justice, has given the Judges a discretion. I think the defendant is entitled to the taxed costs of the summons.

KINDERSLEY, V.C. } *Ex parte* THE PLUM-
 Nov. 22. } STEAD, WOOLWICH
 AND CHARLTON WA-
 TER COMPANY.

Joint-Stock Companies Acts—Winding up—Jurisdiction of the Court.

Where a company has been registered under the Joint-Stock Companies Acts of 1848 and 1849 as an unlimited company, and subsequently registered under the 19 & 20 Vict. c. 47. as a limited company, the Court of Chancery has power to make an order for the winding up of the whole transactions of the company.

The Plumstead, Woolwich and Charlton Water Company was originally registered under the Joint-Stock Companies Acts of 1848 and 1849, and was subsequently registered under the Joint-Stock Companies Act, 19 & 20 Vict. c. 47, as a company with limited liability. A petition

was now pending in the Court of Bankruptcy for the purpose of winding up those transactions of the company which had taken place subsequently to its registration as a company with limited liability; and a petition had also been presented to this Court for winding up those transactions which had taken place prior to that time. It was now asked that the petition to this Court might be amended so as to make it apply to all the transactions of the company, both before and subsequently to the registration under the stat. 19 & 20 Vict. c. 47, on the ground that extreme inconvenience and expense would be caused if the company were subjected to the double procedure of two winding-up orders in different courts.

Mr. Glasse and Mr. Lewis, in support of the application, submitted that the Court had power to make this order, and they cited the 59th and 60th sections of the act, which were in the following terms:—Section 59. "The provisions of this act relating to the winding up of companies shall apply to all companies registered under the act, 8 Vict. c. 110, and entitled 'An act for the registration, incorporation and regulation of joint-stock companies,' from and after the date at which they have obtained registration under this act, in manner hereinafter mentioned, but not any other companies." Section 60. "The expression 'the Court,' as used in the third part of this act, shall mean the following authorities; (that is to say,) in the case of a company engaged in working any mine within and subject to the jurisdiction of the Stannaries,—the Court of the Vice Warden of the Stannaries: In the case of a limited company registered in England that is not engaged in working any such mine as aforesaid,—the Court of Bankruptcy having jurisdiction in the place in which the registered office of the company is situate: In the case of a limited company registered in Ireland, whose registered nominal capital does not exceed 5,000*l.*,—the Commissioners of Bankruptcy in Ireland: In all cases not hereinbefore provided for, the Court shall mean as respects companies registered in England the High Court of Chancery of England, as respects companies registered in Scotland the Court of Session in either division

thereof, and as respects companies registered in Ireland the Court of Chancery of Ireland."

Mr. Baily and *Mr. Roxburgh* appeared for the directors of the company; and

Mr. Jessel, for shareholders other than the petitioners, and supported the application.

KINDERSLEY, V.C.—I think the construction of the act which has been suggested is the most rational and correct one, and it is manifestly for the convenience and advantage of all parties that there should be but one process of winding up. I will, therefore, make the order for the winding up of the whole company in this court, and for that purpose the petition may be amended as proposed.

FULL COURT
OF
APPEAL.
Dec. 7.

VINEY v. CHAPLIN.

Practice—Rectifying Decree after Enrolment.

The costs of an interlocutory application and order were reserved, but by inadvertence on the final decree ordering the defendant to pay all the costs of the suit, no provision was made for these costs. The defendant enrolled the decree; but, upon the plaintiff's petition, the defendant was ordered to pay these reserved costs.

In this case (reported 27 *Law J. Rep.* (N.S.) Chanc. 434) a decree was made, by which the defendant Chaplin was ordered to pay the costs of the suit. In this decree, however, no mention was made of the costs of an order, dated the 11th of February 1858, and made by Kindersley, V.C. for an injunction, and of an order, dated the 10th of March 1858, made by consent, when the motion for an injunction was renewed before the full Court (see 27 *Law J. Rep.* (N.S.) Chanc. 436).

The decree of the 8th of May was enrolled by the defendants in July.

The plaintiffs now presented a petition, praying that the taxing Master might be directed, in taxing the costs of the suit under the decree of the 8th of May, to allow to them the costs of the orders

of the 11th of February and the 10th of March.

Mr. Druce appeared in support of the petition, and contended that, notwithstanding the order of the 8th of May had been enrolled, the Court would rectify what was an obvious omission—*Fearon v. Desbrisay* (1), *Ex parte Justices of Essex* (2), *Spearling v. Lynn* (3), *Yow v. Townsend* (4) and *Chester v. Gorges* (5); or there might be a separate order now made—*M'Dermott v. Kealy* (6), *Ford v. Wastell* (7) and *Thornhill v. Manning* (8).

Mr. Baily and *Mr. G. L. Russell*, for the defendants, said that no case had been made for vacating the enrolment, neither fraud nor surprise being alleged—*Backhouse v. Wylde* (9), *Wickenden v. Rayson* (10), and *Barnes v. Wilson* (11). It was not competent to the Court now to make a supplemental order. Where costs of a motion were reserved, and no order was made as to them by the final decree, such costs must be lost—*Colman v. Sarrell* (12).

The LORD CHANCELLOR said that it was the intention of the Court at the time the decree was made to give these costs, and the only question was how this was now to be done.

The following order was made:—After reciting an order for injunction on the 11th of February 1858, and the order of the 10th of March 1858, by which, without prejudice to any question, the order of the 11th of February 1858 was discharged, and it was by consent ordered that the consideration of the costs of the application to the Court below, and of that motion, and of the action, should be reserved until

(1) 21 *Law J. Rep.* (N.S.) Chanc. 511.

(2) 22 *Ibid.* 328.

(3) 2 *Vern.* 376.

(4) 1 *Dick.* 59.

(5) 2 *Moll.* 335.

(6) 1 *Phil.* 267; s. c. 12 *Law J. Rep.* (N.S.) Chanc. 237.

(7) 6 *Hare*, 229, 234; s. c. 16 *Law J. Rep.* (N.S.) Chanc. 372; 17 *Ibid.* 368.

(8) 1 *Sim. N.S.* 451; s. c. 20 *Law J. Rep.* (N.S.) Chanc. 604.

(9) 26 *Law J. Rep.* (N.S.) Chanc. 812.

(10) 25 *Ibid.* 162.

(11) 1 *Russ. & M.* 486.

(12) 2 *Cox*, 206.

the hearing, with liberty to apply; and reciting, that by an order made by the full Court, on the 8th of May 1858, it was ordered that a perpetual injunction should be awarded, &c., and it was ordered that the defendant J. Chaplin should pay the costs of the said action at law and of this suit; and reciting that the defendants, or one of them, had caused the order of the 8th of May 1858 to be enrolled; and reciting that the costs of the said applications of the 11th of February 1858 and the 10th of March 1858 were not included in the costs by the order of the 8th of May 1858, directed to be taxed; and reciting the plaintiffs' petition that the omission might be rectified so as to enable the costs to be allowed to the plaintiffs, and that, if necessary, the enrolment of the order of the 8th of May might be vacated for the purpose, &c., "their Lordships taking notice that it was intended by them that the said order, dated the 8th of May 1858, should extend to the taxation and payment by the defendant John Chaplin to the plaintiffs of their costs of the said applications and orders of the 11th of February 1858 and the 10th of March 1858 respectively, and that such costs were omitted to be included in the said order of the 8th of May 1858 by mistake only; do order that it be referred to the proper taxing Master of this Court to tax the plaintiffs their costs of the said applications for and orders of the 11th of February and the 10th of March 1858; and it is ordered that the defendant John Chaplin do pay to the plaintiffs, James Viney and William Giles the said costs to be taxed; and their Lordships do not think fit to give any costs of this application."

LORDS JUSTICES. }
 Dec. 9, 10, 17. } DE MATTOS v. GIBSON.

Injunction — Charter-Party — Mortgage of Ship — Specific Performance.

One of the Vice Chancellors refused to decree the specific performance of a charter-party, or to grant an injunction at the suit of the charterer to restrain a mortgagee of the ship, who had notice of the charter-party, from making a sale in pursuance of his power of sale contained in the mortgage-

deed; but the Lords Justices, considering that where property is contracted to be used in a particular manner, and a purchaser buys that property, with notice of that contract, he is bound not to use it otherwise than in accordance with the contract:— Held, that the plaintiff was entitled to an injunction to restrain the mortgagee from exercising his power of sale, and from interfering with the ship on her voyage, the injunction to continue till the hearing of the cause, and the plaintiff undertaking to be answerable in damages.

This was an appeal from an order of Vice Chancellor Wood, refusing to grant an injunction to restrain a registered mortgagee of a ship and the owner of the same, at the instance of the charterer of the ship, under the following circumstances:—On the 23rd of October 1857, the defendant Curry, who was then negotiating the purchase of the ship in question, agreed, by charter-party of that date, to carry a cargo of coals for the plaintiff from Newcastle to Suez. The plaintiff was to pay the freight, part in acceptances of three and six months, and the rest on the performance of the voyage; but the acceptances were not to be handed over until after the vessel had sailed. On the 6th of January 1858, a bill of sale of the ship was executed to Curry, and deposited by Messrs. Bramley, Moore & Co., of Liverpool, who were the vendors of the vessel, with Messrs. Heald & Co., of North Shields, the plaintiff's agents, who undertook not to part with the plaintiff's acceptances on account of the freight (which were also in their hands) without seeing that Bramley, Moore & Co. were paid the balance of their purchase-money, if any should be then due. On the 12th of January 1858 Curry mortgaged the ship to the defendant Gibson, for 1,500*l.*, and shortly afterwards 1,080*l.* (part of the mortgage-money) was paid by Gibson, at Curry's request, to Messrs. Bramley, Moore & Co. On the 18th of January 1858 Curry's bill of sale was registered at Dumfries. On the 24th of January 1858 Gibson's mortgage was registered at North Shields. On the 29th of January 1858 the vessel sailed, and after the plaintiff's agents, Messrs. Heald & Co., had satisfied themselves of that fact, they handed to Curry's wife acceptances

to the amount of 980*l.*, on account of freight, and Curry's wife out of the proceeds sent Messrs. Bramley, Moore & Co. the balance of the purchase-money of the ship, amounting to about 700*l.* In February the ship, meeting with stress of weather, became so leaky that it was found necessary to take her into Penzance, where she was repaired. On the 12th of July the mortgagee's power of sale became exercisable, and shortly afterwards he took possession of the ship and paid for the repairs. Upon this the plaintiff filed this bill, praying specific performance of the charter-party and an injunction against Gibson to restrain him from interrupting the voyage or selling the ship, without giving notice to the purchaser of the charter-party. On the 25th of November last the plaintiff applied to Vice Chancellor Wood for an injunction against Gibson until the hearing of the cause, when the Vice Chancellor refused the injunction, and from this order the plaintiff appealed.

The argument in support of the motion was, that a mortgagee, with notice of a charter-party, was not entitled to defeat the same by the exercise of his power of sale; while, for the mortgagee, it was insisted that the Court could not grant specific performance of a charter-party, and that a mortgagee had a clear title to remove and sell the ship included in his security without reference to the charter-party, particularly when, as here, there was ample time for the performance of the voyage according to the terms of the charter-party, without further delaying the rights of the mortgagee. The Vice Chancellor took time to consider his judgment, which was delivered at his private residence on the 29th of November, and was as follows:—"On a full consideration of this case, I have come to the conclusion that it is not one in which a Court of equity ought to interfere, either by way of specific performance or by way of injunction to restrain the defendant Gibson from using the ship before the completion of her voyage, according to the charter-party. I conceive that the specific performance of an agreement to convey coals to Suez (which is, in effect, the operation of the charter-party) is beyond the controul of the Court, for what directions could be given as to the navigation of the ship? By what process could the hiring of

the sailors, the appointment of a proper master, the victualling of the vessel and the like, be enforced? As regards the injunction, I conceive the observations of Lord St. Leonards, in *Lumley v. Wagner* (1), to apply to cases in which the spirit of the positive agreement involves a special damage beyond that of the mere non-performance of the agreement itself. He says:—"It was clearly intended that Johanna Wagner was to exert her vocal abilities to the utmost to aid the theatre to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theatre, she would have broken the spirit and true meaning of the contract." That is to say, a special damage would be done by her singing elsewhere at a rival theatre, *ultra* the non-performance of her contract to sing at the given theatre which had engaged her. The Court could not make her perform the latter agreement, but could prevent her doing anything which was an aggravation of her breach of it. This is more apparent if his Lordship's observations on *Clarke v. Price* (2) (in p. 622 of the report in *Lumley v. Wagner*) be attended to. Indeed, at the close of his observations on that part of the case, his Lordship says, he should not have granted any injunction on the affirmative part of the contract only in the case before him. Now, in *Clarke v. Price* an injunction to restrain Mr. Price from writing any other reports until he had written reports for the plaintiff, might have had the effect of compelling him to write for the plaintiff; but it was not the nature of the contract, as Lord Eldon observed, that there should be such a restriction; so in the case before me, it is no point of the contract that the ship should not carry coals for others, nor will the plaintiff be at all the worse for its doing so, beyond the mere loss of his contract. Any other ship will carry the plaintiff's coals as well, or probably better, and the whole matter sounds in damages; he would gain nothing by the ship remaining idle, whereas, in all cases of negative contracts, there is a positive benefit from their observation. Lord Cottenham, in *Heathcote v. the North Staf-*

(1) 1 De Gex, M. & G. 604; s. c. 21 Law J. Rep. (N.S.) Chanc. 898.

(2) 2 Wils. Ch. Rep. 157.

fordshire Railway Company (3), puts the very case now before me as the one in which the Court will not interfere. 'If A. contract with B. to deliver goods at a certain time and place, will equity interfere to prevent A. from doing anything that may or can prevent him from so delivering the goods?' I must, therefore, refuse the motion, and let the costs of it be costs in the cause."

From that judgment the plaintiff appealed.

Dec. 9.—*Mr. Amphlett and Mr. E. Macnaghten*, for the plaintiff.

Mr. Rolt and Mr. Bedwell, for the defendant Gibson.

After the argument it was suggested that it would be convenient to serve the defendant Curry (who did not appear upon the motion), and bring the matter on again, as upon motion for a decree. A provisional order was made in the mean time.

Dec. 10, 17.—The parties not being able to serve Mr. Curry, the motion proceeded. The argument turned principally on the question of the Court granting a negative injunction. The following cases were cited:—

Heathcote v. the North Staffordshire Railway Company.

Lumley v. Wagner.

Tulk v. Moxhay, 2 Phil. 774; s. c. 1 Hall & Tw. 105; 18 Law J. Rep. (N.S.) Chanc. 83.

Storer v. the Great Western Railway Company, 2 You. & C. C.C. 48; s. c. 12 Law J. Rep. (N.S.) Chanc. 65.

Clarke v. Price.

Webster v. Dillon, 3 Jur. (N.S.) 432.

Flint v. Brandon, 8 Ves. 159.

LORD JUSTICE KNIGHT BRUCE said, that both reason and rule in all cases of this kind went together. Where property is contracted to be used in a particular manner, and a purchaser buys that property with notice of that contract, he is bound not to use it otherwise than under the contract. The defendant Gibson took with notice of the charter-party, and was bound thereby, and the injunction must be granted.

(3) 2 Mac. & G. 100, 112; s. c. 20 Law J. Rep. (N.S.) Chanc. 82.

LORD JUSTICE TURNER thought that an injunction ought to be granted until the hearing of the cause, inasmuch as at the hearing there would be three points to be argued before the Court, and which points could not be so properly gone into on an interlocutory application like the present. The first was, whether the plaintiff was entitled to specific performance of the charter-party; the second, whether, if not entitled thereto, he was or not entitled to an injunction, to continue until the voyage should have been performed; the third point being whether Curry had or not a right of damages against Gibson, and whether that right did or not accrue to the plaintiff through Curry. None of these points could be determined at present. Their Lordships would, therefore, grant an injunction to restrain the defendant Gibson and his agents from removing the vessel to Newcastle, or interfering to interrupt the voyage to Suez, the plaintiff undertaking to answer any order the Court might make as to damages; the injunction and the undertaking to last until the hearing of the cause.

LORDS JUSTICES. }
Dec. 20, 21. } BROUGHTON v. HUTT.

Deed—Rectification of Mistake.

A. B., under the mistaken notion that he was, as heir-at-law of his father, entitled to shares in a joint-stock company as really, executed a deed, by which he joined in indemnifying the directors in respect of certain advances made by them. It turned out upon inquiry that the shares were personal estate, and *A. B.* filed his bill to be relieved from the deed, and the Court made a decree in his favour, which decree was upon appeal affirmed.

The facts of this case, which came on by appeal from a decree of Vice Chancellor Stuart, were as follows:—Mr. John Vicary Broughton became the owner of three shares in a joint-stock company, called the Western Australian Company, which was formed for purchasing land in Western Australia. The deed of settlement contained a clause providing that, as between the real and personal representatives of the shareholders, the shares should be consi-

dered as personal estate. Mr. Broughton died in June 1850, having appointed his wife and daughter executors of his will, but having made no bequest of his shares, which were accordingly supposed by his eldest son and heir-at-law to have descended to him. After the testator's death the company made a call on the shareholders, and the testator's daughter drew a cheque for the amount due, as her father's executrix; and the amount was entered in the company's books to the credit of "the executors of the late J. V. Broughton." The company did not succeed, and it was agreed that it should be dissolved; and, in order to meet certain liabilities the directors undertook to procure the necessary funds, on the shareholders indemnifying them to the extent of 200*l.* per share. A meeting was accordingly convened on the 30th of May 1853, by circulars addressed to the shareholders, one being sent to the residence of the eldest son of the testator, who bore the same name and occupied the same house as his late father. Mr. J. V. Broughton, jun., accordingly attended the meeting, and while there executed a deed of covenant, which had been already prepared and engrossed, whereby he covenanted, as one of the shareholders, to indemnify the directors for the sum borrowed. Three actions were subsequently brought against him on this covenant by three of the directors, and he then made inquiries as to his interest in the shares, and ascertained that he was not entitled to them, and had executed the deed under a mistake. He accordingly filed a bill, praying a decree that he had executed the deed by mistake, and that it might be cancelled, and that the actions might be stayed. Vice Chancellor Stuart, considering that it was a case of mutual mistake, made a decree in his favour. From this decision the defendants, who were the directors of the company, appealed.

Mr. Bacon and *Mr. Schomberg*, for the plaintiff, supported the decree of the Court below.

Mr. Amphlett and *Mr. Baggallay*, who were for the appellants, argued that if the plaintiff had any remedy it was at law and not in this court, and that, as the directors had incurred the liability on the faith of Mr. Broughton executing the deed, he was

not entitled to retire from the engagement, and leave them open to the consequences of his act.

LORD JUSTICE KNIGHT BRUCE.—Whether the plaintiff has a case for relief at law as well as in equity I give no opinion; but certainly he has a case for equitable relief, and that whether he has incurred any legal liability by executing the deed or not. It is unimportant for all purposes of this suit whether the plaintiff is under legal liability or not—I doubt whether he is; but, however that may be, it makes no difference to his claim to relief in equity. It is evident that he executed the deed under a mere mistake of law and fact. Were the real circumstances known to the defendants, who caused this deed to be prepared and procured the plaintiff's execution of it, with no knowledge of its contents, except what might have been obtained from the reading of it for the first time in the room? It is impossible that the defendants can be heard to say that they were not themselves aware of the circumstances. Probably, independently of the payment of the call by persons who are called in the books of the company "executors," I should have come to the same conclusion, but that fact is decisive. They could not but have known that the plaintiff was not a shareholder, and they ought not to have allowed him to execute the deed without apprising him of the circumstances. I am not convinced that any damage has accrued or will accrue to the defendants by reason of this gentleman executing the deed. But even assuming that some damage has accrued, or will accrue, it is damage which, with full knowledge of the circumstances, they have brought or will bring upon themselves. It is as plain a case for relief as I have ever seen, and the appeal must, therefore, be dismissed, with costs.

LORD JUSTICE TURNER.—This is as plain a case of both mistake and surprise as can be. The plaintiff never intended to be bound unless he was a shareholder, and the defendants never intended him to be bound unless he was so. What are the circumstances? He attended a meeting and executed the deed on the supposition that he was a shareholder. He acted under a mistake, and also under surprise. The mere circumstance that the defen-

dants contracted liability on the faith of the plaintiff executing the deed makes no difference, for they did so under circumstances which they had better means of knowing than he had. It is altogether a case of mutual mistake; and the appeal must be dismissed, with costs.

KINDERSLEY, V.C. }
Nov. 25. } BAXTER v. WEST.

Partnership—Appointment of Receiver.

The plaintiff filed a bill for dissolution of a partnership entered into with the defendant, and moved for a receiver. A question was raised upon the evidence as to the conduct of the parties, and as to whether there was any term fixed for the expiration of the partnership:—Held, that these questions must be decided at the hearing, and that the Court, not being able to say that a dissolution must be decreed at the hearing, would not appoint a receiver, which would operate as an injunction.

This was a suit for a dissolution of partnership, and the plaintiff now moved for a receiver, and for an injunction to restrain the defendant from interfering with the partnership assets.

The plaintiff and defendant entered into partnership, as booksellers, in 1855, when articles of partnership were executed between them, but no time was appointed by the articles for the continuance of the partnership. The business was carried on until October 1858, when the plaintiff gave notice to the defendant's solicitor for a dissolution.

The evidence on the part of the plaintiff went to shew that the defendant had violated the articles by improperly receiving money and giving orders in the business, which he was not entitled to do.

The evidence for the defendant was to the effect, that there was an understanding that the partnership should continue for seven years; that he had not violated the articles, but that he had acted in the partnership in the manner alleged by the plaintiff in consequence of the plaintiff's own conduct.

Mr. Glasse and Mr. Hislop Clarke appeared in support of the motion, and contended that the conduct of the defendant had been such as to entitle the plaintiff to a dissolution, and that, consequently, he was at any rate entitled now to a receiver.

Mr. Baily and Mr. Ellis, for the defendant, submitted that there had been no violation of the articles on his part; that the question as to whether there was a term or not could only be decided at the hearing, and that, unless the Court could see clearly that at the hearing there must be a dissolution of partnership, there could be no receiver appointed upon an interlocutory application.

Mr. Glasse was heard in reply.

KINDERSLEY, V.C.—I am of opinion that I cannot now grant a receiver in this case. A receiver operates as an injunction; and the principle on which this Court acts with regard to the appointment of a receiver in these cases is this: it will not appoint one, upon a motion of this kind, unless it sees that there is an actual present dissolution arising from the acts of the parties, or that at the hearing it would, upon the merits, dissolve the partnership. If the partnership is a continuing one, and may continue, it will only direct an account. If partners agree upon a term for the partnership to continue, neither partner can dissolve the partnership until the end of the term. But, if there be misconduct, this Court can and will before the time expires appoint a receiver, and the Court, though disinclined to such orders, will, on a proper case being made, appoint a receiver on an interlocutory application. But the case then to be made must not be one raising merely a question whether there is or is not misconduct, as between the partners. The Court must, especially if there be no term, see its way to a dissolution at the hearing; and it must be remembered that where there is a dissolution the appointment of a receiver is *prima facie* a matter of course. The question whether there is or is not a term is one proper for the hearing, and is not one that the Court will try on an interlocutory application of this sort. Does the case shew beyond doubt that there was a term here? I think not. Still I do not think there is sufficient to enable me,

at this stage of the cause, to say that, at the hearing, it will appear that there was no term. If there was a partnership term, and it was dissolved, as contended, by the notice of the plaintiff, a receiver would be a matter of course; but, as I have said, the question of a term or no term is one proper to be decided at the hearing of the cause on the merits. Upon the whole, therefore, I think on this ground, I must refuse to appoint a receiver. Then, as to the misconduct of the partners; and first, as to that of the plaintiff. If he has been guilty of any, he cannot, of course, take advantage of it to procure a dissolution. As to the misconduct of the defendant; has there been any such—is any proved—such as to entitle the plaintiff to a dissolution, or to make it impossible to continue the partnership? I think not; for I gather from the evidence that the plaintiff had the whole controul of the business until it became more extensive, when he had some difficulty in finding funds for carrying it on; the defendant then received and paid monies, gave orders and managed the affairs of the partnership, and seems to have been obliged to do as he did in consequence of the plaintiff's own conduct. There may, therefore, have been so far a violation of articles, but it was on both sides. I must say that I think there was no such violation on the defendant's part as to amount to misconduct. On this ground, therefore, I must also refuse the receiver. The rest of this motion must stand over till the hearing, and the costs must be reserved.

KINDERSLEY, V.C. }
 Dec. 3. } WILD v. HILLAS.

Injunction—Action upon a Covenant—Equitable Plea—Mistake.

The plaintiff sold two leasehold houses, one to the defendant and another to L. The conveyance to the defendant contained by mistake a part of the property intended to be sold to L, but which the defendant believed he was purchasing. Upon a bill filed against the defendant by L, he was directed to reconvey to L. that portion which by mistake was included in the assignment to him. The defendant then brought an action at law against the plaintiff, the vendor, for damages

under his covenant against incumbrances. An equitable plea was put in by the plaintiff, who now filed a bill for an injunction to restrain the action; but the injunction was refused.

The bill in this case was filed to restrain an action at law under the following circumstances. The plaintiff, as the executor of Thomas Street, sold by auction the leases of two houses in Inverness Road, Bayswater, being numbers 20 and 21. The first house was held under a lease dated the 3rd of February 1843, for ninety-five and a half years, and the second under a lease dated the 2nd of February 1843 for the same period. No. 20 was comprised in lot 5, and was described in the particulars of sale as “a convenient and well-arranged dwelling-house, No. 20, Inverness Road, with wing at side extending over gateway. It is brick built, with stuccoed front and slated roof, has a forecourt inclosed with iron palisade front on stone curb, and contains (here followed particulars of the rooms in the house). At the side, with distinct entrance by carriage gates, is a yard, with shed under the wing of dwelling, and back coach-yard, at the end of which is a brick building or coach-house, two-stall stable, with two rooms above, small yard beyond, with loose box or extra stable. The residence is let to Mrs. Watson, by agreement for three years, from Lady-day, 1854, at 65*l.* per annum. The yard, coach-house, &c., are let to Mr. Hawkins, fruiterer, &c., as a yearly tenant, at 23*l.* per annum. The foregoing is held, by lease for a term of ninety-five years and a half, from Christmas, 1843, at a rent of only 2*l.*” No. 21 was comprised in lot 6, and was thus described:—“A leasehold private residence, No. 21, Inverness Road, adjoining lot 5, and of similar design and accommodation, with the deficiency of the wing. It is now, and has been for years past, in the tenure of Mrs. Trulock, a yearly tenant, at, per annum, 55*l.*, and held, by lease for a term of ninety-five years and a half, from Christmas, 1843, at a ground rent of 7*l.* 10*s.*” The house No. 21 stood upon the north of the two pieces of land; and a piece of the land comprised in the lease under which No. 21 was held had been separated from

it, and a building intended to be used as a larder to No. 20, and solely accessible from that house, and a loose box or extra stable, had also been constructed upon a part of the land. The remainder of the piece of land so separated was used as a small yard, but the stable and yard were accessible only through a carriage entrance under part of the wing to the house No. 20. The conditions of sale provided that the abstract of each lot should commence with the respective leases under which they were held, and that each purchaser should be considered to have purchased with full notice of the contents of the said leases, and it was further provided that if any mistake be made in the description of the premises, or any error or misdescription appear in the particulars, the same should not affect the sale, but a compensation should be given or taken as the case might require, to be settled by the auctioneer at the sale.

At the sale by auction, one Mr. Leuty agreed to purchase lot 5, and Mr. Hillas, the defendant, purchased lot 6. The abstract sent to Leuty comprised merely the property held under the lease of the 3rd of February, and that sent to Hillas comprised all held under the lease of the 2nd of February. The titles were accepted, and only that held under the lease of the 3rd of February (that is to say, merely the house and yard of No. 20, without the small yard and larder) was conveyed to Leuty, and all that held under the lease of the 2nd of February, including, therefore, the small yard and larder, was conveyed to Hillas. Leuty began to make alterations in the small yard, whereupon Hillas claimed it as his. Leuty then filed his bill against Hillas and Wild (the vendor), praying that the small yard and larder might be assigned to Leuty, or otherwise that the purchase might be rescinded. It appeared that Hillas had never been actually into No. 21 previous to the sale, but had inspected it from the next house. The cause came on before the Master of the Rolls, who dismissed the bill. The plaintiff Leuty then appealed to the Lord Chancellor, who reversed the decision of the Master of the Rolls, and directed Hillas to execute a proper conveyance to Leuty (1).

(1) 2 De Gex & Jo. 110; s. c. 27 Law J. Rep. (s.a.) Chanc. 534.

His Lordship observed, in giving judgment, "Whether Hillas has not a remedy against Wild is a matter which cannot be decided now." Hillas then commenced an action in the Court of Exchequer against Wild, for damages under the covenant contained in the assignment of the lease. The covenant on the part of Wild, the vendor, was as follows:—"And the said James Wild doth hereby, for himself, his heirs, executors and administrators, covenant with and to the said Samuel Hillas and his heirs, that he the said James Wild hath not at any time heretofore made, done, executed or committed, or knowingly or willingly suffered or been party to or privy to any act, deed, matter or thing whatsoever, whereby, or by reason, or by means whereof, the said messuage, tenement and premises, or any part thereof respectively, or the term or interest therein respectively, are, is, can, shall or may be impeached, surrendered, charged or incumbered, or in any manner affected in title, estate, or otherwise howsoever." Declaration was delivered in this action on the 3rd of November 1858, and Wild put in two pleas, one being an equitable plea, stating the above circumstances, and to that plea Hillas had demurred.

The bill was now filed by Wild to restrain the action at law, and it charged that Hillas was a trustee in equity of the larder, &c., for Leuty, according to the Lord Chancellor's decree, and that Hillas was not entitled to sue at law upon the covenant.

Mr. Glasse and *Mr. Speed* now moved for an injunction in the terms of the bill, and contended that the plaintiff would have a good defence in equity if a bill were brought against him, but that the Court of law would not entertain the equitable plea set up by him.

Mr. Baily and *Mr. Surridge*, for the defendant, contended that Wild had committed a breach of the covenant, and had deteriorated the value of the property, and Hillas was therefore entitled to sue him upon it for damages.

Mr. Glasse, in reply.

KINDERSLEY, V.C.—One thing, I think, is clear, that when Mr. Wild put up these lots for sale he intended lot 5 to comprise

not only what was held under the lease of the 3rd of February 1843, but also part of the property in the other lease of lot 6, and lot 6 was only to comprise part of what was held under the second lease. It is also quite clear that it was the intention of the purchaser of lot 5 to buy the whole of what was included in that lot, the back yard, stable, larder, &c. He meant to buy, and Wild meant to sell all that. I think I must give Mr. Hillas credit for this, that whether he took proper means to ascertain or not, he believed he was buying the whole of the property reaching back to the extreme boundary, but he certainly did not take the proper pains to ascertain what was in the occupation of Mrs. Trulock. It was negligence as to his own interest; and I cannot understand a man going into an auction-room and buying a house without ever inspecting the property, but merely going into the next house, which happened to be empty, to see what he could. It was the greatest possible negligence, and if he had done what a man of ordinary prudence would have done, these proceedings would never have been necessary. Still, on the other hand, this is clear, that, in Wild's description, not only is the word "beyond" used, but also there is a misdescription as to the lease and the rents under which the houses were held. When the parties come to execute their conveyances there were words to carry the stable to Mr. Leuty, though not the legal estate in it, and then the vendor conveyed to Mr. Hillas, not only what was in lot 6, but all that was comprised in the lease of the 2nd of February, which, it is clear, Mr. Wild did not mean to sell; but which, I must assume that Mr. Hillas thought he was buying. The Lord Chancellor came to the conclusion that as between Leuty and Hillas, Leuty had a right to say, "This is my property; I am entitled to this; I have agreed to buy it, and it was conveyed by mistake to Hillas, and it must be conveyed by him to me." But Wild had nothing to do with that; and the Lord Chancellor says, "Whether Hillas has not a remedy against Wild, is a matter which cannot be decided now," for it did not necessarily follow that because Leuty had a right to recover that piece of ground against Hillas, Hillas had no right against Wild, and the question now is, whether

Hillas having taken legal proceedings I ought to restrain them. It appears to me that if the action is allowed to go on, it must turn upon the question whether there has been any breach of the covenant, and whether this property is of less value than what Hillas had a right to. Now, Wild is not the owner, but merely a trustee for sale, and he entered into the common trustee's covenant. Still it is difficult to say that Wild has not done "some act whereby the premises comprised in the conveyance to Hillas are impeached," &c., because it is clear that, so far as relates to the part which has been conveyed to Leuty, it has been injured; and it is very difficult to say that the residue, that is, the estate, term and interest, may not be impeached by reason of the acts done by Wild, when the act which conveyed away that portion has vested a part in another person, and has enabled the other person by some act, as by forfeiture, to injure that part which Hillas retained: whether a Court of law will hold that that can be compensated for by damages which can be ascertained as diminution of value, I cannot take upon myself to say. But there is an action which may be maintained by Mr. Hillas, so far as that portion of the claim is concerned, by reason that his portion of the property may be impeached. It appears to me that I cannot restrain him altogether, because, even if we omit all mention of the previous conveyance, here is a question of title, and it is clear that the question still remains open whether, if you correct the deed, there is not just the same ground of action if these words are omitted from the deed. Besides which, upon the real ground of the injunction, as to which I entertain great doubts, I find this, that the defendant at law has put in pleas which raise this defence; and I see no reason why the Court of law would not entertain this defence. The plaintiff at law has demurred to one of these pleas, raising thereby the question whether it is a defence; but I must say that if questions like these are not such as a Court of law can entertain, I should have great difficulty in saying that they could be entertained in a court of equity. Finding that I ought not to interfere as to that part which relates to the loss of the property, I come to the conclusion that I ought not to grant

the injunction. It might be said at law that there may be a ground on which a Court of equity might rectify a deed of assignment, but in the absence of that, a Court of law must deal with the covenant as it finds it; and so far as the rectification goes, a Court of equity ought to have the jurisdiction. At first I considered that this bill was, in fact, to rectify the deed; it has been satisfactorily shewn that that could not be so, because the Lord Chancellor's decree went on the footing of its remaining unrectified, and that Hillas was a mere trustee of the property conveyed to him for Leuty. Having regard to the state of things, I must refuse the injunction, though I must say it is with some degree of hesitation as to whether the moral justice has not been throughout against Hillas. The costs will be costs in the cause.

Wood, V.C. }
Dec. 13. } GROSVENOR v. GREEN.

Vendor and Purchaser—Specific Performance—Notice.

A purchaser of leasehold property is bound to inform himself of the contents of the lease, and cannot avoid specific performance on the ground that it contains an unusual covenant, which was not mentioned in the particulars or at the sale.

The bill in this case was filed for specific performance of an agreement for the purchase of a leasehold carpet factory and other premises in the Foreign of Kidderminster, which were put up for sale by auction on the 15th of June 1857, by the following description:—"All that newly erected carpet factory, called 'the Beaver Works,' situate in the Foreign of Kidderminster, in the county of Worcester, together with a piece of land, containing 2 a. 1 r. 18 p. (on part of which the said factory is erected), together with the engine, shed, steam-engine, machinery, and all other erections, buildings and working gear thereof, and the appurtenances thereto belonging. And also all those two messuages, cottages or tenements adjoining the said factory. The above premises are held under a lease from the Right Hon. Lord Ward, for an unexpired term of fifty-

three years, at the yearly rent of 30*l*. The premises being in the Foreign of Kidderminster, the rates and other payments are very low."

By the 5th condition of sale it was stipulated that the lease should be deemed the commencement of the title, and the production of the receipt for the last half-year's rent should be taken to be conclusive evidence that the lessee's covenants had been duly performed; and the 7th condition provided compensation, to be settled by arbitration, in case of any mistake, error or omission in the particulars or conditions.

At the sale the defendants became the purchasers of the premises at the price of 1,080*l*., and paid the deposit, and signed an agreement for payment of the residue of the purchase-money; but upon perusal of the abstract of title it was discovered that there was in the lease a covenant on the part of the lessee that he would not exercise, or permit to be exercised, upon all or any part of the premises the art or trade of a tallow-chandler, melter of tallow, soap-maker, tobacco-pipe maker, distiller, butcher, slaughterman, or any other noisome or offensive trade. The defendants claimed compensation in respect of this clause, on the ground that the conditions should have disclosed it at the time of the sale, and declined to complete without such compensation; whereupon the present bill was filed.

Mr. Rolé and Mr. Speed, for the plaintiff, urged that there having been no misrepresentation, the usual rule must prevail, that the purchaser of a lease must be taken to have made himself acquainted with all the covenants contained in it.

Hall v. Smith, 14 Ves. 426.

Walter v. Maunde, 1 Jac. & W. 181.

Cosser v. Collinge, 3 Myl. & K. 283;
s.c. 1 Law J. Rep. (N.S.) Chanc. 130.

Pope v. Garland, 4 You. & C. 394;
s.c. 10 Law J. Rep. (N.S.) Ex. Eq.
14.

Mr. Daniel and Mr. W. R. Fisher, for the defendants, referred to—

Jones v. Edney, 3 Camp. 284.

Coverley v. Burrell, 5 B. & Ald. 257.

Brumfit v. Morton, 3 Jur. N.S. 1198.

Flight v. Barton, 3 Myl. & K. 282.

Wood, V.C. (without hearing a reply).—This case is concluded by the authorities, and very reasonably so. A purchaser of leasehold property is bound to inform himself of the contents of the lease, by which the value of the leasehold interest is determined; and I do not see how he can say he is injured by what he has not taken the trouble to inquire about. There has been no misrepresentation; the property has simply been put up for sale according to certain particulars; and not a syllable is said about the lease containing none but the usual covenants. If you agree to grant a lease, it may be that you cannot insist on having any other than the usual covenants inserted; but the sale of an existing leasehold interest is a different thing. The vendor simply says he has a leasehold interest for sale; and it is not to be supposed that upon the purchase of this interest *simpliciter* there is any understood agreement that the lease contains none but the usual covenants. The authorities at common law which have been cited carry the matter no further than the doctrine which has been established in this court. If a vendor sells with notice of a lease, the onus is thrown on the purchaser of making himself acquainted with the contents; but if he takes upon himself to make any representation as to the contents of the lease, the purchaser is absolved from the necessity of inspecting it himself, and entitled to rely on the statement of the vendor. In *Jones v. Edney* there was a false description in the particulars, and though the auctioneer at the sale read the lease, the vendor was held bound by his representation. And in *Coverley v. Burrell*, which was the case of the sale of an annuity payable out of the tolls of Waterloo Bridge, where the particulars did not state that it was, as in fact it was, redeemable, and the Bridge Act had no provision for the redemption, the purchaser was held to be warranted in concluding that it was an annuity for so many years or for life, and he recovered his deposit-money. The authorities in equity are these:—*Taylor v. Stibbert* (1) was a case where a purchaser of freeholds, with notice that the estate was in possession of a tenant, was held to have notice of a lease, although he took it for granted that the tenant was

only so from year to year; and Lord Rosslyn said, that a purchaser, with notice of a lease, had notice of everything contained in the lease, even if there were a covenant for perpetual renewal. This may be one of those cases which are referred to, by Lord St. Leonards (2) as going rather too far. *Hall v. Smith* (3), which came before Sir William Grant, was a suit for specific performance of a contract to purchase an estate, which was in lease to a tenant. The defendant declined to complete the purchase, objecting, amongst other things, to a covenant in the lease, under which the tenant claimed 400*l.* for improvements; and Sir William Grant said, referring to *Taylor v. Stibbert*, "As to the obligation to pay for the improvements, the objection comes to this: that if there be any covenant at all burdensome to the landlord, the purchaser may object to the title. That cannot be so. When a lease is stated, it is the business of the party to look at it, and to see whether there is any covenant that may materially influence his judgment as to the value. If the circumstance that the land was in lease had been concealed, that would be a different consideration; but, upon analogy to other cases, if the party has notice that the estate is in lease, he has notice of everything contained in the leases; if, for instance, there is a covenant to renew, the purchaser cannot object that he had no notice of that particular covenant. That was determined by Lord Rosslyn." *Pope v. Garland* was a case in which it is very questionable whether there was not actual misrepresentation. These cases are all commented on by Lord St. Leonards in his text-book (4), but I would rather refer to his judgment in *Martin v. Cotter* (5). At page 506 he says:—"Sir William Grant carried the doctrine that notice of a lease to a purchaser is notice of its contents along way in *Hall v. Smith*; but in that case there was no mistake or misapprehension as to the subject-matter of the contract; there was nothing but a particular covenant, which was not stated. It might be dangerous to say that the rule laid down in that case was universal in its application; for I can

(1) 3 Vea. jun. 437.

(2) Vend. & Pur. 13th edit. p. 6.

(3) 14 Vea. 426.

(4) Vend. & Pur. 13th edit. 627.

(5) 3 Jo. & Lat. 496.

imagine a covenant in a lease which would so deteriorate the property as to destroy the interest of the seller in it; and the particulars might state some of the covenants and omit that. Such a description might amount to fraud in the sale. I agree that if a purchaser has notice that the property is held under a lease, he cannot object that he had no notice of any particular covenant therein contained. He must look closely and be active in order to ascertain whether there is any such as would materially prejudice him." If I were to hold otherwise in this case, no man could put up a leasehold estate for sale by auction, without setting out every covenant in the lease. Surely it is more sound to hold that the purchaser is bound to inform himself of the nature of the property he is about to buy; and I cannot, without overruling the authorities to which I have been referred, refuse to decree specific performance, with costs.

M.R. }
Dec. 21. } *In re WARD'S LEGACY.*

Bankrupt—Reversionary Legacy—Creditors' Assignee, Sale by.

A bankrupt, after obtaining his certificate, contracted with the creditors' assignee for the purchase of his reversionary interest in a legacy to which he was entitled under the will of his father-in-law. Shortly after the agreement had been signed, the reversion fell into possession. On the day named in the contract for the payment of the purchase-money the bankrupt tendered the amount to the official assignee, who refused either to receive it or to recognize the contract. Upon a petition by the purchaser,—Held, in the absence of fraud or proof of insufficient value, that the contract was valid and ought to be completed.

Samuel Peace Ward became entitled, under the will of Josiah Smith, his father-in-law, to a legacy of 1,400*l.* in case he should survive his wife and there should be no issue of the marriage living at her death, an event which happened.

During the life of his wife S. P. Ward mortgaged his reversionary interest in the legacy to secure the payment of several debts, and on the 4th of July 1855 he joined with the mortgagees in assigning

the said legacy to the Edinburgh Life Assurance Company, to secure a sum of 500*l.* and interest. This security was made subject to redemption, and it also contained a power of sale on the non-payment of either principal or interest. On the same day Ward made a further charge upon the legacy, to secure a debt due to George Brown, for the payment of which he was pressed.

On the 28th of April 1857 S. P. Ward was declared a bankrupt, and Patrick Johnson was appointed the official assignee, and William John Roffe was appointed the creditors' assignee.

On the 8th of January 1858 S. P. Ward obtained his certificate, and immediately afterwards he wrote to the assignee, asking him to consider whether some means might not be adopted to prevent the reversionary interest being sold by the assurance company under the power of sale. This was followed by other correspondence, and on the 11th of January 1858 the assignee wrote, saying that he could find no person to purchase, that there was a disinclination in parties to lock up their money, "especially as they would have to insure Mr. Ward's life to protect themselves from loss, and that the matter would have to be left to take its chance. As to paying off the assurance office and securing any contingent interest for the benefit of the estate, it was impossible. The official assignee had not a shilling, and it was doubtful if there would be sufficient to pay the expenses of the bankruptcy. If you think there is any value in it, you can turn it to account. I will sell this interest to you, subject to the claims of the Edinburgh office and Mr. Brown. If you are coming to town, call, and I will talk the matter over with you." After an interview, Mr. Ward wrote, "saying he was willing to purchase the contingent interest, but he must see the secretary of the assurance office before he could make an offer." On the 2nd of February 1858 he wrote to the assignee, saying "that he had arranged with the secretary of the assurance office to postpone the sale, and that he had obtained the valuation of the reversionary legacy from Mr. Peter Hardy, the actuary of the London Assurance Corporation, who, exclusive of the charges, had estimated it as being worth 616*l.*" A copy of this he inclosed to his assignee, and made him an

offer of 35*l.* for the reversionary interest in the legacy, which he undertook to pay on the 10th of July 1858. This offer Mr. Roffe accepted, and on the 9th of February 1858 he signed a memorandum to that effect, reciting the facts and agreeing, in consideration of the 35*l.*, to sell the reversionary interest in the legacy, and Mr. Ward undertook to pay the claims of the assurance office and of G. Brown.

On the 10th of March 1858 the petitioner's wife died, and the reversion fell into possession.

On the 9th of July 1858 the purchase-money was tendered to the official assignee, who refused to accept it, alleging that the agreement was not binding on him. Copies of all the correspondence and of the agreement were then sent to him; and on the next day the purchase-money was tendered to the creditors' assignee, who accepted it, and signed a receipt for the amount.

George Brooks and William Cooke Norton, the trustees of the will of the testator, Josiah Smith, when apprised of these facts, paid the sum of 1,350*l.* 8*s.* 5*d.* into court, under the Trustees' Relief Act, 10 & 11 Vict. c. 96, on account of the legacy of 1,400*l.*

Mr. Ward now presented this petition, praying that he might be declared entitled to the benefit of the purchase, and that payment might be made to the mortgagees of what, upon taking the accounts, should be found due to them, and that any surplus might be paid to him.

Mr. R. Palmer and *Mr. Parke*, for the petitioner.—The question was, whether a creditors' assignee had power to sell a reversionary interest of the bankrupt in a legacy, without the consent or intervention of the Commissioner or the official assignee. Before any contract was entered into an attempt had been made to sell the reversion; and before the purchase was made a long correspondence had taken place, during which the opinion of an actuary had been taken on the value of the reversion, and he, upon the assumption that it was free from incumbrances, valued it at 616*l.*, about the amount of the existing charges. It was under these circumstances that the petitioner offered to pay off the mortgages, and to pay a further sum to the assignee for the purchase of

the reversion; and these sums appeared to be the full market value, considering the charges, the threat of sale under the power, and the liability to costs. The accident of falling into possession within so short a period of the purchase ought not to prejudice a contract made *bonâ fide* in every respect.—

Hughes v. Morris, 9 Hare, 636; s. c.

21 Law J. Rep. (N.S.) Chanc. 761.

12 & 13 Vict. c. 106. ss. 40, 149.

Mr. Bagshawe and *Mr. T. Parker*, for Mr. Roffe.

Mr. Speed, for the Edinburgh Assurance Company.

Mr. Sheffield, for Mr. Brown.

Mr. Wickens, for the trustees of the will of J. Smith.

Mr. Higgins, for the official assignee.—The creditors' assignee sold the reversion without the consent of the Commissioner or of the official assignee. The purchase was also made in consideration of a sum to be paid, not of an immediate money payment. Assuming, for instance, that the tenant for life had been unwell or dangerously ill, it might be doubted whether a full value had been given for the reversion. The official assignee, however, in the exercise of his discretion, had not thought fit to receive the purchase-money; he had preferred having the whole transaction submitted to the Court.

The MASTER OF THE ROLLS said, that the contract of the creditors' assignee would support the sale if made *bonâ fide*. Neither fraud nor inadequacy of value had been proved, and there was nothing to impeach the contract. It was a reversionary interest, purchased not only subject to mortgages upon it, but also subject to other contingencies. The accident of the death of the tenant for life so soon after the agreement had been signed was one which could not be considered, unless, possibly, there was proof of dangerous illness, which was known to the parties at the time. This contract, however, was made after a long correspondence and inquiry. As to the price, that seemed sufficient. The order, therefore, must be as prayed; but the official and creditors' assignees, as well as the mortgagees and trustees, must be paid their costs out of the fund.

KINDERSLEY, V.C. } MACPHERSON v.
 Nov. 16. } STEWART.

*Thellusson Act—Accumulations of Income
 —Corpus—Scotch heritable Property.*

*A testator gave the income of all his property to his mother for life, and after her death he gave an annuity of 100*l.* to each of his two sisters, the longer liver to have 200*l.* After the decease of his two sisters, he gave two legacies of 500*l.* each. The testator then left the whole of his property, real and personal, to trustees, to be placed out on such securities as they should think most advisable, for the benefit of his heirs; and after the decease of his mother and two sisters, the amount of the same to be invested in landed property in Scotland, which was to be strictly entailed on his nephew and his heirs lawfully begotten:—Held, that the gift for the benefit of the heirs of the testator was a gift of the corpus of the property, as it existed at his death, for the benefit of all those who were entitled to any of his property real or personal; that the directions in the will rendered accumulations of income necessary, which could not be done for more than twenty-one years after the death of the testator, by reason of the *Thellusson Act*; and that the direction to invest accumulations on land in Scotland did not prevent the operation of the *Thellusson Act*.*

Robert Macpherson by his will, dated the 11th of April 1822, devised and bequeathed as follows:—"I give, devise and bequeath the rents, issues and profits, and interests, dividends and produce of all the property or estate which shall be belonging to me at the time of my death, or of which I can under this my will have power to dispose, to my dear mother, Mrs. Isabella Macpherson, of Bencher, for and during all the days of her natural life, and from and after the decease of my dear mother, Isabella Macpherson, I will and bequeath an annuity of 100*l.* sterling a year to each of my sisters, the Misses Magdalena Macpherson and Isabella Macpherson, of Bencher, and the longest survivor of my aforesaid two sisters, to receive an annuity of 200*l.* sterling a year during her natural life; after the decease of my said sisters, I leave and bequeath 500*l.* sterling to each of my nephews Captain

Duncan Macpherson, of his Majesty's 11th Regiment of Foot, and Captain James Macpherson, of his Majesty's 13th Regiment of Foot: the whole of my property, real and personal, heritable, leasehold, or of whatever description it may be, I leave in trust to the after-mentioned trustees and executors, who are during the lifetime of my aforesaid mother, Mrs. Isabella Macpherson, and my aforesaid sisters, Misses Magdalena Macpherson and Isabella Macpherson, to place the same in such funds, stocks or securities, either in Europe or India, at their discretion as they may think most advisable, for the benefit of my heirs; and after the decease of my aforesaid mother, Mrs. Isabella Macpherson, and sisters, Misses Magdalena Macpherson and Isabella Macpherson, the amount of the same, whatever it may be, is to be vested in the purchase of landed property in the highlands of Scotland, which said landed property is to be strictly entailed on my nephew Lieutenant Evan Macpherson, of the 21st regiment of Madras Native Infantry, and his heirs lawfully begotten."

The testator died on the 6th of January 1823; Mrs. Isabella Macpherson died on the 23rd of June 1823; one of the sisters had since died, and the other sister was still alive. Evan Macpherson died in 1847.

The bill was filed for the purpose of obtaining the opinion of the Court upon the construction of the will.

Part of the property of the testator had been invested in heritable bonds in Scotland.

Mr. Baily and *Mr. A. Smith* appeared for the plaintiffs, the executors and trustees of the testator.

Mr. Goldsmid and *Mr. Cotton*, for the next-of-kin, contended that the direction to accumulate was void, and that the property must be considered as personalty.

Mr. Anderson and *Mr. Graham Hastings* appeared for the heir-at-law of the testator, and submitted that the direction to invest in landed property in Scotland excluded the bequest from the *Thellusson Act*, and that an investment in Scotch heritable bonds was sufficient to satisfy the terms of the statute, since these bonds were a good

heritable security in Scotland, and would go to the heirs of entail.

Mr. Glasse and *Mr. Harrison* appeared for other parties.

The following authorities were cited:—

Tench v. Cheese, 6 De Gex, M. & G. 453; s. c. 24 Law J. Rep. (N.S.) Chanc. 716.

Eyre v. Marsden, 2 Keen, 564; s. c. 4 Myl. & C. 231; 7 Law J. Rep. (N.S.) Chanc. 220.

Nettleton v. Stephenson, 18 Law J. Rep. (N.S.) Chanc. 191.

Morgan v. Morgan, 4 De Gex & Sm. 164; s. c. 20 Law J. Rep. (N.S.) Chanc. 441.

Polley v. Seymour, 2 You. & C. 708; s. c. 7 Law J. Rep. (N.S.) Ex. Eq. 12.

Underwood v. Wing, 4 De Gex, M. & G. 633; s. c. 23 Law J. Rep. (N.S.) Chanc. 982; 24 Ibid. 293.

Curtis v. Hutton, 14 Ves. 537.

Bromley v. Wright, 7 Hare, 334.

Blamire v. Geldart, 16 Ves. 314.

The Attorney General v. Mill, 3 Russ. 328; s. c. 25 Law J. Rep. (N.S.) Chanc. 153.

Monkhouse v. Holme, 1 Bro. C.C. 298.

1 *Jarman on Wills*, 50.

39 & 40 *Geo. 3. c. 98*.

KINDERSLEY, V.C.—This case presents some peculiar questions, and there is very little direct authority bearing upon them. The first question is, who are or is entitled to the accumulations which have taken place since the death of Mrs. Macpherson, the mother? There are questions also arising under the Thellusson Act; but anterior to those is the construction of the will; and whatever doubt there may be upon those questions, one proposition is clear, that in construing the will the consideration of the Thellusson Act, or of any other act, must be postponed in the first instance, and the intention of the testator then alone regarded. In this case there is a gift by the testator of the income of all his property to his mother, for her own benefit during her life, without any trust. Then comes the gift of the annuities, and two legacies are to be paid at the death of the survivor of the two sisters. There is no doubt that these legacies are payable at

the decease of the survivor, whenever that event takes place. There is not the smallest doubt that the gift “for the benefit of my heirs” is a gift of the *corpus* of the property as it existed at the testator’s death, a gift which would carry any subsequent income subject to a trust during the life or lives of the mother and two sisters. During the life, therefore, of one person entitled to the income for her own benefit, there is an implied trust to invest the *corpus*, but not the income. The testator directed the income to be actually paid to his mother for her life; and therefore the investment, so far, cannot mean an investment or accumulation of income. The testator then goes on to direct an express investment of all his property, and says it is to be so invested as in his will is specified, “for the benefit of his heirs.” Now the word “heirs” in the English law is understood in the limited or technical sense of “those persons entitled by inheritance or succession to real estate”; but here the testator clearly does not mean heirs in that sense. Not only in the Scotch law and the Civil Law, but in popular parlance, the word “heirs” includes heirs, whether born or constituted, as *hæres natus aut factus*, and it is not confined to real estate. It must here be taken in the wide and general sense: the testator meant, I think, to include all those persons who in any form by the will or otherwise after his death would become beneficially entitled to his property. The word “heirs,” so accepted, will therefore include not merely those persons who under the subsequent limitations will be entitled to the property to be purchased in the highlands of Scotland, but the mother who was to take the life income, and the two sisters who took the annuities, and there is no reason to exclude his nephews. The amount of the same (that is, the property given to the trustees, whatever it may be) is that which is to be invested. Although there is here a specific direction to invest the *corpus* at first, that, coupled with the direction that it is to be for the benefit of all those persons to whom the testator has ultimately given it, carries the income as well as the *corpus*. The tenant for life was to have the income arising from the implied trust to invest in the first instance for her own benefit; and the sisters

their annuity, so far as by means of the investment there was a fund out of which it was payable for their benefit. Extending this construction to the last persons named, they, subject to the life interest of the mother and the provision for the annuities, are absolutely entitled; and this view is corroborated by the consideration that there would be otherwise an intestacy. It then becomes necessary to consider the operation of the Thellusson Act. Although a testator may not in terms direct accumulations, still, if he gives such directions as make investments and accumulations necessary, the act applies. Here the testator has given such directions; and therefore the trustees, from the exigency of the case, would be under the necessity, from the time when Mrs. Macpherson died, viz. on the 23rd of June 1823, of investing the income and accumulating it. But the Thellusson Act provides that no accumulation shall be made for more than twenty-one years from the death of the testator. That period expired on the 6th of January 1844; and from that time, therefore, all the directions to accumulate, either express or implied, are void. From that time the income would belong to the next-of-kin of the testator at his death.

It was also said that part of this property, having been invested in Scotch heritable bonds, was not within the statute; and it was argued thus:—The direction in the testator's will to invest, included an investment in land in Scotland. An investment in Scotch heritable bonds was such an investment. Therefore it was a disposition affecting heritable property in that country, and so within the 3rd section of the Thellusson Act, and exempted from its operation. But I do not think so. For observe, if that argument is correct, a person in England may direct an investment until every member of the Lords and Commons is dead, and make it effectual by directing the investment to be made upon heritable bonds in Scotland. By so doing some one, some day or other, would come into an enormous property, and that is the very mischief meant to be guarded against by the Thellusson Act. It is true that the reason for the exception of heritable property from the Thellusson Act was to avoid trenching upon the prejudices of the Scotch

people, and out of regard to the Scotch law of perpetuities, but that does not alter this case. Then comes the question, to whom does the income go after the expiration of the twenty-one years? If the next-of-kin of the testator at the time of his death were now living, it would go to them. Some, however, died within the twenty-one years, and, therefore, the representatives of such deceased next-of-kin are entitled to a part of the income, whether arising from heritable securities or not. With regard to the 500*l.* legacy to the nephews, as there was no present, but only a future, gift of that sum to take effect after the death of the two sisters (not of the mother), if the sisters had died in the lifetime of their mother, the legacies would have taken effect, even in derogation of the life income.

M.R. }
Nov. 17. } WHITE v. JAMES.

Rent-charge—Arrears—Deficient Rents—Sale of Estate.

The owner in fee of a small freehold estate granted twenty-two separate rent-charges to several persons and their heirs, each of which was made subject to the others; the whole fell into arrear, and the power of distress and entry could not be enforced. Upon a bill by one of the grantees, on behalf of himself and the other grantees,—Held, that the arrears must be raised by a sale of the estate.

Robert Smale, on the 30th of January 1845, was seised in fee of a piece of land, formerly part of Hounslow Heath, which was inclosed, under the 53 Geo. 3. c. clxxiv. In the same year he contracted to sell the land, with four cottages erected thereon, to the defendant, William Henry James, who was an agent for the Anti-Corn-Law League, a combination then lately organized to promote the repeal of the then existing Corn Laws, and by creating freehold rent-charges of 40*s.* a year, to enable persons of similar opinions to give effect thereto through their votes at elections for members of Parliament.

By an indenture, dated the 30th of January 1845, R. Smale, in consideration of 50*l.*, granted to William White, the

plaintiff, an annual yearly rent-charge of 40s. to be charged upon and issuing out of the premises sold, to hold the same to him, his heirs and assigns, and to be paid on the 30th of January in every year, free from taxes; and R. Smale granted and agreed that, in case the rent-charge should at any time be in arrear for forty-one days, it should be lawful for the plaintiff, his heirs and assigns, to enter and distrain as for rent reserved on lease, for the purpose of satisfying the rent-charge and all arrears, together with the costs, charges and expenses, and in case the yearly rent-charge or any part thereof should at any time be in arrear for six months, the plaintiff, his heirs and assigns, was empowered to enter upon the premises, and hold the same or any part thereof for his own use until full payment of the arrears of the rent-charge due and to accrue due during his being in possession, with all costs, charges, damages and expenses, such possession, when taken, being without impeachment of waste. Robert Smale further covenanted that he had good right to grant the rent-charge, and the powers and remedies for compelling payment, and to charge the same on the premises, which he further declared should for ever thereafter remain subject to the rent-charge and the powers given for the recovery of the same. He also covenanted against incumbrances, except those appearing in the schedule.

On the same day R. Smale, by separate deeds, granted twenty-one similar rent-charges to twenty-one other persons. These were the incumbrances referred to in the plaintiff's grant, and each of these grants was made subject to the several other grants.

Robert Smale, who was originally made a party to the suit, was dismissed, on his stating, by his answer, that he had no interest in the estate, but that he had granted the several annuities at the instance of W. H. James; that he was ignorant of the purpose, and that W. H. James claimed to be seised of the estate, which appeared to have been conveyed to him on the 1st of March 1845, subject to the rent-charges.

The plaintiff's and all the other rent-charges were in arrear. The cottages had been for some time unoccupied, and there

was nothing on which to distrain, as that power had been so frequently exercised that no tenant could be found willing to occupy them, and none of the several grantees could recover or maintain possession of the premises at law.

The premises were unproductive, and would so remain unless tenants were quieted in possession. They were also unprotected and deserted and falling to decay and depreciating in value, and unless protected would soon cease to be a sufficient security for the several rent-charges.

The plaintiff, therefore, for himself and the other grantees, prayed for an account and payment of what was due to him and the other grantees of rent-charges, or in default that the arrears, together with the costs of the suit, might be raised by sale or mortgage of the premises, and if by sale, that the residue of the purchase-money might be invested to secure the future payment of such rent-charges. The bill also prayed for a receiver; and on the motion of the plaintiff, one was appointed.

Mr. R. Palmer and Mr. W. Morris, for the plaintiff.—As there is no available remedy for the recovery of the arrears of the rent-charges, the plaintiff is entitled to have the premises sold, and to have the receiver continued in the mean time.—

Cupit v. Jackson, M'Cle. 495; s. c. 13 Price, 721.

The Mayor of Basingstoke v. Lord Bolton, 1 Drew. 270; s. c. 22 Law J. Rep. (N.S.) Chanc. 305.

Mr. Shebbeare, for W. H. James.—The rent-charges were granted by Mr. Smale, and the deeds contained no covenant for their payment. The defendant was fully aware of these grants when he took a conveyance of the premises. The purchase-money for these rent-charges was paid to the Anti-Corn-Law League. Mr. Smale was not their agent. The contract made by the parties was for an interest in land; they were, therefore, bound to look to its sufficiency. All they contracted for was a grant with power of distress and entry. It was, however, now asked that the whole property might be taken and sold, and that when nothing but the income was

charged and when the grants contained no authority to sell the fee. The plaintiff, therefore, had no right to the estate against the defendant, or any other parties—

The Duke of Leeds v. the Corporation of New Radnor, 2 Bro. C.C. 338, 518.

Graves v. Hicks, 11 Sim. 536; s. c. 10 Law J. Rep. (N.S.) Chanc. 185.

Philipps v. Philipps, 8 Beav. 193.

2 *Bythewood on Conveyancing*, 49 et seq. 3 ed. by Sweet.

1 *Powell on Devises*, by Jarman, 234.

THE MASTER OF THE ROLLS.—I am bound by *Cupit v. Jackson*, notwithstanding any observations made upon it; but the passage read from *Bythewood on Conveyancing* adopts apparently the view of the Vice Chancellor, in the cases cited, that the Court as a matter of discretion will not direct a sale until the fee simple, out of which the arrears are to be raised, is in possession. In *Graves v. Hicks* the Vice Chancellor says, that the money must not be raised before the inheritance falls in. There is no conflict between that case and *Cupit v. Jackson*. If I refuse to raise the arrears of this rent-charge now, when shall I be in a better position to decree a sale? The rent-charges have been created; and it has been proved impossible to pay them out of the rents. I cannot allow the owner of the fee to enjoy the land without paying the arrears. Neither can I suffer the property to go to waste. The consequence of leaving the property subject to these rent-charges would be to render it unproductive; it would also cease to be of value to any one. Under these circumstances, as the premises subject to the rent-charges cannot be made available by any other means, it must be done by a sale. I am not pressed by the observations that the other grantees are not present, and might prefer not to have a sale; their interest is the same as the plaintiff's, and they must be served with a copy of the decree. Their concurrence will then be necessary in any proceedings under it. I must, therefore, follow the case of *Cupit v. Jackson*, and make a decree to raise the arrears by a sale of the estate.

STUART, V.C. }
Dec. 3. } BLOWER v. BLOWER.

Administration of Estate—Interest on Simple Contract Debt—Statute of Limitations.

A testator, by his will, gave all his real and personal property to his wife, out of which he desired that she would discharge all his legal debts and enjoy the surplus for her life; and at her decease the property was to be divided as in the will mentioned. A farm servant of the testator left his wages from time to time in his master's hands, and it was agreed between them that the debt thus due should carry interest. The testator died in 1837:—Held, in a suit instituted after the death of the widow of the testator, in 1854, for the administration of his estate, that the Statute of Limitations did not operate as a bar to arrears of interest upon the sum left by the servant in his master's, the testator's, hands.

This was an administration suit. The testator in the cause died in March 1837, having, by his will, given to his wife the whole of his real and personal property, desiring her thereout to discharge all his legal debts and to enjoy the surplus for her life; and then disposed of the said property in manner therein mentioned.

The testator for some years before his death had in his employment one John Pritchard, as a husbandry labourer. Pritchard left his wages, amounting to 8*l.* per annum, in his master's hands, the master advancing him from time to time various small sums for the discharge of his personal expenses; and it being agreed between them that the debt thus due from the master to the servant should carry interest. After the testator's death, Pritchard remained in the service of his widow and executrix, who maintained him and occasionally paid him small sums by way of wages and for necessaries. After the widow's death, in 1854, this suit was instituted, for the administration of the testator's estate, when the question arose whether interest upon the simple contract debt due from the testator's estate to that of Pritchard was payable for the whole time which had elapsed from the testator's death, or whether the

Statute of Limitations prevented the recovery of more than six years' arrears.

It appeared that the following memorandum had been made in the testator's own handwriting:—

"May 1, 1834. Wages, principal and interest due to John Pritchard up to this day, 154*l.* 8*s.*," followed by entries of payments of 1*l.* each from time to time to the said J. Pritchard.

The claim made before the chief clerk in respect of principal and interest due to the estate of J. Pritchard from that of the testator amounted to 334*l.* 8*s.* 2*d.* Of this the sum of 154*l.* 8*s.* was claimed as due to Pritchard up to the 1st of May 1834, and the rest as being the amount of several sums of money left in the hands of the testator, with interest upon such sums and upon the said 154*l.* 8*s.*, after deducting the payments made to Pritchard from time to time by the testator on account.

The chief clerk allowed the claim to the extent of 280*l.* 2*s.* 9*d.* in the following manner:—

	£.	s.	d.
Amount due 1st May, 1834	154	8	0
Wages from 1st May 1834 to June 1837, less 14 <i>l.</i> paid on account.....	12	0	0
	166	8	0
Interest at 4 <i>l.</i> per cent. from 1st May 1834 on 117 <i>l.</i> 5 <i>s.</i> 11 <i>d.</i> to date of certificate, less tax	110	11	9
Costs of proof.....	3	3	0
	£280	2	9

The plaintiff now moved to vary the chief clerk's certificate in the following particular: that the sum of 110*l.* 11*s.* 9*d.* allowed for interest as above mentioned on 117*l.* 5*s.* 11*d.*, part of the debt found due to the estate of J. Pritchard, might be reduced to such a sum as such interest would amount to if calculated from the 23rd of May 1850, being six years previous to the date of the decree, on the ground that all interest accruing on the said debt prior to the 23rd of May 1850 was barred by the Statute of Limitations.

Mr. Dickinson, in support of the motion.—The claim before the Court is for arrears of interest in respect of money charged on land, and therefore falls within the words of the enactment of 3 & 4 Will. 4. c. 27. s. 42,

that "no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due."

Du Vigier v. Lee, 2 Hare, 326; s. c. 12 Law J. Rep. (N.S.) Chanc. 345.

Hunter v. Nockolds, 1 M. & G. 640; s. c. 19 Law J. Rep. (N.S.) Chanc. 177; 1 Hall & Tw. 644.

Greenway v. Blomfield, 9 Hare, 201; s. c. 22 Law J. Rep. (N.S.) Chanc. 162.

Cox v. Dolman, 2 De Gex, M. & G. 592; s. c. 22 Law J. Rep. (N.S.) Chanc. 427.

Young v. Lord Waterpark, 13 Sim. 204; s. c. 15 Law J. Rep. (N.S.) Chanc. 63.

Snow v. Booth, 2 K. & J. 132; s. c. on appeal, 25 Law J. Rep. (N.S.) Chanc. 417.

Mr. C. C. Berkeley, for another party, in support of the motion.—The debt being a simple contract debt does not carry interest—*Barwell v. Parker* (1). Though there is here a charge upon the testator's assets for payment of debts, that is not of itself sufficient to make the Statute of Limitations inapplicable to the case.

Lord St. John v. Boughton, 9 Sim. 219; s. c. 7 Law J. Rep. (N.S.) Chanc. 208.

Dundas v. Blake, 11 Ir. Eq. Rep. 138.

Mr. Amphlett (with whom was *Mr. C. M. Roupell*), contra.—The present is not the case of a mere charge of the testator's property with the payment of debts. The creditor claims not under a mere charge, but under a trust for the payment of debts. The testator has given all his real and personal property to his wife, "out of which he desired that she should discharge all his legal debts." These words create an express trust within the meaning of section 25. of the statute, which enacts, "that when any land shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to recover such land, shall be deemed to have first accrued, according to the meaning of the act, at and not before

(1) 2 Ves. 363.

the time at which such land shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him"—*Hargreaves v. Michell* (2) and *Dillon v. Cruise* (3). The debt being from a master to an old servant, a relation between the parties analogous to that between guardian and ward, is another ground for holding that the statute does not apply—*Thomas v. Thomas* (4).

Mr. Martindale appeared for another party.

Mr. Dickinson replied.

STUART, V.C. said, the case raised and argued in support of the motion was, as to the length of the time during which interest was recoverable. There was in this case a charge of debts made by the testator's will. The debt due to the servant was a debt carrying interest by the terms of the contract. It was a simple contract, but it was a simple contract to pay interest, and there could not be a doubt as to its validity. It had been settled by authority in this court, that where, by a testator's will, a charge has been created upon the whole of the estate for payment of debts, and the person named in his will charged with that duty is directed to apply the whole of his estate in payment of the debts, in such a case, the creditors being bound to resort to the person who holds the property charged with the duty of paying the debts, the Statute of Limitations has no application—*Hargreaves v. Michell* and *Hughes v. Wynne* (5). When the interest formed a part of the simple contract debt, that doctrine had as much application to the interest as to the principal. It was said, however, that the recent statute did apply, because it was enacted by the 42nd section that only six years' interest should be recoverable in respect of money charged on land; but there was no authority shewing that the Court had ever sanctioned the notion that the statute was applicable to a case in

which there was an express trust of real estate for the payment of debts. The motion, therefore, must be refused; and, having regard to the circumstances under which it was made, refused with costs.

M.R. }
Dec. 10. } WRIGHT v. STANSFELD.

Equitable Mortgage—Registration in Middlesex.

A memorandum charging a leasehold estate in the county of Middlesex with the payment of a sum of money, retains its priority over a subsequent mortgage duly registered under the 7 Anne, c. 20; and in a suit by the equitable mortgagee,—Held, that he was entitled to a foreclosure.

By a lease, dated the 16th of January 1810, a piece of land in Grosvenor Street, West, in the county of Middlesex, was demised to Richard Wardle, from the 29th of September 1809, for ninety-seven years, at a yearly rent of 29*l.*, subject to various covenants therein contained.

This land, upon which several houses had since been built, became vested in Ann Hughes, for the residue of the term.

On the 28th of February 1857, Ann Hughes assigned the premises to Ralfe Raddiffe Whitehead and James Heywood Whitehead, by way of mortgage, to secure the repayment of 1,900*l.*, with interest at 5*l.* per cent.

John Lamp Wright, the plaintiff, subsequently advanced to Ann Hughes a sum of 120*l.*, and on the 23rd of May 1857 she signed and delivered to him the following writing:—

"Memorandum.—In consideration of your having this day advanced and lent to me the sum of 125*l.*, for which I have given you my warrant of attorney, I hereby agree to charge my leasehold houses, situate, &c., with the payment of the same, and hereby undertake at your request, and at my own cost, to execute a proper assignment of the said premises as you may direct, and I agree to pay interest on the said sum at the rate of 6*l.* per cent. per annum."

On the 25th of January 1858, Ann Hughes was declared a bankrupt, and

(2) 6 Madd. 326.

(3) 3 Ir. Eq. Rep. 70.

(4) 2 K. & J. 79; s.c. 25 Law J. Rep. (N.S.) Chanc. 159.

(5) Turn. & R. 307.

Hatton Hamer Stansfeld was appointed the official assignee, and John Harrison and Stephen Moore were appointed the creditors' assignees.

J. L. Wright then filed the bill in this suit, praying for payment of what was due, or that the defendants might be foreclosed.

It was then ascertained that Ann Hughes, on the 13th of November 1857, had assigned the same premises to Mary White, by way of mortgage, to secure the repayment of 600*l.* and interest at 5*l.* per cent.

A memorial of this deed had been duly registered in pursuance of the 7 Anne, c. 20. The memorandum taken by the plaintiff was not registered.

Mary White was then made a party to the suit, and she now claimed priority over the plaintiff.

Mr. R. Palmer and Mr. Southgate, for the plaintiff. — The memorandum taken by the plaintiff as security was neither a deed, conveyance nor will: it was merely a contract, which remained to be perfected. The 7 Anne, c. 20. did not require its registration.

Sumpter v. Cooper, 2 B. & Ad. 223; s. c. 9 Law J. Rep. K.B. 226.

Sugden's Vendors & Purchasers, 600, 13th ed.

9 *Bythewood's Conveyancing*, 682, 693, 3rd ed., by Sweet.

Mr. Bardswell, for the assignees.

Mr. Bernard, for Mary White. — The words of the Registration Act are large. The legislature contemplated a complete registration of the title affecting lands; a memorandum creating a charge gave in effect the rights of a mortgagee, and it was within the mischief which the act intended to guard against. The word "conveyance" included any writing which passed an interest in land. The case cited had no application to the present; the point was altogether new.

THE MASTER OF THE ROLLS.—The memorandum given to the plaintiff is not within the provisions of the 7 Anne, c. 20, requiring deeds, &c. to be registered; I must, therefore, make the usual decree for foreclosure against all the defendants.

M.R. }
Dec. 11, 13. } COLLINS v. COLLINS.

Arbitration—Reference as to Value—Umpire—Common Law Procedure Act, 1854.

Arbitrators were named in a contract to determine the value of brewery premises and the plant, &c. Before entering upon the valuation they were to appoint an umpire, whose authority was to be limited to the matters in difference between the arbitrators. The arbitrators could not agree in the appointment of an umpire; and upon a summons under the Common Law Procedure Act, 1854,—Held, that this was not an arbitration within the meaning of the act, and that the Court had no authority to appoint an umpire.

Edward Collins carried on the business of a brewer, at Richmond. After his decease, a suit was instituted for the administration of his estate, and on the 25th of February 1858, Esther Rachel Collins, the widow, and one of the devisees and trustees of the testator, entered into a contract with Charles John Phillips and James Wigan, for the sale to them of the freehold, leasehold and copyhold houses and premises belonging to and forming part of the Richmond Brewery, together with the fixtures, furniture and things held therewith, and also the stock in trade, casks, horses, drays, loose articles and miscellaneous effects belonging to and in and about the brewery premises comprised in schedule 2, at a customary brewery valuation as belonging to a brewery in work. They were also to purchase all the copyhold houses and brewery premises mentioned in schedule 2. at a valuation, but such premises were not to be valued as brewery premises, but with reference to their capabilities for any other purpose than that of carrying on a brewery therein. They were also to purchase all the fixed plant, vats, tuns and machinery belonging to or in and about the copyhold premises in schedule 2. at a valuation, which was not to be made as of brewery plant and effects in use, but at such a price as they would realize if broken up and sold in lots. They were also to purchase all the

stock in trade, book debts owing by publicans, and rents of public-houses of the Richmond Brewery, which should belong or be due to the brewery at the time when the purchaser should be let into possession of the premises, and the licences and policies appurtenant thereto, at a customary brewery valuation to be made by the valuers or their umpire; and the contract provided, "that the purchase-money of all the premises agreed to be sold should be determined by G. W. W. Mason on behalf of the vendor, and by Richard Moss on behalf of the purchaser, and they shall choose an umpire before entering upon the valuation, and in case of the death of either of the valuers before making their joint valuation, then the purchase-money shall be determined by the survivor of the said persons, and such other persons as the party hereto whose valuer shall have died shall nominate within fourteen days next after such death, or in case he shall make no such nomination, or having made such shall not give notice thereof in writing to the other party hereto within such space of fourteen days, then the same shall be determined by the person who shall have been chosen umpire as aforesaid, and the decision of the said valuers or their umpire, or of such valuers or umpire jointly, shall be conclusive and binding on the parties hereto. And it is agreed that if either of the said valuers shall give to the other of them notice in writing requiring him to enter upon, proceed with, or complete the said valuation, or to join in requesting the umpire to act, and the valuer to whom such notice shall be given shall from any cause fail to comply therewith within fourteen days from the day on which it shall be given, then the valuer giving such notice may, immediately after the expiration of such fourteen days, request the umpire to act, and he is hereby authorized to act accordingly. And it is further agreed that the duties of the umpire shall be strictly confined to the matters in difference between the said valuers; and that if before the said umpire is called on to act, the said valuers shall have agreed upon the valuation of any part or parts of the premises contracted to be sold, the umpire shall adopt the valuation of such part or parts so agreed upon, and incorporate the

same with his valuation of the remaining part or parts of the premises."

The agreement was sanctioned by the Court; but the valuers themselves could not agree upon the appointment of an umpire.

A summons was then taken out for all parties to attend, that the Judge in chambers might appoint an umpire. The question, however, was adjourned into court.

Mr. Lloyd and Mr. Baggallay, for the defendant, E. R. Collins.—In this case the Court has a jurisdiction vested in it, under the 17 & 18 Vict. c. 125. s. 12. It not only included every reference where disputes had arisen, but also all references made where no dispute existed. The Court will therefore not allow the contract to fail in consequence of a disagreement between the valuers, but it will appoint an umpire.—

In re Lord, 1 Kay & J. 90; s. c. 24 Law J. Rep. (N.S.) Chanc. 145.

Elvin v. Drummond, 4 Bing. 415; s. c. 1 Mo. & P. 88.

Mr. Selwyn and Mr. Mackeson, for the plaintiff, Dorothy Katherine Collins, the only child of the testator, an infant.—In the Lands Clauses Consolidation Act the legislature used the word "arbitration" to describe mere valuation.—

Darbey v. Whitaker, 4 Drew. 134.

Leeds v. Burrows, 12 East, 1.

Perkins v. Potts, 2 Chit. Rep. 399.

Morgan v. Milman, 3 De Gex, M. & G. 24; s. c. 10 Hare, 279; 22 Law J. Rep. (N.S.) Chanc. 897.

Tilsley on Stamps, 66.

Mr. Bovill and Mr. Schomberg appeared for the creditors; but the Court declined to hear them.

Mr. R. Palmer and Mr. Druce, for Messrs. Phillips and Wigan.—The question raised in this case has nothing to do with arbitration. The contract was conditional; either for sale or purchase, it was incomplete. There was nothing in difference between the parties: a valuation of property alone was to be made. The parties never met. To make this an arbitration there must be an award; but no award was required in this case. The rules relating to arbitration can never apply to

contracts for purchase. This may be a contract on which an action would lie; still it is not a complete contract to purchase, and it could not be sued on in equity. The act was passed to remedy defects which impeded Courts in the administration of justice; but every case of valuation was clearly to be excluded.—

Gordon v. Whitehouse, 18 Com. B. Rep. 747; s.c. 25 Law J. Rep. (N.S.) C.P. 300.

Hawkins v. Gathercole, 6 De Gex, M. & G. 1; s.c. 24 Law J. Rep. (N.S.) Chanc. 332; 1 Sim. N.S. 63; 1 Drew. 12; 20 Law J. Rep. (N.S.) Chanc. 59; 21 Ibid. 617.

Milnes v. Gery, 14 Ves. 400.

Hemingway's case, n. to *Parkes v. Smith*, 15 Q.B. Rep. 305; s.c. 19 Law J. Rep. (N.S.) Q.B. 405.

Lee v. Hemingway, 3 Nev. & Man. 860; s.c. 3 Law J. Rep. (N.S.) K.B. 124.

Mr. Lloyd, in reply.

THE MASTER OF THE ROLLS.—The result contended for, as arising from the effect of the 17 & 18 Vict. c. 125. s. 12, was at first rather startling; it, of course, assumed that the vendor was right, upon the construction of the statute. Had it been so, cases which this Court could not have enforced would, under this act of parliament, have been brought within its jurisdiction, and all those circumstances relied upon by parties to prevent the interposition of the Court would have been at once removed. For instance, if a person agreed to sell property to another, and said that the price should be fixed by J. C., who had a particular knowledge of that species of property, in consequence of which he was willing to intrust the valuation to him, and to him alone, yet if that person died before he could make the valuation, the purchaser, under this act of parliament, might call upon the Court to appoint a stranger to make a valuation binding upon both parties, and to be carried into effect as if the valuation had been made by the person originally appointed, and that notwithstanding the contract was entered into by the vendor only because he knew that the valuer first appointed had

a particular knowledge of the value of the property to be sold, and the worth arising from its situation. What, then, are the words of the act of parliament? Is there an express direction, or does such a result arise from necessary implication? The words used in section 12. are, "if in any case of arbitration": it is unnecessary to read further, all depends on those words. What, then, do they mean? What is a case of arbitration? It is certainly important not to lose sight of the construction that has been put upon the provisions of the 9 & 10 Will. 3. c. 15. The word "arbitration" is not co-existent with the 17 & 18 Vict. c. 125; it was known before it. Still, it is material not to lose sight of the manner in which the Courts dealt with the word "arbitration," as it existed under the 9 & 10 Will. 3. c. 15, in order to arrive at a satisfactory meaning to be attached to it in this case; and there certainly appear few reasons for excluding any particular arbitration, or any form of arbitration which may be called an arbitration, from the 9 & 10 Will. 3. c. 15, that do not apply to the 17 & 18 Vict. c. 125. Now, it is submitted, that the word "arbitration," as used, does not mean the arbitration specified in the act of parliament, but anything, whether within or without the act, which can by any means be called "arbitration"; and certainly the words are very general and large, and there are instances of this construction, as where the Statute of Limitations says, "no action shall be brought to recover any legacy" (1); this refers to every species of legacy. This is an illustration of the view contended for, that, although the act specifies a particular species of arbitration, still that the word is general and applies to every case: and if this can satisfactorily be shewn to be so, the Court must act upon it. It therefore becomes necessary to consider what "arbitration" means. I concur in the observation, that fixing the price of a property may be "arbitration"; but in this case I do not think that the fixing the price of the property is "arbitration," in the proper sense of the term. An arbitration is a reference to the decision of one or more persons,

(1) 3 & 4 Will. 4. c. 27. s. 40.

either with or without an umpire, of a particular matter in difference between the parties; and although it is very true that in one sense it must be implied either that there is a difference, or that a difference may arise between the parties, yet the distinction is material, and one which has been properly relied on. If nothing had been said respecting the price by the vendor and purchaser between themselves, it can hardly be said that there is any difference between them. It may be said that if the purchaser knew the price which the seller required, there would be no difference—that he would be willing to give it. It may well be that the decision of a particular valuer appointed may fix what is to be the price; and the price may be equally satisfactory to both, so that it can hardly be said there is a difference, although, as a general rule, the seller wants to get the highest price for his property, and the purchaser wishes to give the lowest; in that sense it may be said that there is to be an implied or expected difference between the parties; but unless that difference has arisen, it does not appear to be “arbitration.” If two persons enter into an agreement for the sale of property, and try to settle the terms, but cannot agree, and after dispute and discussion respecting the price, say, we will refer the question of price to A. B., he shall settle it, and they agree that the matter shall be referred to his arbitration, that would appear to be “arbitration,” in the proper sense of the term, within the meaning of the act; but if they agree to a price to be fixed by another, that does not appear to be arbitration. *Leeds v. Burrows* draws the proper distinction between what is “arbitration,” in the proper sense of the term, and appraisement valuation, in which case the valuation certainly precludes differences, in the proper sense of the term—it precludes differences from arising, but it does not settle differences which have arisen. That is the distinction which exists between cases of appraisement and cases of arbitration. It seems to be drawn in *Hemingway's case*, in which there was an agreement to sell land, at a particular price to be fixed; by award the price was fixed, and one party came for an attachment under the award, and said that it was an arbitra-

tion; but Littledale, J. pointed out the distinction: he says, “this is not properly an arbitration: it is, in effect, an agreement to sell the land, and this is not a settlement of any difference between the parties, but merely something auxiliary to the contract entered into between them for the purpose of the sale of the land. And accordingly, upon a breach of the contract, you have your remedy, for it is clear that a specific performance would have lain here in that case. It is clear, also, that an action would have lain for damages; but not being an award, because it was not a matter in difference that was referred by these parties, you cannot have it by way of attachment.” Therein lies the distinction; and that is approved of by Lord Campbell, who thinks that it is a proper distinction, and one that he must adopt. *Gordon v. Whitehouse* does not appear to affect the case materially one way or the other. The cases which are material are *Hemingway's case* and *Leeds v. Burrows*; but I look at this case simply as in the nature of a contract, to the purposes of which contract this was auxiliary, and in order to save discussion, and to prevent differences which might arise between the parties, it was agreed that the price should be settled by the decision of two persons who were to be called in, who were to call in an umpire before they proceeded to the settlement. Accordingly, in *Darbey v. Whitaker*, it never occurred to the parties that the Court had power to appoint an arbitrator, which would have removed all the difficulty and arrested a series of decisions, of which *Milnes v. Gery* is an instance. If the act of parliament had intended to refer to these cases, it would, as you must attribute to the legislature a perfect knowledge of the law, have gone on to say, “And be it further enacted, that in any case of a suit for specific performance, it shall not be any sufficient defence to such suit to allege that the arbitrator has died, or that no arbitrator was appointed, and this Court shall have power to appoint an arbitrator in such case for the purpose of completing the contract.” Whether the legislature foresaw what the consequence would be of the general use of the words used, it is impossible to ascertain; but by restricting the word “arbi-

tration" to the proper sense of the term, the section is perfectly right, and does not apply to a case of this description; and having had an opportunity of speaking to Wood, V.C. since the discussion of this case, I have his authority for saying that he did not intend *In re Lord* to apply to a case of this description. Concurring with him in that decision, and in the opinion which he gave as to the remedial nature of the statute, still it does not govern this case. I must therefore hold, that the Court has no authority, under the 17 & 18 Vict. c. 125, to appoint an umpire. The question, however, has been properly argued in court; I shall therefore allow counsel only, and not give any direction about costs.

LORDS JUSTICES. }
Dec. 13, 14, } RAWLINS v. WICKHAM.
15, 16. }

*Contract—Fraud—Misrepresentation—
Partnership—Double Remedy—Unsup-
ported Charges in a Bill—Costs.*

*J. W. and C. B. were partners as bankers. C. B. was the managing partner, J. W. not interfering in the active business of the concern. They negotiated with R. R. to become a partner, and shewed him a written statement of the affairs of the bank, which was wrong to the extent of 15,000*l.*; but J. W. was ignorant of the falsehood. R. R. joined the partnership, which continued four years; but he never examined the books. On the discovery of the fraud R. R. brought an action against J. W. and C. B.; but before declaration J. W. died, and the action being continued against C. B., R. R. obtained a verdict, with damages assessed by arbitration. C. B. became insolvent, whereupon R. R. filed a bill against the executors of J. W. to set aside the contract, and to render the estate of J. W. liable for the indemnity of R. R. against the claims of the creditors of the late firm. One of the Vice Chancellors having made a decree in accordance with the prayer, but without costs, in consequence of the unsupported charges of fraud contained in the bill, the executors of J. W. appealed:—Held, that the plaintiff was entitled to relief; and the*

appeal was dismissed, with costs, except that the plaintiff was allowed the deposit.

A representation made by a party, not knowing that it is false, is binding upon him; and if the other party enters into a contract on the faith of its truth, the Court will set aside the same altogether, and not merely rectify it. Though the other party does not examine the books for four years during which the partnership continued, it not being his duty to do so, it will not bar him of relief on the score of negligence or acquiescence.

The bringing of an action against the partners, and recovering a verdict against the survivor of them, does not prevent the deceived party from seeking relief in equity.

This was an appeal from a decision of Vice Chancellor Stuart.

The facts of the case may be stated very shortly, although the pleadings and evidence were very voluminous, the latter being in many respects extremely conflicting. The bill contained many charges of fraud of a gross character, which were not supported by the evidence, on account of which, and of the conduct of the plaintiff not being satisfactory, the Vice Chancellor refused to give him his costs.

The facts, which are very fully stated in the judgment, were, that in 1848 James Wickham, Charles Bailey and Robert Jessett carried on the business of bankers in partnership, at Winchester, under the firm of "The Winchester and Hampshire Bank." On the retirement of Mr. Jessett, in February 1850, Mr. Robert Rawlins, a retired solicitor, living at Whitchurch, near Winchester, became a partner with Mr. Wickham and Mr. Bailey for 2,500*l.*, that being the sum in which the old firm were indebted to him for money advanced. The partnership of Wickham, Bailey and Rawlins commenced on the 1st of March 1850, under a deed of partnership of that date. During the progress of the negotiation, or at the execution of the deed, or at both times, a statement in writing was produced to Mr. Rawlins by Mr. Wickham, having been made out by Mr. Bailey, shewing that the balances due to the customers of the bank were 11,000*l.*, but it subsequently turned out that the sum was 26,000*l.*, though Mr. Wickham was wholly ignorant of the fact. The partnership continued for four

years, when, the business-being sold to the Hampshire Banking Company, the fraud was discovered, and great deficiencies were found in the books, caused by the misconduct of Gattrell, a confidential clerk in the bank. Mr. Rawlins brought an action against Mr. Wickham and Mr. Bailey, but before declaration Mr. Wickham died, and the action was continued against Mr. Bailey, and a verdict returned in favour of the plaintiff, with such damages as should be assessed by an arbitrator. After the verdict Mr. Bailey became insolvent, and thereupon Mr. Rawlins filed the present bill, seeking to set aside the partnership contract; to have the deed of partnership delivered up to be cancelled; that the defendants, the executors of the will of Wickham, might be ordered to pay back the 2,500*l.* paid by Mr. Rawlins for his share in the business, with interest; that the defendants might be decreed to execute to Mr. Rawlins an indemnity against all outstanding debts and liabilities which he had or might become subject to and liable to pay in respect of the dealings and transactions of the partnership; for accounts, and particularly of what Mr. Rawlins had had in respect of such dealings and transactions, and for repayment of the same, and payment of the costs of the suit by the defendants.

The Vice Chancellor made a decree in favour of the plaintiff (1); and the execu-

(1) The judgment of the Vice Chancellor, pronounced on the 4th of May 1858, was as follows:—

"This case is unfortunately too clear. No contract of partnership, whether made between two or more individuals, where one of them enters into it upon the faith of false representations, can be allowed to stand. It has been urged, on behalf of the late James Wickham, that, in cases of the kind to which I have just alluded, all that a Court of equity can do is to compel the person proved to have been guilty of making a false representation to make such representation good. Such, however, is not the doctrine of this Court, when dealing with questions of partnership. In this case the plaintiff, who was desirous of entering into a banking co-partnership with the late Mr. James Wickham and the defendant Bailey, was presented with a statement of the affairs of the then existing firm, from which he was led to believe that the amount due from such firm to its customers was 11,000*l.* only. It has been established in evidence that the amount so due, at that very time, was not less than 26,000*l.* The two material topics of defence which have been insisted upon are these:—First, it has been urged

tors appealed. Mr. Bailey did not appear, either at the original hearing or on the appeal.

The chief points made for the defence are carefully examined in the judgment.

which were unquestionably made to him, were open to the plaintiff. But that is no defence against a charge of misrepresentation. It frequently happens that the means of ascertaining the truth, in cases of this nature, are within the power of the complainant, but it has never been held, that in order to entitle him to rescind his contract, he is bound to shew that he has resorted to all the means of information within his power. The very motive of the misrepresentation is to check inquiries of this nature. The contest upon this point is one which scarcely requires the assistance of authority; but I may refer to a case, before Sir John Leach, *Maddeford v. Austwick* (1), in which one partner agreed to purchase his co-partner's share in their joint business for a sum which he knew, from the accounts in his possession, was an inadequate consideration. There the contract was set aside; although the misrepresentation might readily have been detected by the partner to whom it was made. The second topic of defence to the prayer of the bill, which seeks an entire dissolution of partnership as to the three partners, is, that Mr. James Wickham was himself deceived in the matter. Then, who made the false representation? The defendant Bailey? But when Mr. Wickham and Mr. Bailey were about to enter into partnership with the plaintiff, Rawlins, if Mr. Wickham thought fit to intrust Mr. Bailey to represent to the incoming partner the actual state of affairs, and if, in consequence of the representations so made, the partnership formed upon the strength of those representations is to be dissolved, so far as regards Mr. Bailey, the whole contract is at an end. However, it is of no consequence whether the guilty foundation of this contract lay with Mr. Bailey or Mr. Wickham, or, as has been alleged, with a person who was the clerk of both. The principles of equity make it necessary that I should declare that both Mr. Bailey and Mr. Wickham are answerable for the effects of the falsehood, and that the contract in question cannot stand. All that has been urged, therefore, with reference to the honesty and *bona fides* of the late Mr. Wickham, is clearly beside the question. The other matters which have been discussed appear to me to have reference rather to the question of costs than to the actual measure of relief to which the plaintiff must be held entitled. It has been insisted, as an answer to the whole relief prayed by the bill, that the plaintiff, Mr. Rawlins, almost forced himself into the partnership which he is now so anxious to disclaim. One of his letters has been referred to, in which he states to the effect that 'unless he is allowed to step in quickly, the bank must fall.' There can be no doubt but that the plaintiff was aware of the difficulties with which the partners were contending; but this knowledge, although it may be a very sufficient ground for imputing rashness to the plaintiff,

(1) 1 Sim. 89.

Mr. Malins, Mr. Collier and Mr. J. Hinde Palmer, for the plaintiff, appeared in support of the decree, and cited—

Sadler v. Lee, 6 Beav. 324; s. c. 12

Law J. Rep. (N.S.) Chanc. 407.

Marsh v. Keating, 2 Cl. & F. 250.

Evans v. Bicknell, 6 Ves. 174.

Burrowes v. Lock, 10 Ibid. 470.

Blair v. Bromley, 2 Phil. 354; s. c. 16

Law J. Rep. (N.S.) Chanc. 495.

Hern v. Nichols, 1 Salk. 289.

Wright v. Crookes, 1 Sc. N.R. 685.

Taylor v. Green, 8 Car. & P. 316.

Fuller v. Wilson, 3 Q.B. Rep. 58; s. c.

11 Law J. Rep. (N.S.) Q.B. 251.

Macdowall v. Fraser, 1 Dougl. 260.

Schneider v. Heath, 3 Camp. 506.

Pulsford v. Richards, 17 Beav. 87; s. c.

22 Law J. Rep. (N.S.) Chanc. 559.

Partridge v. Osborne, 5 Russ. 195;

s. c. 7 Law J. Rep. Chanc. 40.

Reynell v. Sprye, 1 De Gex, M. & G.

660; s. c. 21 Law J. Rep. (N.S.)

Chanc. 633.

Pawson v. Watson, Cowp. 785.

Maddeford v. Austwick, 1 Sim. 89.

Harris v. Kemble, 1 Sim. 111; s. c. 2

Dow & Cl. 463; s. c. 5 Law J.

Rep. Chanc. 131.

Sugden's Concise View, 178.

Mr. Bacon and Mr. G. L. Russell, for the defendants, the executors of Mr. Wickham.

The counsel for the plaintiff disclaimed any intention of imputing personal fraud or deception to the late Mr. Wickham,

is no excuse for a misrepresentation, the effect of which was to make a confessedly bad state of things look better than it really ought. Still, however, it is a point which will weigh with the Court when dealing with the question of costs; and there are in this case other circumstances which are not favourable to the plaintiff in this respect. His case has been greatly overstated in the bill. This is not an unusual circumstance where relief is sought upon the ground of alleged fraud; but it is a highly injudicious course. The parts of the bill in which these erroneous statements occur are many in number. There is an allegation to the effect that the plaintiff entered upon the partnership almost reluctantly, that he did so solely at the inducement and persuasion of Messrs. Wickham and Bailey. Now, it is perfectly clear upon the evidence, that the plaintiff was more anxious himself to plunge into this ruinous concern than those gentlemen were to receive him. Nor must it be forgotten that after the plaintiff had entered upon the partnership,

and Lord Justice Knight Bruce also declared that what was by the technical rules of the court denominated fraud was alone laid to his charge, he being as much deceived as to the state of the bank as was the plaintiff. His Lordship also observed that the counsel for Mr. Wickham's executors might take for granted that nothing like personal fraud or dishonesty was imputed to that gentleman. The imputations of fraud were doubtless of far greater importance to the Wickham family than any amount of property involved in the dispute.

Dec. 16.—**LORD JUSTICE KNIGHT BRUCE.**—This is a suit for enforcement of a familiar principle, in a state of circumstances not by any means of an ordinary kind. Its object is to relieve the plaintiff from the effects of a contract for partnership, into which it is his case that he was led by material and important misrepresentations relating to the subject-matter of the contract, which were made on the part of those with whom the contract was entered into. The facts are these. The plaintiff, who had been a member of the legal profession, which he had quitted, was living as a country gentleman not far from the city of Winchester. In that city a bank had been established for many years, being considered a respectable establishment; it had acquired considerable provincial celebrity, and was reported to have enriched more than one of those who had been partners in it. In the year 1848 the partnership consisted of three gentlemen: Mr. Jessett, who appeared not to have been an active partner; Mr. Wickham, also not an active partner, who seemed, as far as the Court knows, not to have been of any profession, but to have been simply a country gentle-

knowing, as he did, that, owing to the state of the country in 1848, the concern was not in so flourishing a condition as it had been, and after discovering that it was, in fact, in a state of extreme embarrassment, he, nevertheless, went on with it for between three and four years, without ever once complaining of the misrepresentation which had been made to him. Looking at the whole conduct of the plaintiff, and at the sort of allegations which have been inserted in his bill, the Court, although it must set aside the contract into which he has entered, cannot allow him his costs. The decree will be substantially according to the first five paragraphs of his prayer."

man; and, in the third place, Mr. Bailey, who, in addition to being a banker, was a practising solicitor in the city, officially connected with the corporation, and therefore apparently having the confidence of the corporation and others. Mr. Rawlins, the plaintiff, appears to have been on terms of intimacy with Mr. Bailey and Mr. Wickham, and had lent them a considerable sum of money, exceeding 2,500*l*. Mr. Jessett thought at that time of retiring from the partnership, and it occurred either to Rawlins himself or to Bailey and Wickham in the first instance, that it might be desirable for Rawlins to enter into the bank in the place of Jessett. Rawlins thought well of the proposal, whether originally proceeding from himself or not; and the better, possibly, because he had a family, and one of his sons might be advantageously introduced into the concern. Accordingly, the subject became one of much discussion and negotiation between Rawlins, Wickham and Bailey—a very protracted negotiation—protracted partly through the difficulty of arranging the terms of Jessett's retirement. Ultimately the terms were settled, and in the early part of 1850 the new partnership was formed, and the plaintiff was introduced in the place of Jessett to one-third share of the business and assets—not gratis, but under the arrangement that 2,500*l*. should be taken out of the debt which Wickham and Bailey owed him. The transaction was completed in the early part of 1850, and the deed of partnership was signed. The partnership was to continue for twenty-one years, but to be determinable upon twelve months' notice on the part of any one of them. It continued for some years, under, however, great and growing dissatisfaction on the part of Rawlins, the new banker. He complained, though in a friendly manner; and in the end the other members of the firm became also tired. An arrangement was then made for parting with the business to a joint-stock company. The arrangement was completed in 1854, rather more than four years after the commencement of the partnership. Almost simultaneously with the completion of this arrangement, died suddenly the sole or principal clerk of the bank, who had been trusted exclusively, and considered most respectable, and al-

most entirely conducted the business. Upon his death, the amount of money discovered in his house created surprise and suspicion. Hence arose an investigation, and it was discovered that frauds, extensive in their nature, had been committed by this confidential clerk, who for a series of years had been thus intrusted, and that the state of the business was very serious and bad, causing great loss to the partners. This led to a suspicion, even if it had not been previously entertained on the part of the plaintiff, as to the manner in which (to borrow a phrase of bankers) he had been "arranged" in the matter. He made inquiries, he consulted the books, and the evidence appeared conclusive that he had been (to use a coarse expression) cheated into becoming a partner. This led to the present suit. The plaintiff stated that the affairs and state of the business were grossly misrepresented by Wickham and Bailey, and he has, in my opinion, clearly established that gross misrepresentations were made, which must be ascribed to both. Upon the negotiation a paper had been produced containing a statement of the debts and credits of the firm, and, amongst other things, the amount due to customers, which was stated, not in detail, but in the aggregate, as about 11,000*l*. The real amount exceeded that by many thousand pounds—a fact which appeared upon the books; and if they had been examined by any person ordinarily competent, the fraud would have been at once discovered. On the question, whether fraud has been practised, it is not necessary to go any further; it may have been that this was not the only misrepresentation, but it is enough to say that this is distinctly proved. Is there any excuse, any apology for this? For Bailey, there is none. As a professional man, personally attending the bank and personally managing its affairs, I say, in the most pointed manner, that it was his duty to know what the books contained. Beyond a doubt, he was a party to the gross misrepresentations. On the other hand, Wickham was an inactive partner; he did not interfere with the customers, attended only occasionally at the bank, not meddling with the books, and knowing nothing of them—but still a partner, and not a sleeping partner, who had a right to examine the books and to

make himself acquainted with the whole state of the business; and, as between himself and a partner newly introduced, it was his duty to be so acquainted. What did he do? Whether with acquaintance or lack of acquaintance with the affairs, it is proved that he joined with Bailey in the misrepresentations in producing the statement of accounts alluded to, and alleging it to be an accurate account of the position of the bank. He ought not to have asserted what he did not know to be true. If he did not know, it was his duty to say—"It may be correct or not. I have a good opinion of Mr. Bailey and Gattrell. I do not know the facts; you must ascertain for yourself." He did not say so; he joined in the assertion, that the falsehood was truth; and in the position in which he stood towards the plaintiff, I am clearly of opinion that he was as much personally liable as if he had personally known the falsehood of what he asserted. It has been plausibly urged, that even if Wickham had spoken as he ought to have done, the plaintiff would still have acted as he did, having confidence in Bailey. But this is only conjecture, and the Court cannot speculate on what did not happen. There is therefore a joint assertion for every purpose of the suit—though I do not say for every moral purpose—and not as implicating Wickham in any delinquency beyond that which arises from neglect of his business and omitting to state what he ought to have done as to his knowledge of the real condition of the bank. He became, therefore, answerable for the misrepresentation, and the contract was vitiated. If, therefore, the plaintiff had discovered the fraud earlier and complained earlier, there would have been no question as to the result. But it is said that during all the four years that the partnership lasted Rawlins might have inspected the books. I am not satisfied that difficulties would not have been thrown in his way—I am not satisfied that Bailey would not have objected; but he did not do this—and I must conclude that he not only entered into the firm without examining the books, but that he voluntarily continued in the same state of ignorance during the whole time till the business was sold. There are many persons to whom the plaintiff

would not have been allowed to say that he was ignorant of the contents of the books—to whom the utterance of such an excuse would have been a vain thing. There are many persons with respect to whom it was the plaintiff's duty to know the contents, as much as it had been Wickham's duty to know them at the commencement of the partnership, but was it as much his duty as between himself and Wickham and Bailey? I think not. The plaintiff was entitled to believe in the accuracy of the statement made to him without opening one of the books before the partnership, and he was entitled to continue in that belief until there was suspicion on his part or complaint on the part of one of his partners. But no complaint was ever made against him for not entering into the affairs, taking part in the business, or examining the books. On the contrary, he had reason to believe that any inspection of the books or interference with the business would have been disagreeable, and have given offence. It cannot be said that he committed any breach of duty—and it cannot be said that if it had been, the other partners could not have remonstrated. It is true that he was early dissatisfied with the state of the affairs, but it was in no unfriendly spirit, and I must hold that from the commencement of the partnership until the death of the dishonest and wicked clerk, who was instrumental in causing so much misery to all parties—he was entitled to say that he was in complete ignorance that he had been deceived. Strange, therefore, as it may seem till unexplained, when explained the plaintiff's case has not been destroyed, nor even made worse by the extraordinary silence of four years. I am convinced that the Vice Chancellor has taken a correct view, and that the plaintiff is entitled to stand in the same position as at the commencement of the partnership. If by any acts of the plaintiff he has in any way prejudiced or damaged the business, there may be grounds for compensation, and in that case the Court might have granted an inquiry. But there is no such suggestion—there is no probability that he did mischief or harm of any kind. It has been ably argued that justice might be done by only charging the defendants

with the difference between the misrepresentation made and the actual state of things. But the plaintiff has a right to elect, and to say that the misrepresentation vitiated the whole contract. Another peculiarity in this very singular case is, that an action in respect of this misrepresentation has been brought by the plaintiff against Wickham, while he was living, and Bailey. Before declaration, Wickham died, and the action was continued against Bailey alone; a verdict was obtained by the plaintiff and the damages referred to arbitration, and the award has settled the amount at several thousand pounds; but this is not sufficient to make good all that the plaintiff claims to be entitled to, or all the loss sustained by him, as he alleges. It seems to me that this judgment, not being against Wickham, did not take away the plaintiff's right against his representatives. But if anything is recovered upon the judgment against Bailey, it must be accounted for in this suit, the amount so recovered being first liable to the payment of the plaintiff's costs at law. The decree is not so worded as to provide for this, and it is probable that the attention of the Vice Chancellor was not directed to this point. Substantially the decree is correct. It is said that the decree, having proceeded on the principles on which it is grounded, should have given costs against the estate of Wickham. But I am not disposed to disturb the decree in this respect. The statements of the plaintiff in his bill are too strong—stronger than the evidence warranted. On that ground I am not disposed to give the plaintiff the costs of the appeal; but I think that justice will be done by giving him the deposit.

LORD JUSTICE TURNER. — This is an appeal from a decree by which the Vice Chancellor has set aside a purchase made by Mr. Rawlins, and directed accounts and inquiries, the result of which will be to place Rawlins, as against the estate of Wickham, in the same position as if he had never formed the partnership. I cannot but feel regret at the conclusion at which I am compelled to arrive, a conclusion agreeing with that of the Vice Chancellor and my learned Brother. But I think it is right and just in the first place to Mr. Wickham, to state that I do not

believe that there was any moral fraud on his part. However, his case cannot be put higher than this, that he knew nothing of the state of the bank, or of the debts due from it, at the time of the negotiation. But, unfortunately, though knowing nothing, he during that period placed in the hands of the plaintiff a statement, professing to be the half-yearly account, shewing that the debts due from the bank to its customers amounted to no more than 11,000*l.*, and yet it incontestably appeared that such debts in truth exceeded 26,000*l.* The delivery of this account by Wickham to the plaintiff cannot be considered in any other light than as a representation by Wickham to the plaintiff, that the concern was a debtor to the customers to the amount of 11,000*l.* only, when in truth it was so to the amount of 26,000*l.* It was at least a representation by Wickham of a fact of which he knew nothing whatever, whether it was true or not; that the representation must have formed a material inducement to the plaintiff in the consideration of the matter of the purchase, cannot be doubted. It turns out that this representation was false. I repeat, that there was no moral fraud; Wickham does not appear to have known that the account was inaccurate; but the representation being untrue, there is legal fraud, and the consequence is that his estate must answer for it. It is not necessary to enter into the principles governing such cases; upon them there has been no dispute at the bar, and the present case plainly falls within them. If, on the treaty for a purchase, one party makes a representation, surely he cannot be afterwards heard to say that he knew nothing about the matter; and still more surely he cannot be allowed to retain any benefit which he might have acquired from the representation which he has made. It is necessary to say this much, for it would be most dangerous to allow any doubt of this doctrine; the opposite principle would be opening a door by which to escape from every case of misrepresentation as to credit. Mr. George Russell, who has argued the case for the defendants with much earnestness and great ability, contended that the misrepresentation complained of as to the amount of the debt formed no part of the

basis of the contract, and that the plaintiff's assertion that the account was produced at the time of the meeting for the execution of the deed could not be relied on. I feel sure that if the account was not produced at the time of the execution of the deed, it certainly was produced in the course of the treaty; it was an element in the consideration, and formed part of the inducement; for what other purpose could it have been produced but to enable the plaintiff to determine whether he would or not join the firm? It has been argued for the defendants on the proofs before the Court, that the plaintiff did not rely on the statement, and that he would have joined whether the bank was solvent or insolvent; and it has been also well put by the defendants' counsel that the plaintiff could not have relied on the statements of Wickham, because he well knew that Wickham took no active part in the bank. But without saying that there can be no case where a person who has made a misrepresentation may now be allowed to say that the other party did not rely upon it, the evidence in the present instance falls very far short of what would be required in such a case; and, moreover, it is met by the plaintiff with a distinct assertion that the statement was relied on, and that it was upon the faith of it that he entered into the partnership. I think that the argument that the plaintiff would have joined in any case, is untenable; if the plaintiff had known the true circumstances he would have been able to exercise his judgment, and it is impossible for the Court to say from what was done what he would have done if the misrepresentation had been detected. The argument arising from the fact that Wickham had taken no part in the bank has more weight; but still I am satisfied, on consideration, that the Court cannot rely on it. It does not lie in Wickham's mouth, or in that of his representatives, to say that he had no means of knowing things of which he asserted the truth. Another argument urged by Mr. George Russell related to the time which elapsed since the execution of the articles and the means of knowledge which the plaintiff had since the commencement of the partnership. It was not said that the plaintiff had actually dis-

covered the fraud, but that he had the means of detecting it, and might and ought to have done so before the sale to the Hampshire Bank; and the case of all parties was, that it was not detected until then. This argument, it should be observed, does not proceed on the ground of acquiescence; to an argument so put a sufficient answer would be that the party had no knowledge of his right to claim; and so far as the argument rested upon the plaintiff's means of knowledge, the evidence proves that in the first place there was no examination of the books by the plaintiff; and if the argument could have been put higher, the case of *Harris v. Kemble* forms an answer to it. That case was for a specific performance of an agreement for a lease of Covent Garden Theatre. The rent had been calculated on a statement of profits of the theatre for several preceding years; and on this ground it was contended that there ought to be no specific performance of the agreement. Sir John Leach decreed specific performance, and the case was brought by appeal before Lord Lyndhurst, and afterwards before the House of Lords. In the report of the appeal in the House of Lords (2) Lord Lyndhurst's judgment in the Court of Chancery is reported. He there said (at p. 471): "Misrepresentations are charged to have been made with respect to the profits of the theatre in the two seasons 1819—20, and 1820—21. It is said on the other side, that Mr. Harrison, or the parties, had access to the books, and that by inspecting and examining certain books, they might have corrected those documents. It appears, from all the evidence, that the books were kept in such a manner as to render it extremely difficult, without bestowing a great deal of time and attention, and employing the skill of an accountant, to deduce any certain conclusion from them; and it does not appear in evidence whether, if those documents had been examined by the books, the error contained in them could have been easily detected; but, at all events, it was a representation made by Mr. Harris with a view to this agreement, with a view to the fixing of the terms of the rent." Lord Lyndhurst, there-

(2) 2 Dow & Cl. 463.

fore, dissented from the judgment of Sir John Leach, and reversed the decree, and the House of Lords affirmed Lord Lyndhurst's opinion, and refused specific performance. It is true that was a case of specific performance, and is subject to all considerations affecting such cases in this court, but what was said remains of the highest authority as to the detection of fraud. Various acts had in that case been done by the parties to alter the conditions of the lease, and tending to disable the Court from putting the parties who had made the agreement in the same position as if a lease had been granted. That case is important, to shew that the acts must have been strong to induce the Court to refuse relief, which otherwise the plaintiff would have been entitled to. But here I am not aware that any acts of the plaintiff are alleged to have been done at all injurious to the partnership, or from which any loss can have accrued to the partnership. If any such had been alleged and proved by the defendants, there can be no doubt that the right course would have been to direct inquiries; but not finding any, I think there is no ground for inquiry. It has been also urged by Mr. George Russell that the proper course would be to decree the estate of Wickham to make good the representations contained in the paper referred to: that is, to make good the difference between the amount of debts as stated there, and as they really were. But the Court must look to what are the true principles by which it is governed, where a contract has been entered into, and where misrepresentation has induced the contract.

These principles were clearly laid down by Sir Thomas Plumer in *Lord Clermont v. Tasburgh* (3), the marginal note of which is that the effect of partial misrepresentation is not to alter or modify the agreement *pro tanto*, but to destroy it entirely, and to operate as a personal bar to the party who has practised it. That again was a suit for specific performance, but it was not so in *Edwards v. M'Leay* (4). That case is conclusive to shew the course of the Court in cases of misrepresentation. Nor could it be otherwise. The plaintiff

here would perhaps never have entered into this contract but for the statement, and I am of opinion that he ought to have been put in a position to decide whether he would enter into the contract or not. There can be no doubt that the principle of the Court is, that where a contract is founded on misrepresentation, the Court cannot rectify it, but must thoroughly set aside the whole transaction. Remarks have been made as to the effect of the action at law. But the action proceeded on the same grounds upon which the bill is founded, namely, fraud and deceit. I do not see how the fact of one partner having been sued at law, can deprive the plaintiff of the right to pursue the estate of the deceased partner in equity, where alone the assets can be administered. The decree is in substance right, but the alteration which has been suggested should be made, and credit should be given for any amount which may be recovered from Bailey at law beyond the costs of the action. There must be no costs of the appeal, but the deposit will be paid to the plaintiff.

KINDERSLEY, V.C. }
Nov. 23. } HOGARTH v. PHILLIPS.

*Voluntary Post-nuptial Settlement —
Wife's Reversionary Property.*

By a post-nuptial settlement the wife's reversionary property was conveyed to trustees, to pay the interest to the husband during their joint lives, and after the death of either of them, the principal to be in trust for the survivor absolutely. Upon the joint application of the husband and wife, the Court, upon the property coming into possession, treated it as unaffected by the settlement.

This suit was instituted for the administration of the estate of Stephen Howell Phillips, who, by his will, dated the 3rd of October 1821, devised and bequeathed his real and personal estate upon certain trusts, for the benefit of his wife for life, and after her death to be divided between his seven children. The testator died in August 1832. Georgiana Phillips, who was one of the daughters of the testator, inter-

(3) 1 Jac. & W. 112.

(4) Coop. 308; s. c. 2 Swanst. 287.

married with John Rayer Hogarth, on the 24th of July 1832. On the 28th of September 1833, a deed of arrangement was executed between the widow of the testator and his seven children, by which it was declared that the seven children of the testator were entitled absolutely, after the death of the widow, each of them to one-seventh part of the residuary real and personal property of the testator, or the monies to arise therefrom. On the 30th of November 1833 a post-nuptial settlement was executed between Mr. and Mrs. Hogarth, of the one part, and H. Phillips and R. Stert, of the other part, which recited the will of the testator and the deed of the 28th of September 1833, and recited also, that previously to the marriage of the said J. R. Hogarth and Georgiana his wife, it was agreed that the portion or share to which the said Georgiana Hogarth might become entitled, upon the decease of the testator, should be settled upon the trusts thereafter declared, and that the said J. R. Hogarth should secure to the said Georgiana Hogarth, in the event of her surviving him, an annuity of 400*l.* per annum during her widowhood; and by the said indenture it was witnessed, that in pursuance of the said agreement, and for carrying the same into effect, they the said J. R. Hogarth and Georgiana Hogarth, and each of them, assigned, transferred and set over unto the said H. Phillips and A. Stert, their executors, administrators and assigns, all that the reversionary part, share or proportion of the said Georgiana Hogarth, or of the said J. R. Hogarth in her right, as one of the children of the said Stephen Howell Phillips, deceased, under the before-mentioned will and deed or otherwise, of and in the said real and personal estate, or the monies to arise therefrom, with full power and authority for the said H. Phillips and A. Stert, in the names of the said J. R. Hogarth and Georgiana Hogarth, or either of them, to sue for, recover, receive and give discharges for the same. And it was thereby declared that the said H. Phillips and A. Stert, their executors, administrators and assigns, should stand and be possessed of and interested in the said premises thereby assigned, upon trust when and so soon as the same or any part

thereof should become payable and be received, to lay out and invest the same, with the consent of the said J. R. Hogarth and Georgiana Hogarth in writing, in manner therein mentioned; and upon trust, during the joint lives of the said J. R. Hogarth and Georgiana Hogarth, to pay the interest, dividends and annual produce of the said trust funds unto the said J. R. Hogarth and his assigns; and from and after the decease of either of them, the said J. R. and Georgiana Hogarth, the principal or capital of the said trust funds to be in trust for the survivor of them and his or her executors, administrators and assigns absolutely.

The widow of the testator died in 1857, and J. R. Hogarth was one of the executors of her will.

The residuary property of the testator had been sold by the trustees of the will, and the produce thereof had been paid into court under the administration suit.

The cause now came on upon further directions, and J. R. Hogarth and Georgiana Hogarth claimed that the settlement of the 30th of November 1833 should be treated as a nullity, and applied to have the share of the said Georgiana Hogarth in the testator's estate paid over to the said J. R. Hogarth, notwithstanding that settlement.

An affidavit had been made by J. R. Hogarth, to the effect that there never had been any such agreement as that recited in the post-nuptial settlement.

Mr. Baily and *Mr. Leach* appeared for the plaintiffs.

Mr. Grenside, for J. R. Hogarth, contended that the deed of settlement was void, as a voluntary settlement, and that it must be treated as a nullity. It could not be supported against the wife, as no fine had been levied by her, and no act done to bind her. On the part of the husband, it was entirely voluntary as against any one but the wife, and the wife now joined in this application. The following cases were cited:—

Bridge v. Bridge, 16 Beav. 315; s. c.

22 Law J. Rep. (N.S.) Chanc. 189.

Warden v. Jones, 2 De Gex & J. 76;

s. c. 27 Law J. Rep. (N.S.) Chanc. 190.

Thynne v. Glengall, 2 H.L. Cas. 131.

Mr. Wright, for the trustees, in support of the settlement, cited—

Whatman v. Gibson, 9 Sim. 196; s. c.

7 Law J. Rep. (N.S.) Chanc. 160.

Smith v. Garland, 2 Mer. 123.

KINDERSLEY, V.C.—I must hold that this deed was inoperative. I must say, I am strongly opposed to setting it aside on the ground that the husband desires it, even although the wife herself desires it. No instance has been adduced of a husband who had made a post-nuptial settlement of his wife's reversionary property on herself, having on his own application been allowed to treat it as a nullity. *Bridge v. Bridge* is no authority; for all the circumstances there were utterly different from those in the present case. Still I do not see how to avoid the conclusion that is contended for. In this case it happens that both husband and wife ask that the deed should be treated as a nullity. It might be that the husband might desire to treat it as a nullity, but the wife might consider it most for her benefit, and insist upon it that it should stand. If that were the state of the case, I should be reluctant to set aside the deed. Supposing the husband had executed a deed to himself for life, with remainder to his wife—such a settlement as this Court would ordinarily make—in that case I should feel extremely reluctant to treat that settlement as a nullity. But to put the case the other way, and suppose that the husband were not desirous of setting it aside, because it had been made in a form (as in this case) very much to his own benefit—in a form which makes provision for the wife only in case she survived the husband, and makes no provision for the children. If the husband in that case were desirous of maintaining it, and the wife insisted on its being set aside, it is impossible for me to say that such a settlement of a wife's reversionary interest could stand for a moment against her. In that case it would be difficult to say it is to stand against her, when it would not stand against any other person. The principle must be carried out strictly. This is a settlement which has no operation against the wife, as far as the personalty is concerned, because it was reversionary; nor as to the realty, as there

was no act on her part to bind her. No interest passed from her, and nothing passed to the husband; therefore, undoubtedly on the part of the husband it was entirely voluntary as against anybody but the wife. I must also consider that it was entirely voluntary on the part of the husband; and if voluntary he would not be bound by it. Certainly it is not such a settlement as the Court should uphold for the wife. Therefore, I consider that the parties are entitled to treat it as a nullity. I must consider this property as the wife's, unaffected by the settlement. If it is to be paid over to the husband, I must, of course, have the consent of the wife.

STUART, V.C. } *In re HARGREAVE'S*
Dec. 17. } SETTLED ESTATES.

Practice—Appointment of Guardian to Infants—Stat. 19 & 20 Vict. c. 120.—Regulations of August 8, 1857.

Under the Leases and Settled Estates Act, 19 & 20 Vict. c. 120, the appointment of a guardian to infant petitioners should be made after the petition has been presented.

Mr. Pemberton stated that the Registrar had declined, unless by the express direction of the Court, to draw up an order, which had been obtained for the appointment of a guardian to infant petitioners under the above-mentioned act, on the ground, that the order was dated subsequently to the presentation of the petition, whereas, the 21st Regulation of the 8th of August 1857 required that the appointment of a guardian, in a case where an infant is a petitioner, should be made before the petition is presented. He submitted that as the petition in this case was dated on the 1st of August 1857, prior to the issue of the Regulations of the 8th of August 1857, those Regulations were not applicable to the case; and that the question whether the order was irregular must depend upon the construction to be put upon the Leases and Settled Estates Act, 19 & 20 Vict. c. 120. The 36th section of that act provided, that "all powers given by the act, and all applications to the Court under the act, and consents to such

applications might be exercised, made or given by guardians on behalf of infants." There did not appear to have been any decision upon the construction of the 36th section; but the practice upon the 37th section, which related to the consent of married women to applications under the act, and was in words similar to those of the 36th section, had been settled by the Lords Justices of Appeal, in the case of *In re Foster's Settled Estates* (1), where their Lordships had decided that the examination of a married woman, who applies to the Court under the act, ought to be taken after the petition has been carried into Judge's chambers, but before any other step is taken.

STUART, V.C. said, that although the present case must be decided independently of the Regulations, it appeared to him that the most convenient course was to have the guardian appointed after the petition was presented, when there was some proceeding actually pending in the court, rather than beforehand, when there was no suit or matter in which he could be appointed; and that he had so held in many cases that had come before him under the act. As to the Regulations of the 8th of August 1857, he construed them as merely pointing out the manner in which the several proceedings under the act might be taken, for the sake of convenience, and not as being absolutely obligatory in every case.

[IN THE HOUSE OF LORDS.]

1858.	}	EMILY VERNON AND
Feb. 12, 15, 16;		OTHERS, <i>appellants</i> , v.
June 2;		WILLIAM WRIGHT AND
July 20.		OTHERS, <i>respondents</i> .

Devise—Limitations—Estate Tail.

A testatrix devised all her real estate to trustees upon trust for three persons for life, with remainder to their issue in tail, "and for default of such issue, then upon trust for the right heirs of my grandfather, Sir T. S. Bart., deceased, by Mary, his second wife, also deceased, for ever":—Held, affirming the decision of Vice Chancellor Kindersley, that the ultimate limita-

tions created an estate tail special, and not a fee simple.

The question in this case related to the construction of the ultimate trust declared in the wills of two sisters, named Frances Ann Langham and Phillis Langham, who, being each entitled in remainder, after the determination of certain estates which have long since expired, to one undivided third part of the estates in question in this cause, by their wills dated respectively the same day (the 12th of April 1827), declared an ultimate trust of their respective third shares in the same language.

Sir Thomas Samwell (the father of the testatrixes) was the owner of the entirety of the estates, and by his will, dated the 1st of November 1778, devised his real estates to his natural son, Thomas Samwell, for life, remainder to his (Thomas Samwell's) first and other sons in tail male, remainder to Wenman Samwell for life, remainder to his first and other sons in tail male, remainder to Thomas Samwell Watson (afterwards called Colonel Samwell Watson Samwell) for life, remainder to his first and other sons in tail male, remainder to Wenman Langham Watson for life, remainder to his first and other sons in tail male, remainder to Thomas Fuller Drought for life, remainder to his first and other sons in tail male, with the ultimate remainder to the testator's own right heirs.

The testator died in December 1779.

All the tenants for life named in the will died without issue; the last survivor of them, viz., Thomas Fuller Drought (who took the name of Samwell), died in the month of May 1843, whereupon the limitation to the testator's right heirs took effect in possession.

The testator had no legitimate issue.

He was the eldest son of Sir Thomas Samwell by Dame Millicent his first wife. That Sir Thomas Samwell (hereinafter called Sir Thomas Samwell the father) had had issue by Dame Millicent his first wife, besides the testator, four daughters, viz., Mary, Millicent, Frances and Ann. All died without issue, except Mary, who married Stephen Langham, and died in 1747, and had issue five children, viz., John (who died in the testator's lifetime, a

(1) 26 Law J. Rep. (N.S.) Chanc. 836.

bachelor), Millicent and Maria, and the two testatrixes (Frances Ann Langham and Phillis Langham); Millicent, Maria and the two testatrixes were the co-heirs and co-parceners of the testator at the time of his death, in 1779. Maria afterwards died intestate, whereupon Millicent and the testatrixes became the co-heirs and co-parceners of the testator.

Millicent married William Drought and died intestate, leaving Thomas Fuller Drought Samwell (one of the tenants for life named in the testator's will) her only son and heir.

Each of the testatrixes gave to her sister (the other testatrix) a life interest in her real property, with remainder (excepting the dwelling-house in which they both lived) to trustees and their heirs, upon trust for her two nieces, Frances Drought and Juliana Drought, for life, remainder to their children and the daughters of the testatrixes' nephew Thomas Fuller Drought, in equal shares, in tail, with cross-remainders in tail; "and for default of all such issue [which event happened], then upon trust for the right heirs of my grandfather, Sir Thomas Samwell, Bart., deceased (the father of my late uncle Sir Thomas Samwell), by Mary his second wife, also deceased, who was the daughter of Sir Gilbert Clarke, Knight, for ever." The grandfather, Sir Thomas Samwell, referred to in this ultimate limitation, was the person herein called Sir Thomas Samwell (the father).

Frances Ann Langham survived her sister, the other testatrix, and died in April 1830.

Frances Drought, Juliana Drought and Thomas Fuller Drought (who took the name of Samwell), all died without issue; Frances the last survivor died in 1849. Thereupon the ultimate limitations in the testatrixes' wills, in favour of the right heirs of Sir Thomas Samwell (the father), by Mary his second wife, daughter of Sir Gilbert Clarke, took effect in possession.

There were three children only of Sir Thomas Samwell (the father), by Mary Clarke his second wife, viz.: Wenman (afterwards Sir Wenman Samwell, Bart.), Catherine (who married Thomas Atherton Watson), and Dorothy, who died an infant and a spinster.

By the death of Sir Wenman Samwell, who died in 1789, without issue, his sister Catherine Watson, became right heir and issue in tail of Sir Thomas Samwell (the father) by Mary Clarke.

Catherine Watson died in 1790, leaving Thomas Samwell Watson (Col. Watson, who, on succeeding to the property, took the name of Samwell), her eldest son and heir, and he was the person who answered the description of right heir and issue in tail of the said Sir Thomas Samwell (the father), by the said Mary Clarke, at the respective times of the deaths of the testatrixes.

He died in the year 1831, without issue, and without having barred the estate tail. Thereupon it descended and devolved upon his brother Wenman Langham Watson Samwell, and upon his death, in 1841, without issue, and without having barred the estate tail, upon his brother Atherton Watson.

Atherton Watson died in 1851, without issue, and without having barred the estate tail, whereupon it devolved upon his grand-nephew, Wenman Langham Woodford (one of the defendants in the cause) and his niece, Charlotta Henrietta Wright, deceased (the late wife of the respondent William Wright), as his co-heirs and co-parceners, and they then became the right heirs and issue in tail and co-parceners of Sir Thomas Samwell (the father), by his second wife, Mary Clarke.

Mrs. Wright, on the 9th of June 1851, executed a disentailing deed, by which her title to the property in question was conveyed to her husband, the respondent, who claimed under its provisions, upon the construction for which the respondents contended, viz., that the ultimate trust in each of the wills of the testatrixes conferred a fee tail descendible on the issue of Sir Thomas Samwell (the father), by Mary Clarke, and that the said Wenman Langham Woodford and Charlotta Henrietta became, on the death of Atherton Watson, entitled, as tenants in common, in tail, to two undivided third parts of the estates devised by the will of Sir Thomas Samwell (the testator).

The appellants, on the other hand, contended that the trust in question gave an estate in fee simple in such two undivided

third parts to the person who answered the description of the right heir of Sir Thomas Samwell (the father), by Mary Clarke, at the respective times of the deaths of the testatrixes, in remainder expectant upon the preceding limitations, to which the estates were then subject; and they alleged that Thomas Samwell Watson Samwell was the person who then answered such description. By his will, he devised all his real estate unto his wife Frances Watson Samwell, her heirs and assigns; and by her will, dated the 13th of December 1839, she devised all and singular her estate and interest in the said estates, to the use of trustees, their executors, administrators and assigns during the life of her niece, Emily Vernon (one of the appellants). The appellants claimed under these wills.

The original bill in this cause was filed on the 9th of August 1852, by the respondent William Wright, and was several times amended.

It stated the facts hereinbefore mentioned, and also stated that in 1851 the plaintiff commenced actions of ejectment to recover possession of the one-third part claimed by him, but that after the commencement of the actions he discovered that the legal estate in fee in the lands was outstanding in certain mortgagees, (whose mortgage securities were stated in the bill), and that such actions had not been farther proceeded with in consequence; and after setting forth other matters not now necessary to be considered, prayed that it might be declared that according to the true construction of the ultimate limitation in the wills of the two testatrixes, the said Charlotta Henrietta Wright (as one of the right heirs and issue in tail and coparceners of the said Sir Thomas Samwell, the father, by Mary, his second wife, the daughter of Sir Gilbert Clarke) became and was, upon the death of the said Atherton Watson, entitled to an estate tail in possession of and in one undivided third part of the said Sir Thomas Samwell's (the testator's) said estates; and it prayed for an account and general relief.

The defendants put in their answers, submitting that according to the true construction of the said wills the limitations therein created an estate in fee simple in

the two undivided third parts of the estates of the said Sir Thomas Samwell, the testator, to the person who answered the description of such right heir at the respective times of the death of the said Frances Ann Langham and Phillis Langham, in reversion expectant upon the limitations to which the said estates were then subject, and that Colonel Samwell Watson Samwell was the person who answered such description at the respective times of the death of the said Frances Ann Langham and Phillis Langham.

The cause came on to be heard, on the 15th of July 1854, before Vice Chancellor Kindersley, who made a decree, declaring that, according to the true construction of the two wills, Colonel Thomas Samwell Watson Samwell, on the death of each of the said testatrixes, took an estate tail in the two undivided third parts, which, on his death, went to Mrs. Wright and Wenman Langham Woodford, as co-heirs in tail of Sir Thomas Samwell, the grandfather, by his said second wife, in coparcenery, and that by virtue of the disentailing deed and conveyance executed by Mrs. Wright, her moiety of the two undivided third parts of the estates became vested in William Wright in fee simple, and that the other moiety vested in Wenman Langham Woodford; and an account was ordered (1). This was the decree appealed against.

The Attorney General (Sir R. Bethell) and *Mr. Swanston*, for the appellants, cited—

2 Jarman on Wills, pp. 6, 7, 8, 9.

Ashenhurst's case, Hob. 34; s. c. 2 Roll. Abr. 416.

Cownden v. Clarke, Moore, 860.

Mandeville's case, Co. Lit. 26, b.

Powell on Devises.

Roe d. Nightingale v. Quartley, 1 Term Rep. 630.

Rolle's Abr. 416, F. 1.

Luddington v. Kime, 1 Ld. Raym. 203.

Heath v. Heath, 1 Bro. C.C. 147.

Gilbert on Uses, by Sugden, 37, n.

Doe d. Candler v. Smith, 7 Term Rep. 531.

Montgomery v. Montgomery, 3 Jo. & Lat. 47.

(1) 23 Law J. Rep. (N.S.) Chanc. 881.

Mr. Glasse and *Mr. Anderson* (with whom was *Mr. Sarrage*), for the respondents, commented on the above authorities, and referred to—

Roe d. Dodson v. Grew, 2 Wils. 322.

Denn d. Webb v. Puckey, 5 Term Rep. 299.

Gummoe v. Howes, 23 Beav. 184; s. c.

26 Law J. Rep. (N.S.) Chanc. 323.

Stewart v. Gloag, 1 M'L. & R. 721.

Burchett v. Durdant, 2 Vent. 311.

Com. Dig. 'Estate,' B. 3.

Preston on Estates, 387.

Wills v. Palmer, 5 Burr. 2615.

Fearne's Cont. Rem. 62, 178.

2 *Jarman*, p. 271.

The Attorney General replied.

The LORD CHANCELLOR (Lord Cranworth) proposed the following question to the Judges :—

Assuming the facts to be correctly stated in the printed cases, but that the ultimate devises in the wills of Frances Ann Langham and Phillis Langham, instead of being made to trustees, had been made directly to the right heirs of Sir Thomas Samwell by Mary his second wife, for ever :

Would Charlotta Henrietta Wright, the late wife of the respondent William Wright, have taken, on the decease of Atherton Watson, any and what estate in the lands in question ?

The Judges requested time to answer this question.

Ordered accordingly.

June 2.—WATSON, B.—My Lords, I am of opinion that Charlotta Henrietta Wright, the late wife of the respondent William Wright, would have taken on the decease of Atherton Watson an estate tail in the lands in question. The ultimate devises in the wills of Frances Ann Langham and Phillis Langham are in the following words : "and for default of all such issue, then upon trust for the right heirs of my grandfather, Sir Thomas Samwell, Baronet, deceased, the father of my late uncle, Sir Thomas Samwell, by Mary his second wife, also deceased, who was daughter of Sir Gilbert Clarke, Knight, for ever." I consider these devises as if the devise had been to the heirs of the body of

Thomas Samwell, in lieu of the words "right heirs of Sir Thomas Samwell by Mary his second wife," which is in truth to the heirs of their bodies.

And this brings it, in my opinion, within *Mandevile's case*, recognized by Taunton, J., in *Winter v. Perrall* (2), which case has remained as law for many centuries, and is in my opinion good law. The addition of the words "for ever" at the end of the devise does not in my opinion enlarge the estate tail in the first taker to an estate in fee : *Doe d. Candler v. Smith* is an authority to that effect. *Roe v. Quartley* does not clash with *Mandevile's case*, and therefore I am of opinion that Charlotta Henrietta Wright would have taken on the decease of Atherton Watson an estate tail in the lands in question.

WILLES, J.—My Lords, I am inclined to think that the estate would be in fee simple. I do not see by what other construction effect can be given to all the words of the will, and I think effect may be given to them all by adopting that construction.

The words of description, I mean the words preceding the words "for ever," are ambiguous, and may be read either as a designation of the person or persons to take, and a limitation of the estate as one to go *quasi* by descent through all the persons who might from time to time, so long as any might exist, successively become such special heirs as described, or, simply, as a designation of the person or persons who was to take when the estate vested, but as not also a limitation of the estate to be taken. This ambiguity appears to me to be removed by the addition of apt and sufficient words of limitation in fee simple, viz., the words "for ever," which, being themselves a limitation of the estate in fee simple, shew that the previous words ought to be read in the latter sense, as *designatio personæ* only. In the absence of such words of limitation, the first of the two constructions above suggested might become necessary, if *Mandevile's case* were, which in this case it is not, in point. Such a construction, however, is not, and was not decided by *Mandevile's case* to be the necessary one;

and, as I have already stated, the words are capable of being used as, and when coupled with the words of limitation are exhausted in their use as, words describing the person or persons to take only.

If this construction be not adopted, the words "for ever" are unnecessarily rejected, and treated as null.

It is obvious that no rule or authority as to the construction of the words "for ever," following an unambiguous and specific limitation in tail, has any application to the present case. Upon the authorities, I am not satisfied that *Roe v. Quartley* has been explained away, and if it has been, then, apart from the supposed authority of that case, I am for the above reasons inclined to think that the words in question would create an estate in fee simple.

CROWDER, J.—My Lords, this question arises upon a clause in a will whereby the testatrix, after giving estates tail to all the existing descendants of Sir Thomas Samwell by his first wife, devises as follows: "And for default of all such issue, then upon trust for the right heirs of my grandfather, Sir Thomas Samwell, Baronet, deceased, the father of my late uncle, Sir Thomas Samwell, by Mary his second wife, also deceased, who was the daughter of Sir Gilbert Clarke, Knight, for ever."

On the death of the testatrix it is agreed that Colonel Samwell answered the description of right heir of her grandfather by his second wife; and the only question in dispute is, whether Colonel Samwell took an estate tail or an estate in fee under that devise.

On the part of the respondents, it was argued that the case falls directly within the principle of *Mandevile's case*, and that, consequently, Colonel Samwell only took an estate tail; the appellants, on the contrary, contending that the case at bar was not at all affected by *Mandevile's case*, and that the devise in question gave an estate in fee to Colonel Samwell.

I am of opinion that the respondents are right in their construction of the devise, and that the case before your Lordships is governed by the rule established in *Mandevile's case*.

Mandevile's case was admitted to be law by the appellants' counsel. But they made two points,—first, that the rule in

Mandevile's case did not apply, because this devise was to a person as right heir, who was not the general heir of his father; the issue by the second marriage not answering the description of general heirs, where there had been issue by the first marriage. And a distinction was taken between the effect to be ascribed to the words "heirs of the body," when such heirs were the ancestor's general heirs, as in *Mandevile's case*, and the effect to be ascribed to the same words, where the word "heirs" did not include the general heirs, as in the devise in question. Secondly, assuming the same meaning to attach to the words "heirs of the body" whether general heirs or not, that the double effect given to those words, of designating the first taker, and shewing the course of devolution of the estate, is controuled by the final words in the clause "for ever," which amounts to a limitation in fee.

It was deduced from the first proposition, that the gift to the heirs of the grandfather by his second wife was a *designatio personæ*, and nothing more, and could only give an estate for life, without the concluding words, "for ever," which carried the fee. The second proposition assumes, that by the application of the rule in *Mandevile's case*, an estate tail would have vested in Colonel Samwell, if the clause had omitted the concluding words, "for ever"; but that these words controuled the devise, and enlarged the estate tail to a fee.

For the appellants' first proposition no authority was cited; and I can see no ground in reason or principle for the distinction contended for. I also think that the second proposition cannot be maintained; because where an estate tail is clearly given, it cannot be enlarged by the words "for ever."

It was admitted by the respondents, that the words "for ever" will in many cases carry the fee, and be equivalent to "heirs and assigns for ever"; but the addition of these words to an estate tail, they contended, could not enlarge it; and many cases were cited establishing that proposition.

A passage in *Fearne's Contingent Remainders*, p. 183, was referred to, in which the

author says, "Where the first words give an estate tail general, and the words engrafted thereon are words serving to limit the fee, it seems by the general and better opinion, that the annexed words of limitation are not to be attended to; as may be seen in the above cited cases of *Wright v. Pearson* (3), *Goodright v. Pullyn* (4), and *King v. Burchell* (5), where the engrafted words limited the whole fee."

Now, I take it, there are ample words of procreation comprehended in the expression "*by his second wife.*" And the devise must be construed precisely the same as if the language had been "*heirs of the body of the grandfather begotten on the body of Mary his second wife.*" If so, I entertain no doubt that the words "*for ever*" would not enlarge the limitation of the estate tail. The substance of the limitation exists in the words "*heirs by his second wife;*" and the words "*for ever*" only import the continued duration of the estate tail.

Roe v. Quartley, however, has been cited as an authority, shewing that the words "*for ever,*" when superadded to words otherwise limiting an estate tail, will carry the fee. Now, with respect to that case it may be observed, that neither in the marginal note by the reporters, nor throughout the argument by either counsel, nor in the judgment of the Court, are the words "*for ever*" referred to. But, on the contrary, it seems to have been assumed by the opposing counsel as well as by the Court, that the devise carried the fee without the addition of these words. Mr. Justice Ashurst in giving judgment says (p. 634), "We are of opinion that Hester took the whole, not by way of limitation, but as a purchaser, and under the description of right heir of Walter and Mary, in the same manner as she would have done if the limitation had been to the right heir of the body of Walter and Mary." That is, she takes the *whole* by purchase, and not a part only, as she would have taken the whole and not a part only if the limitation had been to the "*right heir of the body of Walter and Mary.*"

(3) Amb. 358.

(4) 2 Lord Raym. 1437.

(5) Amb. 379.

This seems to me, therefore, to be no authority binding upon us, that where the words of a devise without the words "*for ever*" would, according to the rule in *Mandevile's case* give a *quasi* estate tail to the parent, the addition of these words converts it into a fee simple in the first taker. Although *Mandevile's case* was referred to in *Roe v. Quartley* for the simple proposition that, under the latter clause of the devise, Hester took as a purchaser, there does not appear to have been any further discussion upon it; and certainly no distinction was attempted to be drawn between it and the case then at bar by reason of the additional words "*for ever.*" I may also observe, in conclusion, that it appears clearly to me to have been the intention of the testatrix to exhaust all the descendants of her grandfather by his second wife; which intention would be entirely frustrated by Col. Samwell's taking the fee. Therefore, upon the assumptions made in your Lordships' question, as propounded to us, I am of opinion that Charlotta Henrietta Wright would have taken on the decease of Atherton Watson an estate tail in the lands in question.

CROMPTON, J.—My Lords, I think that the devise in this case to the right heirs of the deceased baronet by Mary his second wife, also deceased, ought to be construed as creating an estate tail of that peculiar nature which was held in *Mandevile's case* to arise, in order that the statute *De Donis* might be carried out, and the will of the donor observed.

The law with regard to this species of estate having been so long regarded as settled by *Mandevile's case*, it would be improper for me to suppose that your Lordships are likely to disturb it; and the question must be, how far it is applicable to the case at your Lordships' bar?

I see no reason whatever for saying that *Mandevile's case* does not govern the present, on the ground that the party to take in the first instance is not the heir general as well as special. It is now settled that the doctrine by which in some cases the party claiming as special heir is required to make out that he is heir general as well as that he answers the particular

description of heir, does not apply to cases of special estates tail, and I do not see why it should apply to the peculiar estate tail in the present case, any more than to any other estate in tail special.

Treating the present case as without the words "for ever," it appears to come distinctly within *Mandeville's case*. It is the case of a limitation to the right heirs of a deceased person *by* a specified wife, also deceased. There are words of inheritance, "the right heirs of Sir Thomas Samwell," and the heirs are to be his heirs "*by* his deceased wife," which words are clearly words of procreation, and shew the body from whom the issue are to proceed. This, unexplained by other words, is clearly an estate tail.

But it is said that the words "for ever" qualify the other words, and that, taken altogether, the words shew that the expression "right heirs," &c. is to be taken as a *designatio personæ*, and that the words "for ever" give the fee.

I think, however, that we must read the words exactly as if they had been "the heirs of the body of Sir Thomas Samwell on the body of Mary begotten," and then that the words "for ever" have no effect in enlarging what would otherwise be an estate tail into a fee.

If the words were inconsistent with an estate tail, they might possibly so qualify the preceding limitation; but they are words not uncommonly found following a limitation to heirs of the body, and are not regarded in point of law as inconsistent with an inheritance in tail, as they may well mean in that line out of that body for ever. They seem to me in the present case to point to the continuance of the line and race. They seem to mean that the estate shall go on in that special line of descendants of Sir Thomas, and shall go, not only in one particular case to one particular descendant, but in that line as long as it exists; not, as might be argued, as a mere *designatio personæ*, but for ever in that line.

It is quite true that a devise of land to "A. B. for ever" will give him an estate in fee simple. I apprehend that this is because the words "his heirs" must be implied. "To a man for ever" would be nonsense if it did not mean to his heirs for

ever; and therefore the limitation is taken as if his heirs were really inserted; and there being no words pointing to any particular body, the inheritance cannot be in tail, but must be in fee simple. That cannot, however, be the case where, as here, a special line of heirs, which in the eye of the law may last for ever, is distinctly pointed out as the line through which the inheritance is to pass.

Great reliance was placed on *Roe v. Quarley*. In that case neither party set up the limitation in question as an estate tail. Such a construction would, in effect, have shewn that neither party had the title, as the tail would have expired with Hester: and it does not seem that either plaintiff or defendant was heir to the deviser, to whose heirs the reversion would have descended. The succeeding on this point would, therefore, only have decided the pending ejectment in the defendant's favour, but would have apparently given them no title.

Both parties treated the estate, if it vested at all, as a fee; and the principal point made was as to whether the defendants were not entitled to a share of the fee simple. Certainly the question as to whether an estate, which would otherwise have clearly been an estate tail of the kind mentioned in *Mandeville's case*, could be enlarged to a fee by virtue of the words "for ever," was never discussed. The Court treated the words "heir of W. and M. his wife" to mean child from the relation of the parties as husband and wife. There were no express words of procreation, as in the present case, nor were the words of inheritance confined to the one party, as here, but the party to take was to be the heir of both, which the Court said meant child, and was the same as *heir* of the body.

In the octavo edition of the *Term Reports*, 1817, the word of the limitation is heir, in the singular; and in the passage in italics in page 634 the expression is "as if the limitation was to the right heir," in the singular.

In the present case the limitation is to the heirs of Sir Thomas Samwell by his wife Mary; and if he had been alive and had had a preceding estate of freehold, the estate tail would most clearly have

vested in him, and descended to the heirs of his body by that wife.

The present case seems to me to point much more clearly to the descent to a particular line of the ancestor's heirs by a particular wife than can be said to have been the case in *Roe v. Quartley*, and whatever was the exact ground of the decision in that case, I cannot regard it as any authority for saying that *Mandevile's case* is not applicable to a case like the present; or that the addition of the words "for ever" can have the operation of converting into a fee what would otherwise be a clear estate tail of the nature of that in *Mandevile's case*. If any such doctrine had been laid down, I should have thought it wrong; but I agree with the observations of the Vice Chancellor, that the present case is not affected by *Roe v. Quartley*; and concurring also with what appears to me his very able judgment on the point in question, I think that the estate limited to the heirs of Sir Thomas Samwell by Mary his wife, and which afterwards vested in Col. Samwell, was an estate tail, and not an estate in fee simple. I answer your Lordships' question, therefore, by saying that, assuming the facts we are desired to assume, Charlotta Henrietta Wright would in my opinion have taken on the decease of Atherton Watson an estate in fee tail in one half of the one third of the lands under each will.

COLERIDGE, J. — In answer to your Lordships' question, I have to state that, in my opinion, on the assumption there made, Charlotta Henrietta Wright, the late wife of the respondent William Wright, would have taken on the decease of Atherton Watson, an estate in special tail in the lands in question; and that for the reasons which I will now proceed to detail.

It may be assumed, I suppose, that the decision in *Mandevile's case* must be taken to have been admitted law, down to the decision in *Roe v. Quartley*; and, if so, the only questions for consideration seem to be, whether it has been overruled by that decision; and, secondly, if it has been, whether it governs the present case.

In *Roe v. Quartley* the facts were: a devise to Hester Read, daughter of Walter Read, and to the heirs of her body for ever, and for default of such issue, then to

such child or children as Mary, the wife of Walter Read, is now *enceinte* with, and to the heirs of the body or bodies of such child or children, *and for default of such issue to the right heir of Walter Read and Mary his wife for ever*. Hester entered, and died seised without issue and intestate, leaving Mary Nightingale, her cousin, and heir-at-law. Mary Read was not *enceinte*, as supposed, nor had she any subsequent issue, and died, living Hester. Walter married again, and had issue Constantia, afterwards wife of the defendant, and died living Hester. The question arose on the last limitation, and the Court held that under it Hester "took the whole subject-matter devised, as purchaser, and under the description of right heir of Walter and Mary, exactly as she would have done if the limitation had been to *the right heir of the body of Walter and Mary*." Now, in *Mandevile's case* the facts were: "John de Mandeville, by his wife Roberge, had issue Robert and Mawde. Moreville gave lands to Roberge, and to the heirs of John de Mandeville, her late husband, on her body begotten, and it was held that Roberge had an estate but for life, and the fee taile vested in Robert ('heires of the body of his father' being a good name of purchase), and that when he died without issue, *Mawde the daughter was tenant in taile as heire of the body of her father, per formam doni*."

It will be observed that the decision, and the principle of the decision, in *Roe v. Quartley* is in strict accordance with that in *Mandevile's case*, so far as I have stated it; for the Court decides that Hester took the whole as purchaser, exactly as she would have done if the limitation had been to the right heir of the body of Walter and Mary. And this is the principle of the decision in *Mandevile's case*. There Robert had the fee tail vested in him; he dying without issue, Mawde could not take the land by descent from him, because she was not heir of his body; but the Court held that during his life she had an expectancy, and on his death without issue that expectancy took effect, and she came in as heir of the body of her father.

It might seem at first sight that upon the premises laid down in *Roe v. Quartley*, the conclusion should have been that

Hester took an estate tail, and therefore, as Mary Nightingale was not heir of her body, the judgment should have been for the defendant, without considering the defendant's own claim, and simply on the ground that Mary Nightingale had shewn no title. But to this two answers may be given: the first, that no question was raised as to the nature of the estate created by the ultimate limitation, whether fee or tail; the second, and a more satisfactory one, that under the first limitation an express estate tail had been given to Hester; and the words of the last limitation were to be construed with reference to this. To hold that they gave her an estate tail only would have deprived them of all operation, and it was not necessary so to hold, for the same person might be right heir both of Walter and Mary, and yet not heir of their bodies; and therefore the construction of this devise, that it passed an estate in fee, seems to have been assumed; and the language of the Court ought to be read thus: "Hester takes the *whole* subject-matter devised as purchaser *in fee*, under the description of right heir of Walter and Mary, exactly as she would have taken the *whole in tail*, if the limitation had been to the right heir of the body of Walter and Mary." It will be obvious to any one who reads the case with attention, that the only points considered were—Did she take under this limitation as purchaser? Did she take the whole, or part only?

In my opinion, therefore, it is not important to examine whether *Mandevile's case* was brought under the consideration of the Court in *Roe v. Quartley*. In the argument before the House it was assumed that it had been, and that the Vice Chancellor was wrong in his judgment in the court below, in saying that it had not. Upon examination, I venture to think that assumption a hasty one, founded only on the circumstance that the page in 1 *Coke's Inst.*, in which *Mandevile's case* is abstracted, is referred to; but if the two other references which accompany this be looked at, it is by no means clear that the part of the page in which *Mandevile's case* is abstracted was the part to which this reference applies. Be this as it may, it is clear that the Court did not consider that

they were overruling *Mandevile's case*; and, so far as I am aware, no one of the great text-writers, who comment on both cases, has ever treated the older case as overruled by the later.

I pass, therefore, to the second question, which is, whether *Mandevile's case* governs the present. Laying out of consideration for a moment the words "for ever," found in the present case, and not found in *Mandevile's case*, there seems no distinction between the two. In the one the gift is "to the right heirs of my grandfather, Sir Thomas Samwell, deceased (the father of my late uncle, Sir Thomas Samwell, by Mary, his second wife, deceased)," in the other, "to the heirs of John de Mandevile, late husband of Roberge, on her body begotten." There is no gift to the grandfather in the one case, or to John de Mandevile in the other; but the words in each case describe a special heir, who takes by purchase. In this case, says Mr. Fearne, in his book on *Contingent Remainders* (6), they appear to have "a sort of equivocal or mixed effect: for though they give the estate to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor as to pursue the same course of succession, in the same extent of duration or continuance, through the same persons as if it had attached in and descended from the ancestor." And Mr. Jarman (7) says, that in the case of such a devise "the estate will devolve to all persons who successively answer the description of heir of the body"; and whatever technical difficulties there are in the way of this holding, which *Mandevile's case* strongly illustrates, it seems obvious that in this way alone the intention of the grant or devise can be effectuated. In such a grant or devise there can be no doubt that the intent was, that all the heirs of the body should in succession take; in *Mandevile's case*, that both John and Maude should take, the latter, in case the former should die without issue, or the issue should fail; in the present case, that not merely the right heir, when the limitation over should take effect, but all right

(6) Page 80, 7th edit.

(7) Vol. 2, p. 2, edit. 1843.

heirs answering the description in succession, if the first should die without issue, or the issue fail. But if it be held that the whole force of the gift or devise be spent when any one right heir has taken, because he takes by purchase, that intent will obviously in numberless cases be defeated.

I make these remarks, because I think they serve to place *Mandevile's case* on its proper footing. Technically considered, it may be anomalous; but, in substance, it was a vigorous effort, at a very early period, to effectuate the intention of the donor in spite of technical difficulties. Now this, I apprehend, in all cases merely of construction, and where we are not met by legal impediments, is the governing rule of modern decisions.

With this remark I come to the consideration of the two words much relied on to distinguish the present case from *Mandevile's*, "for ever." The question then is, will the addition of these words turn a limitation, which without them would indisputably have created a tenancy in special tail, into an estate in fee? and this, be it remembered, is raised merely as to what is the proper construction, *i. e.* the meaning and intention of the whole sentence. When, in order to make out the affirmative, cases were put of the words being "for years," or "for life," or "in fee," I could hardly suppose that the distinction between each of them and the words in question could have escaped notice. These are all unequivocal in themselves, and inconsistent with the tenancy in tail. If effect be given to them, they cut it down or enlarge it. But how does this apply to the words "for ever"? Suppose an ordinary devise to A. B. and the heirs of his body for ever, could it be contended that this gave an estate in fee? Would not common sense affix to these words in such a case the meaning that the deviser intended no more than that the estate should descend to the heirs of the body so long as there were any such to succeed to it; a redundant expression it may be, which, however, is not so unlikely an occurrence as the intentional use of an inconsistent one. But in the present case there seems something more to be said for the use of the words than in the case of an ordinary tenancy in

tail. The testatrix had carefully provided, and in detail, for all members of the nearer line; she was now providing for the remoter, the line descending from the second wife, in a single sentence; and the words "for ever" might be the natural expression of a wish that her intention in their favour might take effect, however remotely, so long as any one was found who answered the description which she had given.

July 20. — LORD CRANWORTH. — My Lords, in this case, the question is, who is entitled to two thirds of certain real estates formerly of Sir Thomas Samwell? One third is claimed under the will of Frances Ann Langham, who died in 1828, the other third is claimed under the will of her sister Phillis Langham, who died in 1830. Both wills are dated on the same day, that is, the 12th of April 1827. The two sisters evidently made them in communication with each other. Indeed, the two wills are precisely the same, except that in the will of Frances Ann Langham, the first limitation is in favour of her sister Phillis, and, on the other hand, in the will of Phillis Langham, the first limitation is in favour of her sister Frances Ann. The ultimate limitation upon which the question arises is in these terms:—"Upon trust for the right heirs of my grandfather Sir Thomas Samwell, Bart., deceased, (the father of my late uncle Sir Thomas Samwell), by Mary, his second wife, also deceased, who was the daughter of Sir Gilbert Clarke Knight, for ever."

In order to understand the question, it is necessary to be informed as to the state of the family. Sir Thomas Samwell the grandfather referred to in the will, died in 1757. He had been twice married. By his first wife, Millicent, he had issue two sons, Thomas and Richard, both of whom died without issue, before 1780, and one daughter, who married Stephen Langham. Mrs. Langham left at her death four daughters, Millicent married to William Drought, Maria, and the two testatrices, Frances Ann and Phillis, whose wills are now in question.

Sir Thomas, the son, and who was of course, the uncle of Mrs. Langham's four daughters, died without issue in 1779, leaving his four nieces, the said Millicent

Drought, Maria Langham, Frances Ann Langham and Phillis Langham, his co-heiresses-at-law. In 1793, Maria Langham died intestate and unmarried, leaving her three sisters, Millicent, Frances Ann and Phillis, her co-heiresses-at-law. In 1808, Millicent Drought died leaving a son, Thomas Fuller Drought, her only son and heir.

Sir Thomas the grandfather, by his second marriage, had issue a son, Wenman, who died without issue, in 1789, and a daughter, Catherine, who married Thomas Watson. She died before 1828, leaving issue an eldest son, Thomas Samwell Watson, who took the name of Samwell, and died without issue in 1831, and who is designated as Colonel Samwell; a second son, Wenman Langham Watson, who died without issue in 1841; a third son, Atherton Watson, who died without issue in 1851, and a daughter Charlotte Felicia, who married Benjamin Tinley, and had issue two daughters, Clarissa, who married Mr. Woodford, and Charlotta, who married the plaintiff.

Such being the state of the family, we must now refer to the will of Sir Thomas, the uncle of the two testatrices. By that will, he gave his real estates, being those the two-thirds of which are now in question, to five several persons and their issue male, in succession, with an ultimate limitation to his own right heirs. It has already been stated, that he died in 1779, at which time his four nieces were his co-heiresses, but Maria having died intestate and unmarried in 1793, the reversion then became vested as to one-third in his niece Frances Ann, and as to another third in his niece Phillis.

The five persons to whom and to whose issue male Sir Thomas the uncle had devised the estates in succession, all died without issue male, in or before the year 1843, at which time, therefore, the ultimate reversion of the two-thirds which had vested in Frances Ann Langham and Phillis Langham came into possession.

The persons entitled under the devises contained in the wills of those two ladies, prior to the ultimate limitation, thereupon entered on the estates and enjoyed the same until all the devises prior to the ultimate devise (the particulars of which I have already stated) became extinct in the

year 1849. The question is, who then became entitled under the ultimate limitation, "in trust for the right heirs of the grandfather, by Mary his second wife for ever"?

The plaintiff Wright filed his bill, contending that, according to the true construction of those devises, the person entitled to the two-thirds when the prior limitations under the two wills failed, was Atherton Watson, as being the then heir of the body of Sir Thomas the grandfather, by Mary his second wife; and the plaintiff further contended, that when Atherton died without issue, in 1851, then the two-thirds to which he had become entitled, passed in moieties to his late wife Charlotta Henrietta, and to the son of Mrs. Woodford, who had then died.

It is not disputed that the plaintiff was right in his contention, if according to the true construction of the will the two-thirds are to go as if in course of descent in tail from the grandfather to the heirs of his body by Mary his second wife. But on the part of the appellants it is argued, that that is not the true view of the rights of the parties. They contend, that the effect of the ultimate limitation in each will was to give the estate in fee to the person who at the death of each testator was then heir of the body of the grandfather by Mary his second wife. Colonel Samwell, the eldest son of Catherine Watson, was at the death as well of Frances Ann Langham in 1828 as of Phillis Langham in 1830, heir of the grandfather by Mary his second wife, and if he took the reversion in fee subject to the prior estates, all of which expired in 1849, then the appellants are right in their contention.

The object of the bill filed by Mr. Wright was to obtain a declaration of his right according to the construction for which he contended, with an account of the rents received since his title accrued, and for a partition against the persons entitled to the other portions of the property. Answers having been put in, the cause was duly brought to a hearing, and Vice Chancellor Kindersley, in an elaborate judgment, made a decree in favour of the plaintiff, giving him an account of the rents not from the death of Atherton Watson in 1851, but from the filing of his bill in 1852.

Against that decree the defendants appealed, and the appeal was heard early in this session with the assistance of the learned Judges. Owing to their absence on the circuit their opinions were not given until after Easter Term. All the learned Judges who heard the case, except Mr. Justice Willes, are of opinion that the Vice Chancellor took a correct view of the law on this case. And concurring with them as I do, I have no hesitation in moving your Lordships to affirm the decree below.

I cannot distinguish this case in principle from *Mandevile's case*, which is in *Co. Lit.* 26, b. That case is thus stated by Lord Coke: "John de Mandevile by his wife Roberge had issue Robert and Mawde: Michael de Morevill gave certain lands to Roberge and to the heirs of John Mandevile her late husband, on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fee tail vested in Robert (heirs of the body of his father being a good name of purchase), and that when he died without issue, Mawde the daughter was tenant in tail as heir of the body of her father *per formam doni*, and the formedon which she brought supposed." Then he gives the form in Latin, the substance of which is, that she claimed as heir of the body of her father. "And yet, in truth, the land did not descend unto her from Robert, but because she could have no other writ, it was adjudged to be good. In which case, it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land *per formam doni* by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing but in expectancy, when she became heir *per formam doni*." It is true that the words there were "to the heirs of the body of John de Mandevile by Roberge his wife," whereas here they are to "the heirs (not heirs of the body) of the grandfather by Mary his second wife." But this makes no real difference. The heirs of a person deceased, by his second wife, must mean the heirs of his body by her, otherwise the reference to the wife would be inoperative, and the limit-

ation could not take effect. This, indeed, was not the point in dispute. What was contended was, either that *Mandevile's case* ought not to be followed, as resting on no sound foundation, or that if that is not so, then there are in this case means of distinguishing it from *Mandevile's case*, owing mainly to the use of the words "*for ever*."

Now, as to *Mandevile's case*, I am not aware of any authority for saying that it is not law. It is true that Mr. Butler, in his note to *Fearne*, p. 83, says, it is an anomalous case; but, he adds, that the law is settled, though the principles on which it is settled, are not easily discoverable. And this is precisely the sort of case in which the importance of adhering to what has been decided is far greater than that of having a rule abstractedly the best or most consonant with other principles. It is impossible to say how often, in advising on titles, conveyancers may have acted on the authority of this ancient case, stated without doubt as good law by Lord Coke, commented on by Mr. Fearne, apparently with approbation, and never, so far as I know, seriously questioned. The rule, moreover, which it enunciates is one certainly very convenient, even if on strict legal reasoning it may be to some extent anomalous.

The main stress of the argument, however, did not rest on the notion that *Mandevile's case* was to be questioned, but on there being grounds for distinguishing the present case from it, and that mainly on the authority of *Roe d. Nightingale v. Quartley*. In that case there was a devise "To Hester Read, daughter of Walter Read, and to the heirs of her body for ever, and for default of such issue then to such child or children as the wife of Walter Read is now *enceinte* with, and to the heirs of the body or bodies of such child or children, and for default of such issue to the right heir of Walter Read and Mary his wife for ever." Hester Read entered on the death of the testator. Mary Read was not *enceinte*, and died (without ever having any child) before Walter her husband. Then, Walter Read, her husband, married a second wife, and afterwards died leaving issue the defendant Constantia Quartley his only child by his second wife. Then, Hester died

without issue, leaving the plaintiff Mary Nightingale her cousin and heir-at-law. She was the only child of Walter and Mary. The plaintiff was held entitled to recover the whole as being the heir of Hester.

The Vice Chancellor, in his judgment, in commenting on that case, says, that neither *Mandevile's case* nor the doctrine derived from it, was referred to in it. I do not think it necessary to consider whether he was or was not warranted in that assumption, for I cannot think that your Lordships ought to treat it as having overruled *Mandevile's case*, proceeding as it did on totally different grounds. In truth, in *Roe v. Quartley* both parties proceeded on the common assumption that the ultimate limitation passed the fee. The testator had already given an estate tail to the only existing child of Walter and Mary, and to another child with which he supposed Mary to be *enceinte*, and if the construction acted on in *Mandevile's case* had been adopted, the effect would have been to repeat the two estates tail already given, first to Hester and then to the child with which Mary was supposed to be *enceinte*. It is true that on failure of these two estates tail the devise would, according to the doctrine of *Mandevile's case*, have been effectual to carry the estate to after-born children of Walter and Mary, if there had been any. Both parties, however, treated the devise as clearly being a devise in fee simple, and as if the only question was, whether the fee vested in Hester or in the child by the second marriage. Whether that was a correct view of the case does not seem to me to be necessary to be determined. The decision, if it is not reconcilable with *Mandevile's case*, cannot, in my opinion, be supported.

It was argued that in this case, as in *Roe v. Quartley*, the ultimate limitation is strictly a limitation in fee; the words "for ever" occurring, and those words being sufficient to shew that the previous words ought to be read as a mere *designatio personæ*. This was the view of the case taken by Mr. Justice Willes, and is therefore entitled to great attention. But I am unable to concur in it. The words "for ever" would no doubt be sufficient, if the context required it, to create an estate in fee;

but, considering how very commonly those words are used in connexion with an estate of inheritance, whether in tail or in fee, being in fact merely tautologous, I cannot think they make any real difference. It is not unworthy of remark that in the very case on which we are commenting, of *Roe v. Quartley*, the words "for ever" are used in connexion with an estate tail, the first gift being "to Hester Read and the heirs of her body for ever."

Mr. Justice Willes points out that if we construe the devise according to the rule in *Mandevile's case*, there is an intestacy as to the ultimate fee. No doubt that is so, and that affords an argument in favour of the construction which he adopts, but it is not, in my opinion, sufficient to outweigh those which press in an opposite direction.

All the learned Judges having concurred in this opinion, with the exception of Mr. Justice Willes, I shall move, as I have already stated, that the decree of the Court below be affirmed.

Before I quit the subject, I ought to mention that, in the course of the argument, it was suggested on the part of the respondents that there was a portion of this judgment which ought to be varied. The Vice Chancellor, in giving judgment, directed an account of the rents only from the time when the bill was filed, and not from the preceding year, in which Atherton Watson, the preceding tenant in tail, had died. His Honour did not do that *per incuriam*. He considered the case very fully, and thought that, inasmuch as during that year the rents had been received by a person as trustee claiming under the person who devised them in fee, and as the trustee had handed them over in what would have been the due execution of his trust to the person entitled, a married woman, to her separate use, they could not, therefore, be recovered back. His Honour thought it would not be just to give an account that would affect that trustee, and, therefore, limited the account to the time of the filing of the bill. Whether an account should be directed from the filing of the bill or from an anterior time is always a matter, in a great measure, of discretion; and I am not at all prepared to say that the Vice Chancellor has not come to a

correct conclusion upon that point. Therefore I shall advise your Lordships to pay no attention to that suggestion, and shall simply move that the decree of the Court below be affirmed. I think that this being a case of very considerable doubt, the costs ought to come out of the estate.

LORD WENSLEYDALE.—My Lords, in this case I do not think it necessary to add many observations to those that have fallen from my noble and learned friend. I concur with him in opinion that your Lordships ought to affirm the judgment of the Vice Chancellor.

The question arises entirely on the construction of one clause in the will of Mrs. Phillis Langham, giving the real estate in default of issue previously mentioned. The words of that bequest are, "And for default of all such issue, then upon trust for the right heirs of my grandfather, Sir Thomas Samwell, Baronet, deceased, the father of my late uncle, Sir Thomas Samwell, by Mary his second wife, also deceased, who was the daughter of Sir Gilbert Clarke, Knight, for ever." The question is, whether the right heir of Sir Thomas Samwell, the father, by his wife Mary, who was Colonel Samwell, takes under that description an estate tail or not. And that depends simply on the question whether *Mandevile's case* (which has been sufficiently stated by my noble and learned friend) applies to this case or not. Now *Mandevile's case* must undoubtedly be considered as a binding authority. It has been objected to, and the principles on which it rests have been described as somewhat anomalous. But I do not believe that it has ever been objected to as bad law, although it is stated in the case of the appellants that it was objected to by Lord Coke as bad law in 2 *Leonard*. But on referring to that case it will be seen that what Lord Coke said was merely as an advocate, and not as a Judge, for he was Attorney General at that time. But in all the treatises upon the subject since, *Mandevile's case* has been deemed good law.

Then, the only question is, whether the present case can be distinguished from *Mandevile's case*. I confess that, during the course of this inquiry, I have felt that,

if this had been a discussion of this question for the first time, and I had been called upon first to decide on the meaning of this clause in the will, I should have entertained some doubt whether it was not to be distinguished from *Mandevile's case*, by two circumstances, the one, that it is a devise "for ever," which imports in fee; and, secondly, that if you construe this to be an estate tail, there will be an intestacy as to the remainders over, which is a circumstance that you ought to avoid in construing wills. My noble and learned friend has mentioned that Mr. Justice Willes, in the opinion which he gave, pointed out that circumstance, but I think he is mistaken there, for I do not think that any of the Judges who have given their opinions upon this case have pointed out that to construe this to be an estate tail would create an intestacy. But the creating an intestacy is only an argument against that construction, nothing more. However, I cannot say that my notions on that subject have amounted to much more than a doubt in the course of this inquiry, and I hold that you ought not to reverse a careful and elaborate decision of the Court below unless you are satisfied that it is wrong. A mere doubt in your own mind as to the propriety of the construction ought not to entitle you to reverse the judgment. And when I consider that that judgment has been recognized as being perfectly sound by four Judges out of the five who have given their opinion, I certainly cannot consider that my doubts ought to weigh. In fact, I may say they are removed. I cannot distinguish this case from *Mandevile's case*. I think the words "for ever" may not improperly be applied to an estate tail, though with respect to an estate tail they are not perfectly correct. The circumstance of this construction having the effect of creating an intestacy does not appear to me sufficient to weigh against the authority of *Mandevile's case*. With the decision of the Court below, and the opinion of four learned Judges in support of that decision, I cannot do otherwise than advise your Lordships to affirm this judgment.

I quite agree that, inasmuch as the testator himself has created the difficulty by not expressing the limitation with sufficient

clearness, his estate ought to pay the costs.

Mr. Glasse.—Before your Lordships affirm the judgment, will you allow me to say one word as to costs? I understand your Lordships to say that the costs ought to come out of the estate. There is no estate, and directing them to come out of the estate would in fact be to direct the respondents to pay the costs of the present appeal, and I apprehend that is not what your Lordships mean.

Sir Richard Bethell.—There is an estate in question.

LORD CRANWORTH.—The respondents have the estate, I suppose.

Mr. Glasse.—No, my Lord, there is a receiver appointed of the estate, and in the Court below no costs were given up to the hearing.

Sir R. Bethell.—There are 6,000*l.* in court now.

LORD CRANWORTH.—The receiver is a receiver for some of the parties interested.

Mr. Glasse.—It is not an administration suit.

Sir R. Bethell.—It is a very unusual thing to have an argument upon a judgment of the House of Lords.

LORD CRANWORTH.—I was in error in what I said about costs. I thought it was an administration suit.

Mr. Glasse.—It is a simple ejectment bill.

Sir R. Bethell.—It is a bill brought to put a construction upon this will. It relates to real estate. A receiver was appointed in the cause, and rents have accumulated to the amount of 6,000*l.*, now in court. There is, therefore, an ample fund to be dealt with, which is the subject of controversy in the suit.

LORD WENSLEYDALE.—If we could properly make an order for the costs to come out of the estate, I should wish to do it; but if we cannot do it there is an end of it.

LORD CRANWORTH.—I know of no precedent for it. I erroneously considered this as being an administration suit. I think the better way will be simply to say, no costs.

Sir R. Bethell.—It is an administration

suit, being a suit to put a construction on the will.

LORD CRANWORTH.—It is a suit to put a construction on the will, and to get possession.

Mr. Anderson.—The legal estate being outstanding.

LORD CRANWORTH.—The better way will be to say nothing about the costs. It is not that the Court has taken possession of the testator's estate, and that now it is administering it. It only happens accidentally that there is a fund in court, because, in consequence of the lapse of time, rents have accumulated.

Decree and order affirmed.

M.R.

Nov. 10;

Dec. 3.

COOPER v. HOOD.

Specific Performance—What constitutes Agreement—Proposal to sell or buy a Share in a Business.

An offer by letter to sell or buy a business cannot be carried into effect unless from the whole letter taken together an inference can be drawn from which the material terms of the contract can be ascertained. In the absence of that, it amounts but to an offer to treat, as nothing can be supplied by conjecture.

What may be considered as fair inferences in such cases.

The bill in this suit was filed, by Samuel Thomas Cooper and John Arthur Cooper, against Henry Hood, praying for a declaration that two letters, dated the 18th and the 28th of May 1857, constituted a valid agreement for the purchase, by the defendant, of their shares in the Leeds Ironworks, and for its specific performance. There was also an alternative prayer for the dissolution of the partnership.

S. Cooper, the father of the plaintiffs, J. Field and H. Hood, carried on the business of iron-manufacturers in Hunslet, near Leeds, under articles of partnership, dated the 7th of March 1839, which provided that the partnership should continue for twenty-one years from the date of the deed, if they all lived so long.

After that, provision was made for its determination. It was also made determinable on the death of any one of the partners.

J. Field died on the 7th of April 1840; and on the 22nd of December 1848, H. Hood purchased his share of the business from his personal representatives; but this share was not assigned to H. Hood until after the death of S. Cooper.

S. Cooper died on the 10th of July 1849. By his will, dated the 5th of March 1842, he directed his business of an ironmaster to be carried on by his trustees during the minority of his sons, the plaintiffs, and upon their attaining twenty-one he gave his share of the business to them equally.

The trustees named in the will disclaimed, and on the 16th of January 1851 letters of administration were granted to Mary Cooper, the testator's widow, until one of her sons should attain twenty-one.

S. T. Cooper, the testator's son, was engaged in the business as an apprentice, from the age of sixteen, and he attained twenty-one on the 23rd of June 1852, and on the 30th of May 1853 he took out letters of administration to his father.

J. A. Cooper, the other son, attained twenty-one on the 28th of July 1855.

By an order made on the 1st of December 1853, on the petition of Mary Cooper and others, she and S. T. Cooper were appointed trustees of his father's will, and at her death, on the 16th of December 1855, S. T. Cooper became the sole trustee.

Towards the end of 1856 H. Hood indirectly mentioned that he might not be unwilling to dispose of his shares in the business and retire altogether, at the same time intimating that he considered his share of the goodwill worth a large sum beyond the price at which they stood in the partnership stock books. The plaintiffs were not unwilling to make an arrangement, but after some interviews, nothing was done beyond making out some rough accounts.

While things were in this position S. T. Cooper received the following letter:—

"Leeds Ironworks, Monday, 18th May, 1857.

"Dear Sam,—Ridehalgh (the plaintiffs' solicitor) is not at home, so, of course, I

have done nothing. I have a letter from J. Taylor, which is about double what could be agreed to (1). In looking over the papers, I find that in all probability my accounts on the 30th of June will be about 140,000*l.*, to this add for goodwill, &c. 55,000*l.* to 60,000*l.* This is, indeed, a large sum, and apparently could at once be rendered upwards of 80,000*l.* without reference to Arthur's share of stock or securities. It is therefore quite clear that under any circumstances a large portion of my money must remain at the works, for it is vain to expect any eligible person possessing this fortune to embark in business, or yet to have it at command. The more I look at this matter, the more I am convinced of the fairness of my views, for it is obvious that for some years I must run the risk of the prosperity of the Leeds Ironworks before my share of the capital (60,000*l.*) can be repaid, and then, after this, the goodwill, &c. The value of this goodwill, and, indeed, the purchase altogether, is rendered more favourable to the purchaser by the loan of capital on such favourable terms as the security of the property itself, and further that the whole bonus or goodwill will in all probability be made and clear itself in less time than will be fixed for its payment. Were I younger, and in your circumstances, I should not for one moment hesitate to purchase in these works on similar terms; and though my wish is, if my way be clear, to retire from the concern, I do so from no fear of its want of continuance, but simply that I have no need of personal attention to business. I am also of opinion that no manufacturing or commercial establishment can prosper, trading with an insufficient capital, and I should on no account give my consent to any alteration in this respect while my property is at stake in the works. I have, therefore, carefully looked into the matter, and believe that 80,000*l.* to 90,000*l.* is requisite as a paid capital, without the liability of any partner's power to withdraw till the end of the partnership term. Now, I have no doubt

(1) Mr. Taylor had been a confidential clerk in the business for about seventeen years, and this referred to some intimation made to him that he would be permitted to have a share in the business.

you will believe me when I say that I should not advise you to do what I would not do myself under similar circumstances, and, moreover, I should be very sorry to carry out an arrangement with any person with whom you could not work well and be in peace and unity during the partnership. These remarks contain my opinion, and will, I think, lead you to a train of reasoning which will, I hope, enable you to make a good and sound conclusion and enable an arrangement speedily to be concluded. As to the fairness of my views, I entertain no doubt, and to shew you this, I will make the additional offer of purchasing your family's one-third, or your own one-sixth, as can be arranged, on exactly the terms I propose to sell to you. You must understand that I make this as a positive offer, either to sell or to purchase, as you may elect. The only other observation that I shall make is to assure you that if I purchase your share, I do so only with the view of taking other steps for the immediate sale of the entire property; a matter I feel certain I shall have no difficulty in accomplishing, and without in the slightest disparaging your judgment as a man of business or your conduct as a gentleman, for believe me, since you first came under my hands on leaving school, I have ever felt you would do both yourself and the business credit.—Believe me, dear Sam, yours sincerely,

“Henry Hood.”

A meeting of the parties was afterwards held at the office of Mr. Ridehalgh. The offer contained in the letter was discussed, and an answer promised one way or the other, which was afterwards sent as follows:—

“Leeds Ironworks, 28th May, 1857.

“My dear Sir,—Since receiving your letter of the 18th instant, I have carefully considered the matter of purchasing your share in the Leeds Ironworks on the terms you ask, and have also taken the advice of friends and my solicitor on the subject. Though sorry as I shall be to leave them after having spent so much of my time here, I cannot but come to this conclusion, that it will be better to dispose of my sixth share and also the interest of my brother to you on precisely the same terms as you propose to sell to me. And

I have communicated with my brother, who fully concurs with me in accepting your offer for our one-third share in the Leeds Ironworks. According to the statements we made and the calculations we went into, on which terms your letter of the 18th instant is based, our account will be on the 30th of June next say about 75,000*l.*; to this add bonus on goodwill from 27,500*l.* to 30,000*l.* These are my views on the subject, and the conclusion I have arrived at after mature consideration. I cannot conclude without thanking you for your handsome letter and for the kind way in which you speak of my having conducted myself here both as a man of business and as a gentleman.—I am, &c.

“Sam. T. Cooper.”

No answer was sent to this letter until the 6th of June 1857, when the defendant in a long letter complained of their accepting his offer, and said “that he never had the slightest intention of purchasing from them.”

Some further correspondence resulted from the refusal to abide by the offer, but finally this suit was instituted.

Mr. R. Palmer and Mr. Wickens, for the plaintiffs.—The acceptance of the defendant's offer to buy was a good contract; he represented the property as too good to be lost, and clearly intended to induce a belief in the plaintiffs that he was willing either to buy or sell. The Court therefore would carry the agreement into effect.

The Solicitor General and Mr. Rasch, for H. Hood.—The terms were far too indefinite to be enforced by the Court. One great temptation to buy was the benefits held out to the purchaser, but none of them had been settled. The whole, therefore, was nothing more than a proposal to treat. The letter did not amount to a concluded agreement.—

Kennedy v. Lee, 3 Mer. 441.

Honeyman v. Marryat, 21 Beav. 14.

Brace v. Wehnert, 27 Law J. Rep. (N.S.)
Chanc. 572.

Price v. Griffith, 1 De Gex, M. & G.
80; s. c. 21 Law J. Rep. (N.S.)
Chanc. 78.

Mr. R. Palmer, in reply.—*Extrinsic*

evidence might be introduced to admit the papers and accounts referred to by the parties. The Statute of Frauds was not at all in the way. Between partners, any uncertainty which might arise from the use of general words or symbols could be explained, if not by the documents, certainly by the way they were understood in the trade. The mere contemplation of having assistance to prepare a proper agreement could not be allowed to invalidate the contract. The Court could also determine whether in such a case the money was to remain on the security of the property; it could also determine the time it ought so to remain: the agreement therefore ought to be enforced.—

Ridgway v. Wharton, 6 H.L. Cas. 238; s. c. 3 De Gex, M. & G. 677; 27 Law J. Rep. (N.S.) Chanc. 46.

Goble v. Beechy, 3 Sim. 24; s. c. 2 Russ. & M. 624; 9 Law J. Rep. Chanc. 200.

Kell v. Charmer, 23 Beav. 195.

Fowle v. Freeman, 9 Ves. 351.

THE MASTER OF THE ROLLS.—The sole question is, whether the terms of the contract are so clear and so free from ambiguity as to enable them to be carried into effect by this Court. If I made a decree for specific performance, the usual terms of the decree after making the declaration (for there is no question about the title) would be to refer the matter to chambers to settle the conveyance in case the parties differ. When I came to settle the conveyance to the defendant of the interest of the plaintiffs in these works, I should have no other guide than the letter of the 18th of May 1857. The two sixths are to be bought on exactly the same terms as the defendant proposes to sell, that is, *mutatis mutandis*, and altering the figures and sums in the proportion of one-third to two-thirds, or in other words, one-half: with this guide and no other, I go through the terms of this letter, and consider how far it is clear and to what extent I could ascertain the means of carrying it into effect. If by a fair inference from the whole letter taken together, I can do this, I can make a decree for specific performance of the contract; but I am not at liberty to supply by conjecture anything not to be found in the

letter or to be derived by fair inference from it.

The first uncertainty suggested was with reference to the word "papers," but nothing turns upon it, because the papers are not incorporated into the agreement, and I cannot refer to them for the purpose of making it clear; but the next uncertainty suggested is, the use of the symbol "&c.," but I do not feel the force of this. The words are "goodwill, &c." These words are connected together, and they mean to unite such other things as are necessarily connected with and belong to the goodwill, many of which are easily pointed out; for instance, the use of trade-marks, and a covenant by the vendor not to carry on a similar business in Great Britain for a reasonable time, to be limited in the conveyance, having regard to the nature of such undertakings. All these would be included in the words "*et cætera*," and would be involved in the conveyance. With respect to that, I should not have much difficulty in carrying it into effect.

The next observation is, that some portion of the purchase-money is to be left in the business, and for some years. This is a much more serious objection. What portion of the purchase-money is meant by "a large portion"—the words used in the letter? How is it to be paid? By what instalments, and after what time, and how is the unpaid portion to be secured? I look in vain for anything in this letter to guide me. It is clear that the purchase-money is not to be paid down, for the passage which I have read and the passage which follows it expressly state "that a large portion must remain at the works," and that "the vendor must run the risk of the prosperity of the works before his share of the capital can be repaid." The next passage may perhaps be fairly interpreted to mean that the purchase-money was to be held on the security of the property, but is the personal security of the purchaser to be added? This is left in doubt; and, still more, the time to be fixed for the payment of the purchase-money is expressly left to be afterwards fixed, for it says, "In less time than will be fixed for its payment." How could I fix this time? The time when the payment

of the purchase-money is to be required is a matter of very great moment, and this may materially affect the eligibility of the purchase, or, indeed, the possibility of effecting it. Another difficulty, assuming as may fairly be done in favour of the plaintiffs, is, that interest is to be paid on the unpaid purchase-money until it is paid: at what rate is the Court to fix the interest to be paid? Is it to be at the legal rate of 5*l.* per cent. per annum, or at 4*l.* per cent., which is the sum usually given by Courts of equity in those cases where no beneficial employment or fraudulent retention of the money has occurred? I do not see how it is possible to get over this difficulty. I assume I can get over the first difficulty—as to the price of the goodwill—by fixing it at such a sum between 55,000*l.* and 60,000*l.* as, having regard to the business and the profits made in it and the sale of similar undertakings, would be considered fair: that would be one-half, when only one-third is bought instead of two-thirds. I assume, also, that I can give a meaning to the “&c.” which follows the word “goodwill.” But how can I, without making a contract for the parties, specify what portion of the purchase-money is to remain unpaid, for what length of time, on what security, at what rate interest is to be paid, in what manner, and by whom it is to be enforced? But this is not the only difficulty. What meaning can the Court give to the words “loan of capital” in this sentence? “The value of the goodwill and, indeed, the purchase altogether, is rendered more favourable to the purchaser by the loan of capital on such favourable terms as the security of the property itself.” Does it mean that the portion of the purchase-money which is to be allowed to remain in the business “is the loan of capital,” and is this to be governed by the sentence in a subsequent part of the letter, where the writer says “that 80,000*l.* or 90,000*l.* is requisite as a paid capital,” in order to obviate the damages pointed out in the previous sentence consequent upon trading with insufficient capital? What construction do the plaintiffs put on this, and what is it that they contend for? Is it that the money is to be paid down, or is it to be paid by instalments

for a considerable number of years, and in the mean time secured on the property? As I understand the plaintiffs' argument, they contend that the whole of the purchase-money is to be paid at once; but I cannot assent to such a proposition. Suppose the plaintiffs had written to the defendant, in accepting his proposal, and had stated to him that they understood the terms of his letter to mean what they now contend for, would not the defendant have been at liberty to say that such was not the meaning of his letter, that he considered all those matters were left to be settled hereafter, and that he had not agreed to bind himself to anything definite on this point. The more I consider the more impossible I find it to arrive at any definite conclusion, and, on the whole, I think the fair meaning to be given to the letter is to regard it as a proposal to buy or sell on terms to be arranged, for which the observations and the statements in the letter are to form the basis, and are to guide the parties in their consideration of the exact terms; and in this I am confirmed by the following sentence:—“These remarks contain my opinion, and will, I think, lead you to a train of reasoning which will enable you to make a good and sound conclusion, and enable an arrangement speedily to be concluded.”

I cannot, therefore, treat this as a serious offer to buy on fixed and definite terms to be found in this letter. It amounts only to treaty, and does not go beyond. I am, therefore, unable specifically to perform the contract as prayed by the bill. The bill must, consequently, be dismissed, so far as it prays a specific performance of the contract; but a decree must be made in the fullest possible manner on the other branch of the alternative, for dissolving the partnership and taking the accounts of the partnership property; and it may probably be desirable to follow the terms of the decree made in *Cook v. Collingridge* (1). There must, also, be an order for a receiver, which the parties may prosecute or not as they please, and either party must be at liberty to propose himself. I shall give no costs.

(1) *Jac.* 607.

M.R. }
Nov. 20. } *In re FAULDING'S TRUSTS.*

Legacy—Vesting—"Then living."

Where a sum directed by the testatrix to be set apart for an annuity was bequeathed, on the death of the annuitant, to such of the testatrix's nephews and nieces as should be "then" living, and the child and children of such of them as should be "then" dead, it was held, that the children of a nephew who was dead at the date of the will were entitled to participate, and that their interests vested at the death of the testatrix.

Elizabeth Faulding, by her will, dated the 22nd of December 1825, gave her real and personal estate to trustees, upon trust to convert the same into money, and to set apart a sufficient sum to pay to each of her brothers, Henry and Anthony Shaw, an annuity or yearly sum of 40*l.* during their respective natural lives, and after the decease of her brother Henry to pay an annuity or yearly sum of 40*l.* to his widow Isabella during her life as aforesaid; and upon trust to pay and divide the remainder of such monies, together with all her other monies, unto her niece, Elizabeth Chapman, and such of her, the testatrix's, nephews and nieces as should be then living, and the child and children of such of them as should be then dead, in equal shares and proportions, as tenants in common, and not as joint tenants, such child or children to be entitled only to the part, share and proportion of his or their parent or respective parents, and to be paid to him, her or them (if more than one), in equal shares and proportions, as and when he, she or they should severally attain twenty-one, with interest for the same in the mean time, towards his, her or their education and support. And after the decease of her brothers and the wife of her brother Henry respectively, the testatrix gave the principal money thereinbefore directed to be placed out at interest as aforesaid, for answering the respective annuities of 40*l.* a-piece per annum, unto and equally to be divided amongst her said niece Elizabeth Chapman and such of her nephews and nieces as should be then living, and the child and children of such of them as should be then dead, such child and chil-

dren to be entitled only to the part, share and proportion of his, her or their parent or respective parents, and to be paid to him, her or them (if more than one), in equal shares and proportions as and when he, she or they should attain his, her or their age or respective ages of twenty-one years, with interest in the mean time.

The testatrix died on the 30th of January 1826. She had three nephews, Thomas, William and Henry Shaw, and one niece, Elizabeth Chapman. The nephew Henry Shaw died in 1820, in the lifetime of the testatrix, leaving six children, who attained twenty-one, and were still living. The nephew Thomas died in 1831, intestate, leaving one son only, a sailor, who was wrecked on a voyage to the Baltic, and had not been heard of for twenty-eight years, and was believed to be dead intestate.

The brother Henry Shaw, the annuitant, died on the 18th of October 1826; his wife Isabella died in his lifetime. The brother Anthony Shaw, the annuitant, died on the 26th of February 1840. Elizabeth Chapman died on the 17th of December 1850, intestate, leaving three children, who were still living and had attained twenty-one.

The estate of the testatrix was now represented by 5,271*l.* 4*s.* 9*d.* consols. The trustees received the income, and out of it paid the annuities so long as they were continuing; the remainder of the income they distributed among the parties entitled.

The nephew William Shaw, and some of the children of the nephew Henry Shaw, now by petition prayed that the shares of the parties might be ascertained and distributed according to their several interests.

Two questions were raised: first, whether the children of Henry Shaw took any and what interest under the will of the testatrix; and, secondly, at what period the trust funds vested under the will.

Mr. Jessel, for the petitioners.—The children of Henry Shaw took no interest under the will; the testatrix was aware of his decease; and the word "then" could only refer to the future. The funds, however, were vested interests at the death

of the testatrix, except as to the funds set apart to answer the annuities which vested on the death of the respective annuitants.—

Ive v. King, 16 Beav. 46; s. c. 21 Law J. Rep. (N.S.) Chanc. 560, 563.

Butter v. Ommaney, 4 Russ. 70; s. c. 6 Law J. Rep. Chanc. 54.

Gray v. Garman, 2 Hare, 268; s. c. 12 Law J. Rep. (N.S.) Chanc. 259.

Mr. Horsey, for Mr. Gouldham, the administrator of Thomas Shaw.—The whole of the fund created by the testatrix out of her real and personal estate, vested on her decease in the parties entitled.

Mr. Keene, for William Henry Pauling, who had purchased the interests of the children of Elizabeth Chapman, cited—

Tytherleigh v. Harbin, 6 Sim. 329; s. c. 5 Law J. Rep. (N.S.) Chanc. 15.

Mr. G. V. Yool, for the children of Henry Shaw, claimed a right to participate in the estate of the testatrix.

THE MASTER OF THE ROLLS.—The expressions in many of the cases are difficult of reconciliation. I incline, however, to the principles laid down in *Ive v. King*; they were drawn on the one hand from *Peck v. Callow* (1), *Waugh v. Waugh* (2), and *Christopherson v. Naylor* (3), and on the other from *Miller v. Warren* (4), *Darrel v. Molesworth* (5), *Haughton v. Harrison* (6), *Mackinnon v. Peach* (7) and *Le Jeune v. Le Jeune* (8). In *Butter v. Ommaney* the testator gave the residue of his estate, real and personal, after the death of his wife and his brother Joseph, to be equally divided between the children of

his brother Joseph and his sister Betty Pratt, who should be then living, in equal shares and proportions, and as to such of them as should be then dead, leaving a child or children, such child or children were to stand in the place of the parent; it was there held, that the children of the brother and sister living at the testator's death were entitled absolutely, and that the children of children who died in the testator's lifetime were not entitled to participate. But in the present case, the gift is to "my niece Elizabeth Chapman, and such of my nephews and nieces as shall be then living, and the child and children of such of them as shall be then dead." The children of deceased nephews and nieces are, consequently, put precisely in the same situation as the nephews and nieces then living. It is not a gift to nephews and nieces followed by a substitutionary gift to children in the event of any dying, but the children of deceased nephews and nieces are put with nephews and nieces living, as objects of the original gift, but their interest is limited by the proviso that they are to take only their parent's share. The testatrix, therefore, intended the children of all her nephews and nieces to take; they, consequently, became entitled to the residuary estate on the decease of the testatrix, and to the fund set apart on the decease of the respective annuitants.

M.R. }
Nov. 20; } *In re CAREW'S ESTATE ACT.*
Dec. 3. }

Vendor and Purchaser—Sale by Auction
—*Agreement by Purchasers not to bid against each other.*

A piece of land was advertised for sale. Two adjoining landowners were desirous of purchasing it; they agreed that one alone should attend the sale and purchase, if it should be sold for a sum not exceeding a sum named. If the land was purchased, terms were arranged, and it was to be divided between them. Upon a summons, by the vendors, to set aside the sale,—Held, that the agreement between the purchasers was not contrary to equity; that it did not

(1) 9 Sim. 372; s. c. 7 Law J. Rep. (N.S.) Chanc. 273.

(2) 2 Myl. & K. 41; s. c. 6 Law J. Rep. (N.S.) Chanc. 176, n.

(3) 1 Mer. 320.

(4) 2 Vern. 207.

(5) Ibid. 378.

(6) 2 Atk. 329.

(7) 2 Keen, 555; s. c. 7 Law J. Rep. (N.S.) Chanc. 211.

(8) 2 Ibid. 701.

situate the contract; and that the application could not be supported.

The Carew Estate Act, 1857, 20 & 21 Vict. c. vi. was passed to vest certain estates, the subject of a suit of *Carew v. Waugh*, in trustees upon trusts for sale.

By an order made in this matter, the Court directed certain parts of the Norbury estate, situate in the parishes of Croydon and Streatham, to be sold by auction by the trustees and mortgagees.

The land was divided into lots and valued; particulars of sale were then prepared, and the reserved price of lot 2 was fixed at 600*l*. Lot 2 adjoined the lands belonging to Henry William Peek and Daniel Watney; each knew that the other was desirous of purchasing it. The sale was fixed for the 19th of June 1858. On the morning of that day Messrs. Peek and Watney entered into an agreement that H. W. Peek should, by his agent, attend the sale and become the purchaser of the freehold land comprised in lot 2, provided that such lot could be purchased for a sum not exceeding 1,500*l*., irrespective of the timber, which was to be taken at a valuation, and that if the lot should be purchased under that agreement, Daniel Watney should take the portion of the land therein referred to, and pay a proportionate part of the entire amount of the purchase-money and valuation for the whole land, which was to be settled by valuers to be appointed by the parties; and, if possible, H. W. Peek was to obtain a conveyance direct from the vendors to D. Watney of his portion of the lot.

H. W. Peek, accordingly, became the purchaser of lot 2, which was knocked down to him at a sum of 650*l*. This was certified by the chief clerk, and the Court confirmed the order absolute. The timber was afterwards valued at 126*l*.; and on the 1st of July 1858 H. W. Peek paid into court the entire purchase-money, which amounted to 776*l*.

The purchaser's solicitor afterwards sent to the vendors' solicitor, for perusal, the draft of a conveyance, and on the 30th of July 1858, it was returned approved. The engrossment was then sent to the vendors' solicitor for execution.

On the 11th of August, before the engrossment was executed, D. Watney's solicitor sent to the vendors' solicitor a copy of the agreement between Messrs. Peek and Watney, accompanied by a letter, stating that the parties had not been able to agree upon the division of the lot and the purchase-money, and giving the vendors notice not to execute or make any conveyance to H. W. Peek of that portion of the lot which was to be conveyed to D. Watney, but to make the conveyance of that portion direct to D. Watney, he, at the same time, offering to pay his proportion of the purchase-money and valuation.

This was followed by a correspondence between the solicitors, and nothing was concluded.

On the 2nd of November 1858 a summons was taken out by the vendors, requiring H. W. Peek to shew cause, before the chief clerk, why the sale made to him should not be set aside. The question was adjourned into court.

Mr. Southgate, for the vendors.—If a party, by any inducement, causes another to stay away from a sale, that is a fraud upon the vendors; the benefit obtained at a sale is the competition, and any agreement with another not to bid at the sale is a fraud; the sale, therefore, ought to be set aside, or the biddings between them opened. There was not a single bidding after the reserved price was passed, and yet the parties were willing to have given a much larger sum for this lot.

The Countess Gower v. Earl Gower, 2 Eden, 348.

Scott v. Nesbit, 3 Bro. C.C. 475.

Watson v. Birch, 2 Ves. jun. 51; s. c. 4 Bro. C.C. 172.

Sugden's Vend. and Pur. 93, 13th ed.

[The MASTER OF THE ROLLS.—The purchaser could not have known the reserved price.]

Mr. Southgate.—It was not known to them; but after it has been passed, the practice of the auctioneers now is to say, "this lot will now be sold."

Mr. J. T. Wood, for H. W. Peek.—The purchase has been confirmed; no ground exists for opening the biddings; a

mere belief that there would have been higher biddings, is no ground to ask the Court to set aside a sale. The agreement was no fraud; it was neither collusion nor conspiracy. The parties to the agreement were not bound to inform the vendors that they intended to make a joint purchase; the fault was in the vendors not fixing a higher reserved bidding, and in not having a person sufficiently skilled in auctions to make use of it.

[The MASTER OF THE ROLLS.—The Court is strict with the vendor; it will not allow puffing.]

Mr. Wood.—A vendor may say he will not sell his estate under a given sum; that sum was passed by *bond fide* biddings, and the vendors had no right to complain.

Mr. Dickinson, for D. Watney, claimed an equitable interest in the purchase made by H. W. Peek, and adopted all that had been said in favour of the sale and the agreement made between them.

Mr. Southgate, in reply.—The vendors had a right to the competition of an open market. Any agreement which caused the withdrawal of a single bidder was a fraud upon them and upon the Court.

Dec. 3.—The MASTER OF THE ROLLS.—There is no authority, neither is there any principle which shews that the agreement between the purchasers was contrary to equity. It is the sum which the parties between themselves agreed to bid for the lot that has induced the vendors to raise this question; had they merely agreed to bid to the amount of 700*l.*, this application would not have been made. The amount, however, which they might have been willing to give cannot affect the question. The validity of the purchase must depend upon whether it was equitable for them to enter into such an agreement; it does not depend on the price which was to have been bid. It is on the ground of fraud alone that the sale can be opened. This is not an application to open the biddings in consequence of a higher offer having been made, no such advance upon the bidding having been made; and if there had been, the application would have been too late, as the conveyance has been prepared, approved and

engrossed, and everything has been completed, except the execution of the deed. If, however, there had been fraud, the execution of the conveyance would not have deprived the parties of their right to open the sale at any time upon the discovery of the fraud. However, I scarcely think I should have entertained the application had it not been for the passage in *Sugden's Vendors and Purchasers*, which was referred to, and which, though it is not binding upon the Court, is, from its elaborate compilation, always considered worthy of attention. It says, "Fraud will, of course, be a sufficient ground for opening the biddings; therefore, if the parties agree not to bid against each other, . . . the Court would open the biddings, although the report had been absolutely confirmed." I desired, therefore, to consider the point, and, accordingly, I have referred to *Watson v. Birch*, but it does not appear to bear upon this case, or even to approach it. I am, consequently, unable to find any ground to support this application, and I cannot set aside the sale on account of the agreement between the parties to purchase. It is evident, however, that the parties conducting the sale employed a surveyor who was not aware of the real value of the land; had they known what they have since learnt, they would have fixed a reserve price, which would have made it immaterial what agreement parties desiring to purchase made between themselves.

KINDERSLEY, V.C. } SMITH v. WATTS.
Dec. 15.

Vendor and Purchaser—Particulars and Conditions of Sale.

*Upon a sale by auction, the property sold was described as a leasehold ground-rent of 50*l.* per annum, amply secured on certain houses producing a rental of 250*l.* let on a lease for the whole term at 82*l.*, held under two leases direct from the original lessor for an unexpired term of twenty-six years, at ground-rents amounting to 32*l.* The purchaser objected to complete, because the ground-rent was not amply secured, and the*

nature of it was not sufficiently set out:—Held, that as the facts stated in the particulars were sufficiently explicit to lead to inquiry, and as, by the conditions, inspection of the documents was offered previous to the sale, the purchaser could not plead ignorance of what he might have made himself acquainted with, and the purchase must be enforced.

The facts of this case were as follows:—By an indenture of lease, dated the 26th of December 1834, certain houses, numbered 4, 5, 6, 7, 8 and 9, in White Lion Street, Chelsea, were demised by the Earl of Cadogan to James Clapperton (the testator in the cause), his executors, administrators and assigns, for fifty years, from December 25, 1834, at the yearly rent of 18*l.*, and subject to the covenants therein contained. By another indenture, of the same date, and made between the same parties, certain other houses, numbered 3 and 4, in Turk's Row, Chelsea, were demised by the Earl of Cadogan to James Clapperton, his executors, administrators and assigns, for the term of fifty years, from the 25th of December 1834, at the yearly rent of 14*l.* By an indenture purporting to be an under-lease, dated the 1st of December 1841, James Clapperton demised the premises comprised in the two indentures of lease respectively of the 26th of December 1834, to A. Burstall, his executors, administrators and assigns, for forty-eight years, wanting ten days, from the 25th of December 1841, at the yearly rent of 82*l.*, and subject to the covenants therein contained. James Clapperton, by his will, dated the 16th of January 1856, after certain specific bequests, gave all the residue of his estate to his wife, Lydia, and to the defendants, W. J. Clapperton and J. Watts, upon certain trusts therein mentioned, and appointed his wife and the defendants his executors. The testator died on the 17th of January 1856, and his will was duly proved by the defendants.

An administration summons was subsequently taken out in chambers; and by an order dated the 3rd of March 1858, the whole of the testator's estate was directed to be sold, and it was accordingly put up to auction in two lots, when a Mr. Davis became the purchaser of both lots, at 960*l.*

and 500*l.* respectively. The purchase had been completed as regarded lot 1. The purchaser objected to complete the purchase of lot 2, on the grounds afterwards stated.

The particulars of sale described the property in lots 1 and 2, in the following manner:—"A leasehold ground-rent of 50*l.* per annum, amply secured on six dwelling-houses, Nos. 4, 5, 6, 7, 8 and 9, White Lion Street, Chelsea; two dwelling-houses, Nos. 3 and 4, Turk's Row and Crown Court, producing a rack rental of 250*l.* per annum, let to Mr. Burstall, on a lease dated the 1st of December 1841, for the whole term at 82*l.* per annum. Held under two leases, dated the 26th of December 1854, direct from the Earl of Cadogan, for a term of which twenty-six years will be unexpired at Christmas, 1858, at ground-rents amounting together to 32*l.* per annum—nett improved ground-rent for twenty-six years, 50*l.* per annum."

The sixth condition was as follows:—"If any error or mis-statement shall appear to have been made in the above particulars, such error or mis-statement is not to annul the sale nor entitle the purchaser to be discharged from his purchase, but a compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation is to be settled by the Judge at chambers."

Seventh:—"Each purchaser is, under an order for that purpose, to be obtained by him, or, in case of his neglect, by the vendor, at the cost of the purchaser, upon application at the chambers of the said Judge, to pay the amount of his purchase-money into the Bank of England, with the privity of the Accountant-General of this court, to the credit of this cause, on or before the 12th day of November 1858, and if the same is not so paid then the purchaser is to pay interest on his purchase-money at the rate of 5*l.* per cent. per annum from that day to the day on which the same is actually paid. Upon payment of the purchase-money in manner aforesaid, the purchaser is to be entitled to possession, or to the rents and profits as from the 11th day of November 1858, down to which time all outgoings are to be paid by the vendor."

Eighth:—“The abstract of the vendor's title will consist as to the other tenements comprised in the said particulars, of the two leases dated 26th of December 1834, also mentioned in the said particulars, being respectively leases from the said Earl to the said James Clapperton aforesaid, subject as to Nos. 4, 5, 6, 7, 8 and 9, to a prior lease for sixty-one years from the 25th of December 1784, and as to Nos. 3 and 4, to a like prior lease, and the before-mentioned indenture, dated 1st December 1841, also mentioned in the said particulars, being or purporting to be a lease from the said James Clapperton to Abraham Burstall. The purchaser shall assume that the lessor in the said leases of the 26th December 1834 was well entitled to grant the same, and not make any objection or requisition in respect of the title of such lessor, or in respect of the said therein-mentioned prior leases, which shall be assumed to have determined, or any other prior lease or leases, or by reason of the term purported to be granted by the said indenture of the 1st December 1841, being in excess of the terms granted by the said leases from the said Earl of the tenements comprised in that indenture, or by reason of any variance between the covenants and conditions of the said last-mentioned leases or the said underlease, and the covenants and conditions of the lease or leases from the said Earl, inasmuch as the said leases from the said Earl, and counterpart of the said underlease, and of the said indenture of the 1st December 1841, or copies thereof respectively, may be inspected for ten days immediately preceding the day of sale by intending purchasers at the office of Messrs. Crosley & Burn, solicitors. The purchaser shall be deemed to buy with full notice of and subject to the contents and effects of those respective instruments, whether he shall make such inspection or not, and notwithstanding any error or omission in the statement thereof, in the said particulars or in these conditions. The purchaser shall also be deemed to buy with full notice of the state and circumstances of the property as regards repairs, dilapidations, fire insurance, and all other matters. The production of the receipts for the rents which last accrued due under the said

leases from the said Earl or other satisfactory evidence of the payments thereof shall be accepted as conclusive evidence that all the covenants and conditions of such leases respectively have been fulfilled, or all breaches, if any, of such covenants and conditions, or any of them, whether appearing by the abstract or otherwise, have been effectually waived down to the time of completion of the purchase, and that such leases are then valid and unimpeachable. The purchaser shall accept all recitals, statements and allegations in any abstracted deed or other document, as sufficient evidence of the instruments, facts, matters or things recited, stated or alleged, and all instruments, facts, matters and things found, proved, admitted, certified or proceeded upon in the above-mentioned cause shall be deemed thereby conclusively evidenced. If consistently with these conditions, the purchaser may require and shall require an abstract or the production or inspection, or any covenant for production of any deed, will or other document not in the possession of the vendor, or any office, attested or other copy or extract of or from any deed, will or other document whether in the vendor's possession or not, and whether required for the purpose of verifying the abstract or of accompanying the title or otherwise, or an affidavit, statutory declaration or other evidence whatsoever, not in the vendor's possession, as to identity of parcels or any other matter, or any evidence or information as to the said cause or the parties thereto, or the constitution thereof, other than such abstract as aforesaid, the expense of complying, or of endeavouring to comply, with any or every such requisition shall be borne by the purchaser, who shall not require from any assigning or assuring party any further or other covenant than a covenant that such party has not encumbered, nor require for any purpose the concurrence of any person in respect of any equitable or beneficial interest under the said will. The purchaser shall, by the assignment to him, enter into a proper covenant for indemnifying the vendor and the estate of the testator against all liabilities under the said lease from the said Earl, and the said underlease and the said indenture of the 1st of December 1841, and shall, if required

by the vendor, execute and deliver to him a duplicate or counterpart, to be prepared by or at the expense of the vendor, of such assignment. All expenses of or incident to the examination or comparison of the abstract, with the abstracted deeds or documents, or other verification of such abstract, including journeys, shall be borne by the purchaser. If the purchaser shall require any deed or other instrument appearing not to have been duly registered in the Middlesex Registry to be so registered, the expense of satisfying such requisition shall be borne by him."

The purchaser objected to complete the purchase of this lot, on the ground that the vendors had only a right to an annual payment, secured by the personal covenant of Burstall, contained in the lease of the 1st of December 1841, and that the term granted by that lease, being longer than the term granted to Clapperton, it operated as an assignment of the whole term, and that there was no power to distrain for the rent; that the only remedy the vendors had was an action on the covenant, and that consequently there was a mis-statement in the particulars, when the property was described as a ground-rent amply secured, for it was not amply secured. A summons had been taken out against the purchaser, requiring payment of his purchase-money, and that summons was now adjourned into court for argument upon the above question.

Mr. Glasse appeared for the vendors; and

Mr. Baily and *Mr. Martineau*, for the purchaser.

The following authorities were cited:—

The King v. Wilson, 5 Man. & Ry. 140, 156.

Langford v. Selmes, 3 Kay & J. 220.

Beaumont v. the Marquis of Salisbury, 19 Beav. 198; s. c. 24 Law J. Rep. (n.s.) Chanc. 94.

Rhodes v. Ibbetson, 4 De Gex, M. & G. 787; s. c. 23 Law J. Rep. (n.s.) Chanc. 459.

Dykes v. Blake, 4 Bing. N.C. 463; s. c. 7 Law J. Rep. (n.s.) C.P. 282.

Seaton v. Mapp, 2 Coll. 556.

Drysdale v. Mace, 2 Sm. & G. 225; s. c. 23 Law J. Rep. (n.s.) Chanc. 518.
Symons v. James, 1 You. & C. C.C. 487.

KINDERSLEY, V.C.—If the question were merely this, that Lord Cadogan having granted certain leases at a specified rent, the property had been afterwards let at a higher rent, for a term which exceeded the first term in duration,—if that were the only question, and under such circumstances there were no right to distrain, there would then be a considerable legal doubt, and I should certainly not consider myself entitled to force the title upon the plaintiff; but the case does not rest on that point. The question I have to consider is, whether the particulars of sale were sufficiently clear to distinctly point out to any man of ordinary intelligence what the facts were, and whether the eighth condition of sale did not contain a fair stipulation that no objection should be raised on that state of facts. The question then is, whether that is the effect of these particulars and of these conditions of sale. Now the conditions commence in these terms:—"A leasehold ground-rent of 50*l.* per annum, amply secured on certain houses." So far there is nothing disclosed, and if it stopped there, I think the purchaser might say, I must have a ground-rent amply secured on these houses, and it is certainly doubtful whether it is properly secured; but then the particulars of sale go on to point out what is the nature of the ground-rent. They describe in distinct terms the premises, that is to say, these houses, that they are the subject of two leases, dated the 26th of December 1834, direct from the Earl of Cadogan, of which twenty-six years were then unexpired. It was expressly stated, that the ground-rent was amply secured; that the rent reserved to Lord Cadogan was 32*l.* per annum, and that the rent payable by Mr. Burstall was 50*l.*, the whole amount being 82*l.*: so there is a distinct representation that Lord Cadogan had let the premises for 32*l.*, and the persons claiming under him had underlet for 82*l.*; so that 50*l.* would be the difference between the two sums. So far there is a clear enunciation, to any man of ordinary intelligence, of what the 50*l.* per annum

consisted of, and he would understand that the term granted by the sub-lessee was equal to the whole term which Lord Cadogan had granted. He would understand that, if he tried to do so, but still he might not know what would be the legal consequences of it; in fact, that question might be argued for a whole day, and there are so many authorities, that it would be extremely difficult to come to any decision; but still he must know, if a man of ordinary intelligence, what were the facts. Now, in stating the leases, they are said to have been granted in 1854; in point of fact, they were granted in 1834 instead of 1854, which is a mere mistake, but it is perfectly immaterial, because, at all events, there was to be twenty-six years unexpired; but the mistake was corrected afterwards, so that it might be evidently seen to be a mere misprint. Then, it is said there are words in this description, which import that the ground-rent is amply secured on these houses, and that in fact it is not amply secured upon them. The other side would argue that it is an ample security. Now, what is the meaning of saying amply secured, and then describing how it is secured? Why that, although the vendor considers it to be amply secured, he may be wrong in his legal conclusion, and the Court might decide that the intermediate tenant had no right of re-entry. I should say on these deeds, that it would be decided that he had a right of re-entry, but I do not assume that it would be so; still it is no misdescription, because the mode in which it is said to be amply secured is pointed out, leaving the parties to judge for themselves. It amounts to this, that the vendor, stating all the circumstances, says it is an ample security. It is contended that the eighth condition of sale has a tendency to catch or mislead the purchaser; but it appears to me this condition is a very fair one. It is fairly and properly worded, and having been prepared by Mr. Hayes, the conveyancer, that would of itself be sufficient to shew that at least nothing unfair was intended. I cannot say I entertain any doubt about the meaning of it myself, and I do not think that any man of understanding would entertain a doubt about the facts of the case, though he might do so as to the law,

and then he would know that he might have inspection of the lease and sub-lease, and could therefore form his own judgment, or consult with others. If a man comes here and says, I was careless, and did not sufficiently examine these conditions, and I gave myself no trouble to understand them, the Court certainly will not assist him. I must assume that a person going to a sale goes properly prepared to bid, and if an offer is made him to inspect documents, it is his duty to do so. Being of opinion, then, that there is nothing catching or unfair in the conditions, the question is, what is the effect of them? Now we find that the purchaser is to assume that the lessor, in the lease of 1834, was well entitled to grant the same, and he is not to make any objection in respect of the title of the lessor. The purchaser was to assume that the prior lease had determined, whatever the legal consequence may be. But that, however, is not the point we have to consider. The condition goes on in these words:—"Or by reason of the term purported to be granted by the said indenture of the 1st of December 1841, being in excess of the terms granted by the said leases from the said Lord Cadogan of the tenements comprised in that indenture, or by reason of any variance between the covenants and conditions of the said last-mentioned leases." Added to this, that there was to be no objection by reason of the term exceeding the original lease, inasmuch as the lease might be inspected by intending purchasers, and that the purchase should be admitted to be with full knowledge of these instruments. If this condition is not to be binding on a purchaser no condition could be. The honest meaning of a condition is, that the vendor shall not put up for sale a better title than he has. Conditions of sale of this nature are perfectly fair and honest. Here a man is told that he must be bound by these facts, whatever may be the consequences. There is clearly a representation of the case, and the way in which the ground-rent is secured. I think, therefore, I ought to hold that the purchaser has precluded himself from coming to the court to rescind the contract.

STUART, V.C. } FOWLER AND OTHERS v. THE
 Nov. 4, 5. } SCOTTISH EQUITABLE LIFE
 } INSURANCE SOCIETY AND
 } RITCHIE.

Insurance on Lives—Policy—Alleged Mistake in Indorsement—Liability of Company.

*R. & K. entered into negotiations with C, the London agent of a Scottish insurance company, for the purpose of effecting a policy on the life of H, a merchant; and it was verbally agreed between R. & K. and C. that the policy should be granted authorizing the assured, under certain conditions, to make voyages in the way of business to the ports of Morocco and other ports in the Mediterranean, and on the coasts of Africa and Asia. A written proposal, in the handwriting of one of the partners R. & K, was communicated by C. to the company, in the following terms, differing by mistake, as R. & K. alleged, from the agreement they had previously made with C:—"Mr. H. to be at liberty to visit, on business, Tangiers, or any other port within the Mediterranean, without subjecting himself to any extra premium, or having to apply for a licence; but it is understood that he is not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go to the interior of Asia and Africa. The above memorandum to be indorsed on the policy." A policy was accordingly granted, whereby 2,000*l.* was assured to be paid to R. & K. after the death of H, with a proviso that in case the said H. should depart beyond the limits of Europe the policy should be void. A memorandum was indorsed on the policy to the effect that, notwithstanding the restriction contained in it, H. should enjoy such liberty as mentioned in the above-written proposal. H, in the course of his business, visited Casa Blanca, a small port on the Atlantic coast of Morocco, south of Tangiers, and died there before he had resided three months. The Court, on a bill being filed for that purpose by R. & K, refused to rectify the policy, as against the company, so as to express the true agreement between R. & K. and C, but declared the policy to be not binding on either the plaintiffs or the company; and ordered the premiums which the plaintiffs had paid to be refunded, as having*

been paid by mistake, and the policy to be delivered up to the defendants.

The case made by the bill in this suit was as follows. Thomas Haire, before and at the time of making the proposal and agreement for an insurance on his life, as after mentioned, was a merchant residing at Gibraltar, and, in the course of his business, was in the habit of making voyages to and visiting the ports of the Empire of Morocco and other ports in the Mediterranean and on the coasts of Africa and of Asia. The plaintiffs, Reis & Koenig, carried on business as merchants in the city of London, and they agreed to open an account with, and to give credit to T. Haire for a sum amounting to 2,000*l.*, and, as he resided abroad and had no property in this country whereon any monies due to the plaintiffs could be secured, it was also agreed that they should, for the purpose of securing to themselves payment and satisfaction of any monies which should become due from him to them, effect a policy of insurance on his life. The negotiation with the defendants, the society, for the grant of a policy on the life of Haire by them to the plaintiffs, was conducted, on behalf of the plaintiffs, by the plaintiff Koenig, and, on behalf of the defendants, the society, by Capt. William Cook, who was at that time their London agent. The bill alleged that in the course of the negotiations the plaintiff Koenig and the said Thomas Haire gave notice and informed Capt. Cook of the above facts and circumstances, and that they in terms stipulated with him that the policy proposed to be so granted on the life of the said Thomas Haire, whatever might be the language thereof, should not be vitiated by reason of Thomas Haire visiting the ports out of Europe aforesaid, and also the Havannah, which he was desirous of doing for the purpose of extending his business connexion; and Capt. Cook expressed his wish that the ports of Alexandria and the Havannah should be excluded from any licence to be granted in any such policy, but, inasmuch as the said Thomas Haire had previously contemplated and agreed to visit both such last-mentioned ports and places, the plain-

tiff Koenig insisted on such places not being excepted out of any such licence as aforesaid; but eventually, and before the making of the said policy of insurance, it was agreed verbally between the last-named plaintiff and Capt. Cook that a policy on the life of Thomas Haire for 2,000*l.* should be granted by the defendants, the society, to the plaintiffs Reis & Koenig, authorizing T. Haire to make voyages in the way of his business to all or any of the ports first above mentioned in and out of Europe (not including Alexandria and the Havannah); but providing that Thomas Haire should not reside more than three months at any one time at any such port, and that he should not go into the interior of Asia or Africa; the plaintiffs, at the request of Capt. Cook as such agent, agreeing to pay the defendants, the society, the customary extra premium in case Thomas Haire should proceed to the Havannah. Upon the faith of this alleged agreement, and before any policy was made out, the plaintiffs, Reis & Koenig, paid to the defendants, the society, the sum of 60*l.* 10*s.*, as one year's premium for the insurance. The policy of insurance which was actually effected was dated the 5th of January 1852. It certified that the plaintiffs, Reis & Koenig, had been duly admitted members of the society, and that they, their executors, administrators or assigns, should be entitled to receive out of the stock and funds of the society, at the end of six months after the decease of Thomas Haire, the sum of 2,000*l.*, &c., on the condition that they duly paid the yearly contribution of 60*l.* 10*s.* It further provided that, in case Thomas Haire should depart beyond the limits of Europe, or should enter into or be employed in any military service, except within Great Britain or Ireland, or in any naval service whatsoever, then the certificate should be void, and all claim to any benefit out of, or interest in, the funds of the said society in virtue of such certificate should cease and determine, and all monies that might have been paid in consequence thereof should belong to the society, excepting always in so far as relief was provided or might be lawfully granted by the directors of the society, agreeable to the laws and regulations thereof. The policy was

signed by three directors of the company, and by Robert Christie, the manager at Edinburgh, the principal place of business of the society, and on it was indorsed the following memorandum: — "Edinburgh, January 5, 1852. — Notwithstanding the restrictions contained in the within policy, Mr. Haire will be at liberty, without licence or extra premium, to visit Tangiers, or any other port within the Mediterranean; but it is understood that he is not to reside out of Europe, at any place in the Mediterranean, beyond the period of three months, or to go into the interior of Asia and Africa." The plaintiffs accepted the policy without reading the same, and regularly paid the several annual premiums of 60*l.* 10*s.* thereon, up to the decease of Thomas Haire, and one premium after his decease, believing the policy to be, upon the full confidence and assurance of Capt. Cook, in all respects in accordance with the understanding and arrangement come to and concluded with him.

The bill alleged that the indorsement on the policy did not represent the actual agreement made between the plaintiffs and the society, but that such indorsement was by mistake limited to Tangiers and ports in the Mediterranean, instead of extending to any ports on the coasts of Africa or Asia.

By an assignment, dated the 9th of February 1856, the plaintiffs Reis & Koenig assigned the policy of insurance, and the whole benefit thereof to the plaintiff William Cave Fowler. Thomas Haire, in the course and for the purposes of his business, visited Casa Blanca (otherwise Dor el Beida), a small port on the Atlantic coast of Morocco, about 160 miles south of Tangiers, and he died there on the 7th of January 1856, within three months of his arrival. The plaintiffs Reis & Koenig, at the request and for the benefit of the first-mentioned plaintiff, W. C. Fowler, brought an action in the Court of Exchequer against the defendants, the society, to recover the sum of 2,000*l.* and interest thereon from the 7th of July 1856; and also the one year's premium which had been paid since Thomas Haire's death in ignorance of his decease. The defendants paid the amount of the premium into court, but insisted, as a defence to the residue of the action, that

the policy had become void by reason of the visit of Thomas Haire to the port of Casa Blanca. The plaintiffs submitted that the actual indorsement on the policy was obviously incorrect, for it implied that Tangiers was a port in the Mediterranean, which it was not.

The bill prayed that the mistake made in the said indorsement might be rectified according to the real agreement made between the parties, and that the society might be decreed to pay to the plaintiff W. C. Fowler the sum of 2,000*l.*, together with interest thereon from the 7th of July 1856, at the rate of 5*l.* per cent. per annum, and that the defendants might be decreed to pay the costs of the suit.

The answer of the society set out a letter dated the 2nd of January 1852, addressed to the Edinburgh manager by Capt. Cook, in which the writer asked that a special board might be called to consider whether a policy could be granted to Messrs. Reis & Koenig on the terms specified in the said written proposal. This letter, as the answer alleged, accompanied the proposal, and stated, that Mr. Haire was born and lived at Gibraltar, and that he had resided there all his life, except when travelling in Europe, Africa and America. Messrs. Reis & Co. signed the printed declaration, to the effect that the above particulars were correct, &c., and agreed that "the foregoing proposal, together with what was therein contained and the present declaration, should be the basis of the contract between them and the society;" and they thereby declared their accession to the articles of agreement and constitution of the society, and to all the alterations thereof, and to the by-laws and regulations of the society. There was also the following attached to the proposal:—"Memorandum—If this proposal is accepted, it must be on the condition annexed to the proposal. I should think that an occasional visit to the various ports in the Mediterranean would rather be conducive to health than otherwise, and should be an additional reason to accept the proposal, if not positively at variance with the established rules of the society. As Mr. Haire leaves England on the 7th inst., I must beg that a special board be called, and that the result may be communicated to me immediately, so as

to enable the parties to effect the insurance elsewhere.—W.C." The condition so annexed, which was drawn up by the plaintiff Koenig himself, was as follows:—"Mr. Haire to be at liberty to visit on business Tangiers or any other port within the Mediterranean, without subjecting himself to any extra premium or having to apply for a licence; but it is understood that he is not to reside out of Europe, at any place in the Mediterranean, beyond the period of three months, or to go into the interior of Asia and Africa. The above memorandum to be indorsed on the policy.—London, Dec. 31, 1851.—Lewis Reis & Co." These proposals were accepted by the society. The society further said, that save as by their answer appeared, they knew nothing whatever of the alleged negotiations between the last-mentioned plaintiffs and Capt. Cook, and they insisted that the indorsement was strictly correct, and that it did not by any means necessarily imply that Tangiers was a port in the Mediterranean. They further insisted that the policy had become forfeited by reason of Thomas Haire having died at Dor el Beida, and thereby committed a breach of the terms and conditions upon which the policy was granted.

The plaintiff Koenig, by his affidavit, deposed to a conversation with Captain Cook, in which it was specially stipulated that the policy should not be vitiated by Thomas Haire making voyages to and visiting the ports of the empire of Morocco, such as Mogadore and Mazagan (which places were specially named in the conversation), and also other ports of the Mediterranean, and on the coasts of Africa and of Asia. He also said, that if it had not been thoroughly understood by him, on behalf of the firm, that Thomas Haire should be allowed to proceed to any of the ports and places in the Mediterranean, and the coasts of Asia and Africa, including the ports of Morocco on the Atlantic coast, that he might think proper, the firm would not have insured Thomas Haire's life; and that he could not have conducted his business without visiting those ports.

Robert Christie in his cross-examination said that, in case any proposal had been made to which a condition was attached for licence to visit any port on the coasts

of Africa, the directors would not, generally speaking, in his opinion, have entertained it on any terms. He further said he was not aware of any practice of insurance offices in London as to the payment of the sums insured, when the lives insured had proceeded beyond the prescribed limits without the cognizance of the holders of the policies. The reason why the policy in this case was refused to be paid was, because the insured went to a place far beyond the limits prescribed, and died there. There was no other reason that he knew of.

Cook died before the institution of the suit, the plaintiffs in which were the said W. C. Fowler, Lewis Reis and Gustavus Koenig; and the defendants, the Scottish Equitable Life Insurance Society, and Ritchie, who had succeeded Cook as the principal agent of the society in London.

Mr. Bacon and *Mr. Jessel*, for the plaintiffs, submitted that Cook, as general agent of the society in London, had power to grant a policy such as that alleged to have been intended, and that there being here clear parol evidence of mistake in the terms of the policy granted, the Court would rectify such mistake. They cited—

Motteux v. the London Assurance Company, 1 Atk. 545.

Henkle v. the Royal Exchange Assurance Office, 1 Ves. 317.

Countess of Shelburne v. Earl of Inchiquin, 1 Bro. C.C. 338.

Taylor v. Radd, cited in 5 Ves. 595.

Higginson v. Kelly, 1 Ball & B. 252.

Ex parte Verner, Ibid. 260.

Ball v. Storie, 1 Sim. & S. 210; s. c. 1 Law J. Rep. Chanc. 214.

Alexander v. Crosbie, Ll. & G. temp. Sugd. 145.

Mr. Malins and *Mr. J. T. Humphry* appeared for the defendants, but were not called upon.

STUART, V.C.—I cannot see that the plaintiffs have established their case. What they are required to prove is, that the defendants, the society, are bound by the terms of the agreement made by their agent, and that the plaintiffs are entitled

to have the instrument which was executed by the defendants in their favour, and which they say does not correspond with the agreement made with the agent, rectified so as to make it correspond with that agreement. The great argument on behalf of the plaintiffs is, that Cook, the agent of the defendants, the society, in London, had power absolutely to bind those defendants as their general agents. The course of dealing and the evidence in the cause shew that, whatever the general authority of Cook may have been as agent, what actually took place was this, that the agreement which the plaintiff Koenig intended to make was to have its force and legal effect from an instrument to be executed in Edinburgh. The case of the defendants, the society, is, that Cook was their agent to negotiate the terms of policies in London as their manager: but that Cook could of his own authority issue a policy in London is contradicted by the evidence in the cause, and cannot be established. The course of business was this: Cook, as manager in London, could negotiate the terms of a policy with any person desirous of effecting one with the society, but the policy itself was an instrument to be made in Edinburgh, which was the head-quarters of the society. The plaintiffs say, that there was no necessity, after a complete agreement with Cook, for the granting of any policy at all; that the society would have been bound by the agreement of Cook, and were bound just as completely as if the policy under the seal of the society had been given to the plaintiffs. That the plaintiffs might have had a remedy against Cook is perfectly plain, but the transaction, as it appears in evidence, and in evidence under the plaintiff Koenig's own hand, is this—there being a stipulation or proposal for a policy upon the life of the gentleman in question, it was agreed between Cook as agent for the company and the plaintiff Koenig, that there should be a waiver of some of the ordinary conditions of a policy, and that that waiver should consist in a licence generally to go to ports in Africa, either within the Mediterranean or outside the Mediterranean. That agreement was made in plain and distinct terms. But the proposal, under the plaintiff Koenig's own

handwriting, was by mistake made in different terms. I think, to that extent there is evidence to shew that there was a mistake in what was written by the hand of that plaintiff himself, for in that the proposal was limited to the ports of the Mediterranean and Tangiers. Now that was a mistake to which unfortunately the plaintiff Koenig himself was a party, by being the person who, in fact, committed it himself. I do not say, however, that that would deprive the plaintiffs of the benefit of the doctrine of the Court, with respect to having an agreement rectified, if they could prove it so as to bind the other parties; but here it is an integral part of the case, that the policy could not be received until the sanction of the society in Edinburgh was obtained. It seems to me, therefore, an irresistible conclusion that, if the directors and manager in Edinburgh, seeing the terms communicated to them by the agent in London, had chosen to say, "We will not agree to the terms; we object to this special waiver of the conditions; and we decline to grant the policy"; they would have had a perfect right to withhold the policy, and not to complete that which was a peculiar and extraordinary contract proposed to their agent in London, agreed to by their agent in London, and communicated by him to them: a contract that must be consummated as an agreement, by receiving the sanction of the Edinburgh body. The rest of the history of the case is very plain. The agent in London communicated this proposal in the erroneous terms given in the handwriting of the plaintiff Koenig himself. To that proposal, which was not the real agreement, the Edinburgh directors assented, and what is sought to be reformed is the memorandum, which was signed by the Edinburgh agent, and adopted by the board as that which constituted the agreement. That Edinburgh manager is now sought to be made to sign, under the decree of the Court, as having agreed to it, a certain stipulation of which he never heard. It seems quite enough to say, that an agreement means that both contracting parties are of one mind. Here Mr. Christie, one of the contracting parties to the instrument which is now sought to be reformed, confessedly never heard of

that which is said to be the real agreement. The result, upon the whole, is plain, that the agent in London agreed to something which he never communicated to his principals. The agent in London communicated that which was a mistaken proposal. The plaintiff Koenig, who made the agreement with the London agent, never intended to be bound by the stipulation which he himself framed in a mistaken form. The result is, that there is no agreement at all. That being so, the plaintiffs seem entirely to have mistaken their remedy; for in this case, there being no agreement, I think the plaintiffs altogether, both the assignee of the policy and the makers of the policy, who join as plaintiffs, have been paying premiums, with the intention of acquiring a right which was never given, or agreed to be given, by those who are now sought to be bound. Cook, who is said to have been the agent, and who is said to have been the person with whom the agreement was made, is no party to the suit. The remedy is sought against the principals, on the footing of Cook having been the general agent of the defendants, the society, and who might therefore bind them. In fact, the person sought to be bound is Mr. Christie, and the agreement sought to be rectified is that which was made by Mr. Christie as the manager in Edinburgh. The plaintiffs have entirely failed in that; but I think that they have shewn a case in which all the premiums paid must be repaid, as the mistake was occasioned by the mistake of the agent of the society in London. It is impossible to say that the suit was unnecessary, as without it the plaintiffs would not have got back the premiums. The plaintiffs have failed in obtaining the full relief they claim; but I think they are entitled to have the premiums returned, and to have it declared that they were paid under a mistake.

The following were the minutes of the order made:—"It appearing to the Court that the memorandum upon the policy of insurance in the bill mentioned is framed under a mistake, and is not in accordance with the terms agreed upon between the plaintiff Koenig and Cook, in the pleadings named, as the agent of the defendants, and that the real terms of the said agreement were not communicated to nor adopted by

the defendants, declare, that the said policy is not binding upon the plaintiffs or the defendants, and order that the defendants do, within a month of the service upon them of the decree, pay to the plaintiffs the amount of the premiums paid to the insurance office, and order that thereupon the plaintiffs do deliver the policy to the defendants. No costs on either side."

L.C.
Dec. 3, 4, 14, } SCOTT v. THE CORPORATION OF LIVERPOOL.
15, 20.

Building Contract—Account—Arbitration Clause—Jurisdiction of ordinary Tribunals, how far excluded.

The plaintiffs contracted with the corporation of L. to perform certain works, and the corporation agreed to pay for them in a specified manner, with a proviso that no sum should be considered due, nor should the plaintiffs make any claim on account of any work executed by them, unless the engineer of the corporation should certify the amount thereof, and that the plaintiffs were reasonably entitled thereto. The corporation also had the power of determining the contract if the plaintiffs should not in the opinion and according to the determination of the engineer exercise due diligence; and thereupon the engineer was to fix the amount earned by the plaintiffs. There was a general clause for referring all disputes and differences to the final arbitration of the engineer. The contract was determined by the corporation, and the plaintiffs filed a bill for an account; but it was held (affirming the decision of one of the Vice Chancellors) that, the certificate of the engineer not having been given, and not being shewn to have been fraudulently withheld, the bill must be dismissed, with costs.

Where parties to an agreement provide for the settlement of disputes arising out of the contract by the arbitration of persons mentioned in the agreement, or to be determined when the disputes arise, this does not oust the ordinary tribunals of jurisdiction in such disputes. But where a contract provides for the determination of the contractor's claims and liabilities by the judgment of a particular person, everything depends on

his decision, and until he has spoken no right arises which can be enforced either at law or in equity.

This was an appeal, by the surviving plaintiff, from the decision of Stuart, V.C., reported 27 *Law J. Rep.* (N.S.) Chanc. 641.

The facts and arguments will sufficiently appear from the Lord Chancellor's judgment.

Mr. Malins and *Mr. Karlake* appeared for the appellant.

Mr. Dewsnap, for the executors of the deceased plaintiff.

Upon the conclusion of the argument for the plaintiff, and at the suggestion of

Mr. R. R. A. Hawkins, who appeared for *Mr. Hawksley* the engineer, the bill was dismissed as against *Mr. Hawksley*, with costs, no case having been opened against him.

The Solicitor General, Mr. Bacon and *Mr. Rowcliffe* appeared for the corporation.

Mr. Karlake was heard in reply.

The following cases were cited:—

M'Intosh v. the Great Western Railway Company, 2 De Gex & Sm. 758; s. c. 18 *Law J. Rep.* (N.S.) Chanc. 94; on appeal, 2 Mac. & G. 74; 19 *Law J. Rep.* (N.S.) Chanc. 374; 3 Sm. & G. 146; 24 *Law J. Rep.* (N.S.) Chanc. 469.

Ranger v. the Great Western Railway Company, 5 H.L. Cas. 72.

Thompson v. Charnock, 8 Term Rep. 139.

Hotham v. the East India Company, 1 Ibid. 638.

Milnes v. Gery, 14 Ves. 400.

Blackburn v. Smith, 2 Exch. Rep. 783; s. c. 18 *Law J. Rep.* (N.S.) Exch. 187.

Grafton v. the Eastern Counties Railway Company, 8 Exch. Rep. 699.

Milner v. Field, 5 Ibid. 827; s. c. 20 *Law J. Rep.* (N.S.) Exch. 68.

Scott v. Avery, 5 H.L. Cas. 811; s. c. 25 *Law J. Rep.* (N.S.) Exch. 308.

Philipps v. Berry, 1 Ld. Raym. 5.

The Taff Vale Railway Company v. Nixon, 1 H.L. Cas. 111.

Livingston v. Ralli, 5 E. & B. 132 ;
s. c. 24 Law J. Rep. (n.s.) Q.B.
269.

*Waring v. the Manchester, Sheffield
and Lincolnshire Railway Company*,
7 Hare, 482 ; s. c. 18 Law J. Rep.
(n.s.) Chanc. 450.

*The North-Eastern Railway Company
v. Martin*, 2 Phill. 758.

Kemp v. Rose, 4 Jur. N.S. 919.

Dimsdale v. Robertson, 2 Jo. & L. 58.

Brown v. Overbury, 11 Exch. Rep.
715 ; s. c. 25 Law J. Rep. (n.s.)
Exch. 169.

Ambrose v. the Dunmow Union, 9 Beav.
509.

Kirk v. the Bromley Union, 2 Phill.
640 ; s. c. 17 Law J. Rep. (n.s.)
Chanc. 127.

Glascott v. Laing, Ibid. 310 ; s. c. 16
Law J. Rep. (n.s.) Chanc. 429.

Phillips v. Phillips, 9 Hare, 471 ;
s. c. 22 Law J. Rep. (n.s.) Chanc.
141.

Dec. 20.—The LORD CHANCELLOR.—
This is an appeal from a decree of Stuart,
V.C., dismissing the plaintiffs' bill with
costs. The bill was filed for the purpose
of obtaining an account of works done by
the plaintiffs for the corporation of Liver-
pool and of monies due in respect thereof,
under an agreement, dated the 6th of
November 1851. The corporation having
acquired, under the authority of acts of
parliament, powers enabling them to sup-
ply the borough of Liverpool and its
neighbourhood with water, and being de-
sirous of constructing new and additional
waterworks, caused to be printed and circu-
lated a specification to be observed by the
contractor for constructing certain reser-
voirs and other works, &c. The specifi-
cation included three proposed contracts,
for one only of which the plaintiffs ten-
dered, and which comprised the formation
of the "Rivington Reservoir." This
contract the plaintiffs undertook to per-
form, for the sum of 56,268*l.* 8*s.* 8*d.*, and
their tender having been accepted, the
agreement of the 6th of November 1851
was entered into, by which the plaintiffs
contracted with the corporation to con-
struct, complete and deliver up the works
comprised in the contract, for the price

aforesaid, and to observe and perform all
things mentioned in the specification, and
on their part to be observed and performed.
There were annexed to the specification
certain general conditions, to some of
which it will be necessary particularly to
refer, for upon the proper construction of
them the case entirely depends. The fol-
lowing are the clauses:—"It shall be
lawful for the said corporation, in case the
said contractor shall fail in the due per-
formance of any part of his undertaking,
or shall not in the opinion and according
to the determination of the said engineer
exercise such due diligence and make such
due progress as would enable the works
to be efficiently completed at the time and
in the manner aforesaid, to determine the
contract, by a notice in writing, under the
hand of the town clerk, and to enter upon
and take possession of the said works, and
of the plant, tools and materials of the said
contractor, and use or sell the same as the
absolute property of the corporation. The
plant, tools and materials provided by the
contractor shall in all cases from the time
at which they or any of them may be
brought upon the works and land of the
corporation, and during the construction
and until the completion of the said works,
become and continue the property of the
said corporation, and the contractor is
hereby prohibited from removing the same
or any part thereof during the progress of
the works, without the consent in writing
of the said engineer. * * And when the
contract shall have been so terminated, or
so soon after as the engineer may think
convenient, the said engineer shall fix and
determine what amount, if any, is then
reasonably earned by the contractor in
respect of work actually done, and in re-
spect to the value of any materials, imple-
ments and tools provided by the contractor
and taken by the corporation, and the
amount thereof, after allowing for all sums
then already paid to the contractor on
account, shall remain in the hands of the
corporation, without interest, until twelve
months after the date of the engineer's
certificate of the final completion of the
works as herein provided ; and the said
engineer shall be at liberty to authorize
by his certificate the said corporation to
deduct the damages, losses, costs, charges

and expenses in his opinion incurred by them in consequence of the premises, or to which they may be put or liable, together with the forfeitures, if any, incurred by the said contractor, from any sum of money which would so become due and owing to the said contractor. * * And the said contractor shall be entitled to payment for his work in manner following, that is to say, to a monthly instalment, equal to 80% per cent. of the value of the amount executed in the then preceding month; to a further instalment of 10% per cent. of the value of the amount of work executed when such works are completed and delivered to and accepted by the said corporation in manner aforesaid; and to the balance, whatever the same may be found to amount to, so soon as the responsibility of the said contractor shall cease and determine, and shall have been entirely fulfilled; provided that no sum or sums of money shall be considered to be due and owing, nor shall the said contractor make any claim against or demand upon the said corporation for or on account of any work executed by him, unless the said engineer shall certify the amount thereof, and that the said contractor is reasonably entitled to such instalment or balance respectively, nor unless such certificate shall have been presented to the town clerk of the said borough; nor shall any such sum or sums of money be considered payable to the said contractor until the expiration of seven days after such certificate shall have been so presented, nor shall any omission to pay the amount of such certificate, at the time the same shall be payable, be held or deemed to vitiate or avoid the contract; but in such case the contractor shall be entitled to interest thereon at and after the rate of 10% per cent. per annum for such time as such omission shall continue. And in case of any doubts, disputes or differences arising or happening, touching or concerning the said works, or any of them, or relating to the quantities, qualities, description or manner of work done and executed, or to be done and executed by the said contractor, or to the quantity or quality of the materials to be employed therein, or in respect of any additions, deductions, alterations or variations made in, to or from

the said works, or any part of them, or touching or concerning the meaning or intention of this specification, or of any part thereof, or of the contract entered into by and between the said corporation and the said contractor, or of any plans, drawings, instructions or directions referred to in this specification or the contract, or which may be furnished or given during the progress of the works, or touching or concerning any certificate, order or award which may have been made by the said engineer, or in anywise whatsoever relating to the interest of the said corporation, or of the said contractor in the premises, such doubts, disputes or differences shall from time to time be referred to, and be settled and decided by the said engineer, who shall be competent to enter upon the subject-matter of such doubts, disputes or differences, with or without formal reference or notice to the parties to the said contract, or either of them, and who shall judge, decide, order and determine thereon; and to the said engineer shall also be referred the settlement of the said contract, and the determination of the said sum or sums or balance of money to be paid to or received from the said contractor by the said corporation, and the directions, decisions, admeasurements, valuations, certificates, orders and awards of the said engineer (which said directions, decisions, admeasurements, valuations, certificates, orders and awards respectively may be made from time to time) shall be final and binding upon the corporation and the said contractor respectively, and shall not be set aside, or be attempted to be set aside, by reason or on account of any technical or legal defects therein, or in this specification, or in the contract founded thereon, or on account of any informality, omission, delay or error of proceedings in or about the same or any of them, or in relation thereto, or on any other ground, or for any other reason, or for any pretence, suggestion, charge or insinuation of fraud, collusion or confederacy, or otherwise howsoever."

This contract has been characterized as one of great severity towards the contractors, who are said to be placed by it entirely at the mercy and the arbitrary discretion of the engineer. But arguments drawn from the hard terms of an agreement are never

admissible after it has been entered into, because the parties have deliberately consented to be bound by it. The contractors entered upon the execution of the works; they complained that they did not obtain possession of the land on which the works were to be executed until a long time after the time specified in the contract, and hence that great delay necessarily arose. On the other hand, the engineer of the corporation attributes the slowness of the works to the dilatoriness of the plaintiffs, and the insufficiency of the plant and materials employed by them. It is unnecessary to determine where the fault (if any) lay. Mutual dissatisfaction undoubtedly prevailed, which led the corporation to exercise the power they possessed of determining the contract by a notice from the town clerk, dated the 28th of February 1855. It is admitted, by the plaintiffs, that the corporation were entitled to give this notice, and that it legally determined the contract, and therefore that the rights of the parties involved in this suit must be ascertained and determined upon as they existed at and from this period. It appears that at the time of the determination of the contract, the corporation had paid to the plaintiffs, on account of the works they had done, various sums of money, amounting to 49,942*l.* 8*s.* 4*d.* These payments were made from time to time during the progress of the works, either on certificates or from the reports of the engineer of the amounts that had become payable under the contract. On the determination of the contract, the corporation, in exercise of the powers which they possessed under it, took possession of the works which had been executed by the plaintiffs, and of the plant, tools and materials which they had brought on the works and land; and completed all that the plaintiffs had left unfinished. While the contract was subsisting, the plaintiffs were desirous of substituting for the decision of Mr. Hawksley, as to the amount payable to them, the arbitration of some other indifferent person, to which the corporation declined to accede. On the determination of the contract, the plaintiffs sent to the corporation a statement of the amount which they claimed to be due to them for the works they had executed;

and the corporation disagreeing to the amount, Mr. Hawksley, on the 19th of March 1855, appointed Monday, the 26th of March 1855, to proceed with the reference on such claims, pursuant to the terms of the contract; to which the plaintiffs' solicitors replied, that the corporation having given them notice that they had determined the contract, they apprehended the references under it were at an end also. The notice by Hawksley was given with an intention of proceeding under the general clause of reference; but having been advised that he ought to proceed under the clause which applies to the case of the contract having been determined, he wrote to the plaintiffs to that effect. To this the plaintiffs' solicitors replied that as the corporation had declined to refer the matters to an indifferent party, "our clients, acting under our advice, will immediately file a bill in equity for relief. Under these circumstances, we will decline to attend at your office on the 21st inst. for the purposes mentioned in your notice." The bill was filed on the 22nd of November 1855, the corporation and Hawksley being made the defendants, and the latter being charged with having, "under the direction of the defendants, the corporation, aided and abetted them in withholding from the plaintiffs payment of the monies justly due to them in respect of the said contract, and the defendants have joined in acts which amount to a *fraud* upon the plaintiffs." This is curiously qualified, in a subsequent paragraph of the bill, thus:—"The plaintiffs do not, however, employ the word 'fraud' in its offensive or obnoxious sense, as meaning a fraudulent scheme or intention, deliberately formed or entertained for the purpose of cheating the plaintiffs, but as meaning conduct which would be the instrument of fraud, if it should prevail to prevent the plaintiffs from recovering payment of what is justly due to them." The bill prayed—"That it may be declared that the withholding of the certificates—which the defendant, the engineer, was by the terms of the said specification and contract bound to give to the plaintiffs—of the amount remaining due to them for works executed by them under the said contract, was and is a fraud on the plaintiffs, and that the plaintiffs are entitled to

receive all such sums of money as they would have been entitled to if such certificates had been duly granted."

To this bill Hawksley demurred, upon the ground that he was improperly made a party to the suit. The Vice Chancellor overruled the demurrer, with costs (1), being of opinion that the charges in the bill (assumed to be true for the purpose of the demurrer) constituted clear grounds of equitable relief, not only against the corporation, but also against the engineer, in respect of his imputed misconduct. The cause then came on for hearing; and his Honour, desiring to be informed whether the plaintiffs had any remedy at law under the contract, requested the assistance of one of the Common Law Judges; and the question was argued before his Honour and Erle, J., whether, on the terms of the contract, and the evidence of the course of conduct of the parties in regard to the execution of the works, the case was one in which, if tried at law, the jury would be directed to find a verdict for the plaintiffs. The learned Judge expressed a very clear opinion in the negative, on the ground that every right to payment during the progress of works was conditional on obtaining the engineer's certificate, and after the determination of the contract, upon the engineer's fixing and determining the amount of work done, and valuing the plant and materials; and that unless the plaintiffs could shew that these requisites had been complied with, they would fail in an action at law. The Vice Chancellor subsequently gave his judgment, that the plaintiffs were not entitled to relief in equity, and dismissed their bill, with costs (2).

The plaintiffs contend that this decree is erroneous, and have urged very strongly in argument before me, that if there is no remedy at law, it follows, of necessity, that there must be a remedy in equity; otherwise, as they say, this monstrous consequence will follow, that a party entitled to large sums of money is utterly remediless. This mode of putting the plaintiffs' case is, however, open to the objection that it begins by begging the whole ques-

tion. It may possibly be, that eventually the plaintiffs may be entitled to recover a large amount that they may prove to be due, and yet at the time of the commencement of an action, or the institution of a suit in equity, they may have bound themselves by contract in such a manner that until some preliminary act is done no right of payment accrues. To speak of a person being either legally or equitably entitled under such circumstances, would clearly be incorrect, as the title, which both Courts of law and equity deal with in cases of this description, is not an imperfect, but a complete title. The question is, whether the plaintiffs have shewn that they have a present right to an equitable remedy? In order to determine this question, it will be necessary carefully to consider the mode in which the plaintiffs now shape their case. The idea of founding their claim to relief on fraud is altogether abandoned. All the charges against Mr. Hawksley, whatever their meaning may have been, are withdrawn, and, as to him, the bill has been dismissed, with costs; and as a corporation cannot commit fraud except through the instrumentality of an agent, this part of the case failing as to Mr. Hawksley, must consequently fail as to the corporation. The plaintiffs, therefore, are driven to sustain their bill by insisting that (the contract not binding them to submission to Hawksley's award) the accounts are so complicated, intricate and voluminous, that they cannot be perfectly dealt with or disposed of by any action at law. This is alleged in the bill; but I do not find any satisfactory proof to support the allegation. At the same time I should always be disposed to regard the jurisdiction of Courts of law and equity, with respect to complicated accounts, as so far concurrent, that where the parties have proceeded at law, I should be unwilling to withdraw the case from the Court of law, merely because a Court of equity could more conveniently dispose of it; but I should not think myself at liberty to refuse the aid of this Court, when invoked, because a Court of common law could completely settle the whole of the disputed accounts. As Lord Cottenham said, in *The North-Eastern Railway Company v. Martin*, "It is impossible with precision

(1) 25 Law J. Rep. (N.S.) Chanc. 227.

(2) 27 Ibid. 641.

to lay down rules or establish definitions as to the cases in which it may be proper for this Court to exercise this jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules, and to escape from such definitions. It is, therefore, necessary for this Court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties." And again, in *The Taff Vale Railway Company v. Nixon*, he says, "In questions of this sort, each case must be decided according to the circumstances belonging to it." If it is necessary, in order to maintain a bill for an account, that "it should relate to that which is the subject of mutual acknowledgment," as was held, by Vice Chancellor Turner, in *Phillips v. Phillips*, I have no difficulty in treating the accounts here as mutual, as the price of the work done by the corporation to complete the plaintiffs' unfinished work might be properly treated as so much done for the plaintiffs, and would have to be deducted from the entire sum which the plaintiffs would have been entitled to if they had completed the whole of the work, besides the deductions which the corporation would have to make for "damages, losses, costs, charges, expenses and forfeitures." I do not think, therefore, that the mere fact of the accounts being capable of settlement and adjustment in a court of law, would have prevented the plaintiffs being entitled to an account if there were no other objection their way. But it appears to me that within the contract itself there exists an invincible impediment to the relief which the plaintiffs claim. It has been already seen that by the terms of the contract the plaintiffs are precluded from all remedy at law until the certificate of the engineer has been obtained, or until he has fixed and determined the sum to which the plaintiffs are entitled for the works which they have done, and the value of the plant and materials which were taken to by the corporation. This view of the case at law goes very far towards a similar decision in a court of equity. There is no equitable construction of an agreement distinct from its legal construction. To construe is nothing more than to arrive at the meaning

of the parties to an agreement, and this must be the aim and end of all Courts which are called upon to enforce any rights created by and growing out of contract. The plaintiffs, however, contend that the stipulations in the agreement referring all matters to the decision of Mr. Hawksley, are not sufficient to oust this Court of its jurisdiction, and various authorities have been referred to in support of this argument. It is unnecessary to enter in detail into all the cases on the effect of agreements to refer, or the jurisdiction of Courts of law and equity, because they have been, most of them, passed in review by Lord Cranworth in *Scott v. Avery*, and are shewn merely to establish this proposition, that if I covenant with a man to do particular acts, and it is also covenanted between us that any question which may arise as to the breach of the covenant should be referred to arbitration, the latter covenant does not prevent the covenantor from bringing an action: a right of action has accrued, and it would be against the policy of the law to give effect to such an agreement that such a right should not be enforced through the medium of the ordinary tribunals. This proposition seems to be established by the class of cases at the head of which is *Thompson v. Charnock*. But it is impossible to pass over altogether the case of *Dimsdale v. Robertson*, both on account of the high authority of the eminent Judge by whom it was decided, and because it seems to have been entirely overlooked in the decision of similar cases. There, Lord St. Leonards, after the consideration of the authorities on the subject, arrived at a conclusion apparently at variance with them. In the view which I have taken of this case, it is unnecessary for me to consider the propriety of his decision; but I cannot forbear the remark, in passing, that the circumstance upon which he relied as giving greater effect to the agreement to refer, in *Dimsdale v. Robertson* (namely, the power to make the submission a rule of Court, and the legislative provisions in such a case, giving authority to arbitrators to examine witnesses upon oath) hardly appears sufficient to distinguish the case from the others in which these stipulations were not found; as they are mere directions as to the mode in which the reference is to

be conducted, or for enabling the parties to give greater efficacy to it by attachment for disobedience, and do not operate until after the case has been withdrawn from the action of the tribunals, which, the prior decisions establish, the parties could have no power to affect. If, then, there had been nothing in this contract but the general agreement to refer, "in case of any doubts, disputes or differences arising or appearing," I should have thought, on the general authority of the class of cases which I have mentioned, that supposing the plaintiffs in all other respects entitled to an account, they might have been decreed it, notwithstanding this provision. But I am of opinion that an earlier clause than this meets the circumstances that have arisen, and must decide the rights of the parties in their present position under this contract. I refer to the clause, which provides for the case of the contract being determined. On the construction of this clause, the question arises whether the principle upon which *Scott v. Avery* was decided does not here intervene and render that case a binding authority upon my judgment. That principle is stated by Lord Cranworth in these terms: "If I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen." And I may ask with him, as the question to be answered in this case, Does any right of action exist in this case until the amount of damage has been ascertained in the specified mode? In order to determine this question, we must refer again to the clause in the specification upon which it depends. It is: "And in case of the contract being so determined as aforesaid, the corporation may re-let the undertaking of the contractor, or any part thereof, and when the contract shall have been so terminated, or so soon thereafter as the engineer may think convenient, the said engineer shall fix and determine what amount (if any) is then reasonably earned by the contractor in respect of work actually done, and in respect to the value of any materials, implements and tools

provided by the contractor and taken by the corporation." Now, suppose the contractors had chosen to agree that they would be paid for their work not a specific sum, nor upon measure and value, but such an amount as the company's engineer might fix—can there be a doubt that such a contract, although a very imprudent one, would be binding, and that the contractors would be bound to submit entirely to the discretion, or even to the caprice, of the person whom they had clothed with this arbitrary authority? What is there more in this case? The contractors agree that, in a given event—namely, the determination of the contract by the corporation—the engineer is to fix and determine what amount, if any, is then reasonably earned by the contractors in respect of the work actually done, and in respect of the value of any materials, implements and tools provided by the contractors and taken to by the corporation. The plaintiffs' counsel agreed (though this was with reference to the general clause of the reference to the engineer) that, if he had made an award even *ex parte*, the contractors would have been bound by it. I cannot, however, understand how this should be if the contractors are not tied by their contract to the judgment of the engineer—if they refuse to appear before him, or in any way to recognize his right to determine the matter. But I think they would be bound by the engineer's decision under such circumstances, because they had agreed to submit to it; and, having done so, how is it possible for them to say that they are entitled to be paid for their work and plant, not the amount which the engineer shall fix and determine, but what some other forum may think that they ought to receive? It was stated that this clause leaves the contractors wholly at the mercy of the engineer, who is only to fix and determine the amount which they are to receive when the contract should have been terminated, or as soon thereafter as the engineer may think convenient; and it was argued that he might consult his own supposed convenience and indefinitely postpone his determination. I do not think that the proper construction of these words is, that they relate to the personal convenience of the engineer; but, be that

as it may, if he were to decline to enter upon the question, or by any affected delay, or any improper proceeding of any kind, were to attempt to delay a decision, a Court of equity would know how to deal with such a state of things, though a Court of common law might be powerless to afford any redress.

The plaintiffs' counsel, however, insist that there are authorities not affected by *Scott v. Avery*, which have determined that in cases very similar to the present, parties have been held to be entitled to an account, notwithstanding there were equally stringent clauses in their agreements binding them to refer their disputes to arbitration. It will be necessary, therefore, shortly to examine these cases. That which was principally relied upon was the case of *M'Intosh v. the Great Western Railway Company*. In the earlier stage of that case it has no bearing on the present question. The plaintiff, who was a contractor, agreed to do certain works for the company, and the company agreed to advance money on account of works done and executed, such execution to be certified by Mr. Brunel or the principal engineer for the time being. The bill alleged that Mr. Brunel had refused to certify, and that in doing so he was acting in collusion with the company; and it prayed a declaration by the Court that the withholding such certificates was a fraud, and that he was entitled to recover the amount. To this bill the defendants demurred, and the Vice Chancellor Knight Bruce first, and afterwards Lord Cottenham on appeal, decided that the allegation of collusion was sufficient to sustain the bill; and the demurrer was overruled with costs, just in the same manner as the Vice Chancellor overruled Mr. Hawksley's demurrer in the present case, although on the hearing the charges of fraud could not be established. But the case of *M'Intosh v. the Great Western Railway Company* came on for hearing before Vice Chancellor Stuart, and it is said, that his Honour arrived at a conclusion inconsistent with his decision in this case, having decreed an account. To ascertain whether the two decrees are thus inconsistent, it must be seen whether the contract in that case is in terms like the present. It is not given in the report,

but I have been furnished with a copy by one of the learned counsel in the case, from which it appears that the provisions for determining the claim of the contractor were very different from those in the present agreement, there being a stipulation for a general reference of disputes to arbitrators to be named, in these general terms:—"But if any difference of opinion shall arise between the company or their engineer and the plaintiffs as to any matter of charge or account as between the company and the plaintiff, such dispute shall be referred and finally settled and concluded by the arbitration of the engineer on the part of the company, and an engineer to be appointed by the plaintiff on his part; and in case of their not being able to agree, a third person shall be named in writing as arbitrator by such two engineers before they proceed upon the subject of the reference, and the decision of any such arbitrator so named shall be final and binding on both parties." This clause, in itself, would distinguish the case from *Scott v. Avery*, and would bring it within the class of cases that follow *Thompson v. Charnock*. I, therefore, think his Honour cannot be fairly charged with inconsistency in his decrees in that case and the present. The case of *Ranger v. the Great Western Railway Company* appears to me not to assist the plaintiffs' argument. The contract there made the engineer during the progress of the works the absolute judge of the mode in which the contractor was discharging his duties, and of how much of the contract price had from time to time become payable, and his decision was to be final; but, unlike the present case, after all the works should have been completed, the contractor was to be at liberty to call in a referee of his own as to any question of amount due beyond what had been certified. The contractor was unsuccessful in his suit on every point but one. Upon that one the plaintiffs' counsel have relied, as entitling them at least to an account of the value of the plant, tools and materials taken by the corporation. But it appears to me that the account decreed in that case is no authority for a similar one in the present. There, as here, the company was empowered to take possession of the works, and of the whole or

of such part of the materials, tools and implements used by the contractor as the company's engineer might consider requisite for carrying on the works. The question was, whether, upon their taking possession, the plant and materials became the absolute property of the company? It appeared there was a clause in the contract, that if the materials, tools and implements so to become the property of the company should be insufficient to cover all the charges occasioned by completing the works, then the contractor was to make good the deficiency; and the House of Lords (adopting the view of the agreement as stated by Lord Cranworth, viz., that the company, though at liberty to seize and appropriate the plant belonging to the contractor, were yet bound to account for its value in settling their accounts with him) decided that the contractor was entitled to an account of the value of the plant, and also of other matters necessarily connected with and incidental to that inquiry. The agreement as to the plant is very different in this case; for, although it is to become the absolute property of the corporation upon their taking possession of it, instead of the value being applicable to make good any liability of the contractors, it is merely to be fixed and determined by the engineer. So that if an account were to be decreed to be taken of its value, it would be an entire departure from the contract, by which that question is agreed to be left exclusively to Mr. Hawksley. It only remains to notice the recent case of *Kemp v. Rose*, which is also stated to be inconsistent with the present case. It will be found, however, that the Vice Chancellor admitted that if the question had there depended on the contract alone, the contractor was completely at the mercy of the architect; but he fastened on circumstances which he considered might produce an improper bias upon the architect's mind, and on that ground alone put the contract aside, and opened the way to the jurisdiction of the Court in that case. The case of *Kemp v. Rose* is not at variance with his Honour's decision in this case. I have entered at so much length into this case, partly on account of its great importance, but principally with a desire to shew that there may be extracted from previous

decisions principles that may be safely applied to determine the effect of provisions, now so common in contracts for the execution of works, by which the contractor's claims and liabilities are placed at the discretion and under the controul and judgment of the agent of the parties for whom the work is to be done. If the parties to the agreement have provided beforehand for the settlement of any disputes that may arise on the rights and liabilities growing out of the contract by the arbitration of persons mentioned in the agreement, or to be determined when disputes arise, such a stipulation cannot be urged as an answer to either party who prefers to resort to the Courts for the determination of his rights, nor can it deprive the tribunals of the country of their jurisdiction, whatever remedy may be open to the parties against whom proceedings are instituted for the breach of the agreement. But where the contract provides for the determination of the claims and liabilities of the contractors by the judgment of some particular person, this would be incorrectly called a provision for submission to arbitration, as no dispute can exist in such a case, everything being dependent upon the decision of the individual named; and until he has spoken no right can arise which can be enforced, either at law or in equity. I think that Mr. Hawksley stands in this relation to the plaintiffs in this case. They have agreed to submit themselves entirely to his judgment, but now decline his authority. If the Court were to assume the jurisdiction which is prayed, it would not be enforcing the contract of the parties, but acting in direct opposition to it. I think, therefore, that the decree of the Vice Chancellor must be affirmed, and the appeal dismissed, with costs.

KINDERSLEY, V.C. }
 Dec. 7. } BIGNOLD v. GILES.

Legacy Duty—Liability of Executors.

A testator directed his estates to be sold, and gave the dividends of one portion of the proceeds to his wife for life, and after her death he gave the capital to A. B. The second portion he gave to A. B, subject to various annuities. By

an arrangement between the widow and A. B., the first portion was paid over by the executors to A. B. during the widow's life, and no sum was retained to answer the legacy duty, which would become payable on the widow's death. A. B. sold the second portion to the plaintiff, and the surviving executors of the surviving executor of the testator joined in the assignment for the purpose of admitting A. B.'s title to the property, and stating that they knew of no incumbrance upon it. Upon the death of the annuitants, the purchaser filed a bill against the executors for a transfer of the fund; and the Court held, that the defendants were not entitled to retain the legacy duty payable upon the first portion of the property.

The bill in this case was filed, by the plaintiff, who represented the Norwich Union Reversionary Interest Society, against the surviving executors of the surviving executor of the testator in the cause, praying that a sum of 3,633*l.* 6*s.* 8*d.* consols, standing in their names, might be transferred to the plaintiff, less the legacy duty thereon, without deducting therefrom the legacy duty payable on a legacy of 5,099*l.*, which had been previously transferred to the legatee.

The following were the facts of the case:—Joachim Hibberd, by his will, dated the 8th of September 1819, appointed his brother, Joseph Hibberd, and Charles Beale executors, and devised and bequeathed to them and the survivor of them, their or his heirs, executors and administrators, all his monies in the funds, and all other his real and personal property and effects, in trust to sell and convert the same into money, and to divide such money, including therein a sum of 4,300*l.* three per cents., into two equal moieties, in trust, out of one moiety of the said aggregate amount (of which the said 4,300*l.* three per cents. should be a part) to pay and discharge any balance that might by a fair statement of all debts and credits appear due from the testator to the said Joseph Hibberd as his partner in business, together with the testator's just debts and funeral expenses, and the costs and expenses of proving his will, and also certain legacies therein mentioned; and after the payment of the before-mentioned charges

and legacies, in trust to invest the surplus of such moiety in the Government stocks or funds, in the names of them, the said Joseph Hibberd and Charles Beale, or the survivor of them, their or his executors or administrators, and to pay the annual dividends and interest thereof and of the said 4,300*l.*, unto his wife Ann Hibberd, during her life, provided she should remain his widow; but in case of her death or future marriage, which should first happen, then he gave and bequeathed such moiety of the said aggregate amount to Ann Beale, the wife of the said Charles Beale, as her own sole property for ever, save and except the said sum of 4,300*l.* in the three per cents., which the testator directed should remain there and be transferred into the names of the said Joseph Hibberd and Charles Beale, or the survivor of them, their or his executors or administrators, for the uses and purposes following; that is to say, as to the annual dividends or interest payable thereon, amounting to 129*l.* per annum, in trust to pay his brother James Hibberd, and his two sisters Patience Lane and Susannah Bowring, one clear yearly annuity or sum of 20*l.* each during their lives, and the remainder of the said dividends or interest of 129*l.* to be paid to his nephew Robert Samuel Hibberd during his life; and as and when the testator's said brother James and sisters Patience and Susannah should depart this life, then that the three several annuities of 20*l.* each should devolve and be paid to Louisa Hibberd, afterwards the wife of Stephen Webb, the said Robert Samuel Hibberd and Elizabeth Hibberd, afterwards the wife of John Riley, and since deceased; the eldest taking the first of the said annuities that should fall, and the others in like manner by seniority; and after the decease of the survivor of them the said Louisa Hibberd, Robert Samuel Hibberd and Elizabeth, then the testator gave and bequeathed the principal sum of 4,300*l.* in the three per cents. and all interest due thereon (if any), to the said Ann Beale, her heirs and assigns, and to be disposed of by will or otherwise as she might think fit; and as to the other moiety of the said aggregate amount of the testator's real and personal effects, in trust for the other persons and purposes in the said will mentioned.

The testator died in July 1820, leaving Ann Hibberd his widow him surviving, and his will was duly proved by the said Joseph Hibberd and Charles Beale. Charles Beale died on the 3rd of February 1825, and Joseph Hibberd died on the 8th of March 1827, having by his will, dated the 5th of February 1827, appointed the defendant George Giles and James Sheppard, since deceased, his executors, who duly proved his will. Susannah Bowring died in May 1822. Patience Lane died in December 1826, and the testator's widow died on the 21st of May 1835.

By an arrangement between the widow of the testator and Ann Beale, the sum of 5,099*l.*, which was the residue of a moiety of the proceeds of the testator's estate (extra the 4,300*l.*), after payment thereof of debts, legacies, &c., was handed over to Ann Beale, by the executors, but no sum was retained thereof to answer the legacy duty which would become payable when the legacy fell into possession.

By an indenture dated the 17th of May 1837, after reciting, *inter alia*, that after the payment of Joachim Hibberd's debts and funeral and testamentary expenses, the clear produce of the sales, made according to his said will, of his freehold and leasehold estates, and the conversion of his general personal estate, exclusive of the said sum of stock, amounted to the sum of 13,023*l.* 2*s.* 3*d.* sterling, whereof the sum of 5,099*l.*, together with the said sum of 4,300*l.* stock, was appropriated, as appeared by the residuary account rendered by the executors to the Stamp-office in the month of January 1824, to answer and satisfy the purposes declared by the will of the moiety or half part first therein mentioned of the aggregate amount of the produce of the testator's estate, and that the charges thereby imposed as aforesaid upon the said moiety were accordingly satisfied out of the last-mentioned sum of sterling money; that the residue thereof was invested pursuant to the will, and that the dividends thereof, and also of the said sum of 4,300*l.* stock, were duly paid to the said Ann Hibberd, the testator's widow, during her life; that the said sum of 4,300*l.* stock was then held by the said George Giles and James Sheppard, as such executors as aforesaid, in trust to pay with the

dividends thereof the said annuities bequeathed by the will of the said Joachim Hibberd to the said James Hibberd, Louisa Webb, Robert Samuel Hibberd and Elizabeth Riley, for their lives respectively as aforesaid, and subject thereto in trust only for the said Ann Beale, who had contracted with the said John Wright, the plaintiff Samuel Bignold, and Robert John Bunyon, for the absolute sale to them of the said sum of 4,300*l.* stock, subject to the payment of the last-mentioned annuities, but free from all other incumbrances, for the sum of 806*l.*; and that the said George Giles and James Sheppard had agreed to join in and execute the indenture as such executors as aforesaid, in order to admit the title of the said Ann Beale to the said sum of 4,300*l.* stock, and to supply proof of notice to them of the assignment intended to be thereby made; it was witnessed, that, in pursuance of the said recited contract, and in consideration of the sum of 806*l.* paid by the said John Wright, the plaintiff and Robert John Bunyon to the said Ann Beale, she the said Ann Beale did bargain, sell, assign, transfer and set over unto the said John Wright, the plaintiff and Robert John Bunyon, their executors and administrators, all that the said sum of 4,300*l.* three per cent. Consolidated Bank Annuities, which as part of one moiety of the aggregate amount of the produce of the real and personal estates of the said Joachim Hibberd, and which also substantively was by the said will of the said Joachim Hibberd given to or in trust for the said Ann Beale as thereinbefore mentioned, and the dividends and the annual produce of the said sum of stock, subject to the payment thereof to the said James Hibberd during his life of the said annuity of 20*l.*, and to the said Louisa Webb during her life of her said annuity of 20*l.*, and to the said Robert Samuel Hibberd during his life of the said dividends originally bequeathed to him, and also the said additional annuity of 20*l.*, and to the said Elizabeth Riley during her life after the decease of the said James Hibberd, if she should survive him, of her said annuity of 20*l.*, and all the right, title, interest, trust, property, benefit, claim and demand whatsoever of the said Ann Beale, in, to and upon the said premises, together with full

power and authority, which the said Ann Beale did thereby give and grant, to and for the said John Wright, the plaintiff and Robert John Bunyon, and the survivors and survivor of them, their and his executors, administrators and assigns, in the name or names of the said Ann Beale, her executors or administrators, or otherwise as might be deemed expedient, forthwith, or as and when the said sum of 4,300*l.* dividends, annual produce and premises should become payable, to ask, demand, sue for, recover and receive, and sign and give sufficient acquittances and discharges for the same respectively; to have, hold, receive and take the capital sum, dividends and annual produce and other premises thereby assigned, and every part thereof, subject to the said annuities as aforesaid, and also to the payment of the legacy duty chargeable upon the said Ann Beale in respect of the same premises, unto the said John Wright, the plaintiff and Robert John Bunyon, their executors, administrators and assigns, absolutely, and as fully and effectually as the said Ann Beale ever had, or she, or her executors or administrators, could or might have otherwise had or been entitled to the same.

James Sheppard died in the year 1843, leaving the said George Giles, the defendant, his co-trustee and executor, surviving. Ann Beale died in May 1846, Elizabeth Riley in February 1851, James Hibberd in March 1857, and Robert Samuel Hibberd in January 1858; so that, in the events which had happened, the only annuity chargeable on the dividends of the sum of 4,300*l.* was that of 20*l.* in favour of Louisa Webb, which would be fully met and provided for by a sum of 666*l.* 13*s.* 4*d.*, which was proposed to be set apart to answer that purpose.

It was under these circumstances that the bill was filed for a transfer to the plaintiffs of the sum of 3,633*l.* 6*s.* 8*d.*, the residue of the 4,300*l.* after deducting the 666*l.* 13*s.* 4*d.*; but the defendant having given a bond to the government for payment of the whole legacy duty, not only upon the 4,300*l.*, but also upon the 5,099*l.* so transferred to Ann Beale by anticipation in the widow's lifetime, insisted that he was not bound to make such transfer without the sanc-

tion of the Commissioners of Inland Revenue.

It further appeared, that on the occasion of the contract for the purchase of this reversionary interest by the plaintiffs, certain requisitions were made by the purchasers' solicitors, which were answered by the defendant's solicitor in the following manner:—

First requisition.—The vendor must prove, by production of the executor's accounts or otherwise, that the testator died possessed of the 4,300*l.* stock in question, and that no part of this sum was required or taken for payment of his debts, &c., or the legacies charged upon the moiety of his residuary estate given to his wife for life.—Answer: See the residuary account inclosed, under the head deductions; by which it appears that the 4,300*l.* was retained for the benefit of the testator's widow for her life only, and that she had independent thereof 5,099*l.* out of which all incumbrances on her moiety were paid.

Second requisition.—That the 4,300*l.* is now standing in the names of the executors or the representatives of the surviving executor, and is held by them only to answer the annuities given by the will, and subject thereto for Mrs. Beale.—Answer: This shall be complied with, and the document forwarded in the course of a few days.

Fifth requisition.—We should have a letter from the trustees, that they have not notice of any incumbrance on the funds proposed for sale.—Answer: The document which is to be sent in reply to the second requisition will also answer this.

This document was in the terms following:—"George Giles, of Hanging Langford, in the county of Wilts, yeoman, and James Sheppard, of Burcombe, in the county of Wilts aforesaid, yeoman, executors of Joseph Hibberd, late of the city of New Sarum, in the said county, innholder (since deceased), do hereby declare, that the 4,300*l.* in the three per cents., bequeathed by the will of Joachim Hibberd, late of the said city of New Sarum, innholder, deceased, to Ann Beale therein described, subject to the annuities therein mentioned, now stands vested in our names in the said three per cents. as the execu-

tors of the said Joseph Hibberd, who was the surviving executor of the said Joachim Hibberd, and that it is held by us only to answer the said annuities given by the will of the said Joachim Hibberd, and subject thereto for the said Ann Beale. Nor have we ever received notice of any incumbrance on the said 4,300*l.* three per cents., except the aforesaid annuities. As witness our hands, the 7th day of March 1837. Signed, George Giles and James Sheppard, executors of Joseph Hibberd. "Memorandum. — The legacy duty on the trust-money bequeathed to Mrs. Beale will be payable on the deaths of the annuitants."

Mr. Goldsmid and *Mr. Martindale*, for the plaintiffs, contended that the defendants ought to be ordered to transfer to them the sum of 3,633*l.* 6*s.* 8*d.*, being the residue of the 4,300*l.*, after deducting the 666*l.* 13*s.* 4*d.* set apart for answering the remaining annuity of 20*l.*, on payment only of the legacy duty on the 4,300*l.*, and that they could not retain any further sum to answer the legacy duty upon the 5,099*l.*

Mr. Glasse and *Mr. W. W. Cooper* appeared for the defendants.

The following authorities were cited:—

Hutton v. Rossiter, 7 De Gex, M. & G. 9; s. c. 24 Law J. Rep. (N.S.) Chanc. 106.

Jorden v. Money, 5 H.L. Cas. 185; s. c. 23 Law J. Rep. (N.S.) Chanc. 865.

Saunders v. Vautier, Cr. & Ph. 240; s. c. 10 Law J. Rep. (N.S.) Chanc. 354.

Eales v. Lord Cardigan, 9 Sim. 384; s. c. 8 Law J. Rep. (N.S.) Chanc. 11.

Ex parte Killick, 3 Mont. D. & D. 480; s. c. 13 Law J. Rep. (N.S.) Bankr. 6.

Farwell v. Seale, 3 De Gex & S. 359; s. c. 18 Law J. Rep. (N.S.) Chanc. 189.

Roper on Legacies, 4th edit. 871.

36 Geo. 3. c. 52. ss. 6, 25.

KINDERSLEY, V.C.—With reference to the question which is first raised, namely, the right of these purchasers, that is, the Reversionary Interest Society, represented by the claimant, to have the benefit of this purchase, my opinion, subject to a ques-

tion of construction, is this:—It was first—at least, as I understand the argument—contended that Messrs. Giles and Sheppard, having joined in this deed, they thereby entered into what amounted to a guarantie on their part against all incumbrances, known or unknown, upon this fund; and I then expressed myself to the effect—and I retain the same opinion—that if that were to be the way in which these gentlemen were to be dealt with, after having, out of consideration and merely for the convenience of the purchasers, executed this deed, expressly stating that they did it only for the purpose of admitting the title of Ann Beale, and for supplying proof of notice to them of the assignment, it would be extremely unjust and unfair. It would be, in fact, catching them in what they never intended, namely, to guarantee this fund against all incumbrances, known or unknown; and it appears to me that what had taken place shews that it was not the intention of the purchasers, or of the trustees (Giles and Sheppard), that such should be the effect of their joining, because in the requisitions that were sent by the purchasers' solicitor to the vendor's solicitor, the second requisition was, "that it should be shewn that the 4,300*l.* is now standing in the names of the executors, or the representatives of the surviving executor, and is held by them only to answer the annuities given by the will, and subject thereto for Mrs. Beale." Now, did that requisition mean that it should be shewn that this stock belonged to Mrs. Beale, without any incumbrance whatever upon it? No such thing. And this is shewn by the fifth requisition:—"We should have a letter from the trustees, that they have not notice of any incumbrance upon the fund proposed for sale." So that they considered that the shewing that Mrs. Beale was entitled did not at all involve the shewing that there were no incumbrances, because they require a letter from the trustees to say, not that there are no incumbrances, but simply, what alone they could be called upon to say, that they had not themselves had notice of any incumbrance. Then, in answer to this requisition, it is said, you shall have such a document as shall satisfy you; and accordingly such a document is

sent, by which the executors declare that the 4,300*l.* three per cent. stock, bequeathed by the will of Joachim Hibberd to Ann Beale, subject to the annuities therein mentioned, stands vested in their names, as executors of Joseph Hibberd, who was the surviving executor of the said Joachim Hibberd; and that it was held by them to answer the said annuities given by the said will, and subject thereto for the said Ann Beale. So far, they clearly did not mean to give a guarantie that it was free from all incumbrances, because the very next passage is this:—"Nor have we ever received notice of any incumbrance on the said 4,300*l.* three per cents., except the aforesaid annuities."—"Memorandum.—The legacy duty on the trust-money bequeathed to Mrs. Beale will be payable on the deaths of the annuitants."

Therefore, it appears to me, that it would be most unjust and most unfair to decide that these gentlemen, by what they had done, had in effect given a guarantie against all the incumbrances. I think, however, that the case does not rest upon that ground; but upon this. In order to explain my meaning, I will first suppose that Joseph Hibberd, the survivor of the original executors of the testator, were still living, and that I was not dealing with his representatives; and it appears to me that Joseph Hibberd's duty and that of his co-trustee, Mr. Beale, as long as he lived, was this:—A moiety of the residue is given to the testator's widow for life; and after her death a portion of that moiety, which is to be constituted of the 4,300*l.* stock, is appropriated to pay certain annuities; and subject to those annuities, and to the widow's life interest, the stock is given to Ann Beale; and the whole of the residue, subject to the widow's life interest, is also given to Ann Beale: that is the effect of the will. Now, what would be the consequences when the testator's widow died, as she did, in the year 1835? Ann Beale then, and then only, for the first time, became entitled to the whole moiety of the residue, except the 4,300*l.* stock, which still remained to be appropriated, being the remaining portion of that moiety specifically reserved or appropriated towards payment of the annuities. Supposing that at that time Joseph Hib-

berd were still living, he would have had, upon the death of the widow, to pay 5,099*l.*, which was all that moiety of the residue, except the 4,300*l.* stock to Ann Beale; and upon paying that to Ann Beale, he would have been bound to have paid the duty to the Government upon that portion, not upon any other portion, but only upon the 5,099*l.* But instead of doing that—instead of waiting until the widow died, when Ann Beale's interest fell into possession in respect to that sum of 5,099*l.*, a few years after the death of the testator, by some arrangement made between Ann Beale and the widow, in which arrangement the trustees concurred—Ann Beale and the widow agree that they will not wait until the death of the widow to have this fund appropriated, but that they should divide it *instantly*. The duty on that portion was still not payable, of course, until the death of the widow, which happened in 1835; but Joseph Hibberd, the surviving executor, instead of retaining enough to answer the duty, allowed Ann Beale, or Ann Beale and the widow between them, to have the whole of it. What was the effect of that? Why then, of course, Joseph Hibberd made himself liable to the claim of the Stamp Office, whenever the time should arrive at which the duty would be payable. He was then personally liable for it; he might have had or not a claim over against Ann Beale for it; that would depend upon any arrangement between them; but, at all events, he himself became personally liable to Government for the amount of the duty upon that portion of the residue whenever the widow should die. If, then, he had been alive he would have been subject to the claim: what would have been his right, then, with regard to this 4,300*l.* stock? Supposing the period had arrived at which that had also fallen into possession, no doubt he might have had a right between himself and Ann Beale to say, I have handed over to you a portion of your moiety of the residue, without retaining the legacy duty, and I will not hand over this portion to you without retaining the whole of the duty. I apprehend there is no doubt that would have been the right as between Joseph Hibberd and Ann Beale, if that were all. Now, instead of Joseph Hibberd being alive, he had died long before

the widow, having, as I have said, dealt with the portion of the residue, so as to have given it all up to Ann Beale, with the concurrence of the widow; and without retaining what was necessary to pay the duty upon that, he made himself, as I have said, personally liable. The present defendants are his executors; they may or may not, for aught I know, be personally liable to the Government; but, at all events, the claim is in effect against them, in the character of executors of Joseph Hibberd, and in that character representing the original testator. I have not heard a word suggested on either side, nor is it necessary for me to express any opinion, whether the claim against them on the part of the Government would be a personal claim against themselves, or whether it would be a claim against them only in the character of executors of Joseph Hibberd, and a claim to be satisfied out of his assets; but, as I understand, Joseph Hibberd did not die insolvent. They received assets of Joseph Hibberd to satisfy his debts, and this duty to the Government undoubtedly had become a debt of his, when it became payable to the Government in the year 1835, on the death of Ann Hibberd, the testator's widow. Now, no doubt, either Joseph Hibberd if he had been living, or the executors of Joseph, he being dead, would have a right to say to Ann Beale, or to any person merely claiming under Ann Beale, "You cannot call upon us to give up this 4,300*l.* stock until the duty is paid to us which we have been compelled to pay the Government." I am supposing that the Government had required Joseph Hibberd, in 1835, or his executors, he being dead, to pay the duty on the 5,099*l.*, and they had paid it, what would be their right? This is not a lien or a charge specifically upon the 4,300*l.*; all they could say would be, "We have an equity, now that we have paid the duty to Government, to come upon that 4,300*l.* stock, as between us and Ann Beale, or as between us and the parties claiming through Ann Beale." Then comes the effect of the deed they executed. What, I have said, would be the effect, supposing Ann Beale had made an assignment to these purchasers without any intervention of the executors? But what do the executors do? The executors, by join-

ing in the deed, although I cannot come to the conclusion that they did, thereby give a guarantie against incumbrances, certainly do say this, that Ann Beale is entitled to this fund, and that they do not know of any incumbrances. Now, it will be observed, that the right to set up the equity against the 4,300*l.* on the part of the executors of Joseph Hibberd accrued when the widow died in 1835, when the duty on the 5,099*l.* became payable to Government. Then their right accrued, but they would have no right of retention until they had made the payment to Government, which they have not done to this hour; they gave a bond that they would pay, but they have not actually paid. Then having joined in the deed for the purpose of admitting Ann Beale's title to the fund, and having stated that they themselves knew of no incumbrance, although it does not amount to a guarantie that there is no incumbrance unknown, it appears to me to amount to this, that they cannot after that set up as against that fund, that is, as against the persons who are purchasing upon the faith of that, in their own right and for their own benefit, a charge or claim upon that fund. They have joined in this deed, upon the faith of which the Reversionary Interest Society has purchased this reversionary interest. Can they, after joining in that for the purpose of representing that the vendor had a right to sell it, afterwards say, now events have happened which give us a right to set up an equity of our own? It appears to me that they cannot. It would be quite inconsistent with principle, and, indeed, with the authorities, to allow them to set up an equity of their own, which although they did not know of it, and it did not exist, in fact, at that time, they might have known would exist whenever they paid the duty upon the 5,099*l.* I take it for granted that they were ignorant about the duty not having been paid. I dare say neither party knew exactly how the fact was; they did not tell anybody further to investigate it, they took it for granted that what ought to have been done was done; they knew nothing about the disposition which had taken place so many years before, and the effect is, that now the executors, either in their character of executors or in their own persons, are

liable to Government for this; and how can they say, if we pay that duty to the Government, or the amount of that duty, we will now, notwithstanding our having joined in that deed, set up against this very fund an equity in our own favour? It appears to me that upon that ground, not upon the ground of guarantie, the plaintiffs have a right to insist that the executors cannot retain the fund themselves, merely on the ground of their right to pay out of it anything they may have to pay to the Government for the duty.

Then comes another question, quite irrespective of that, namely, the construction of the will; in other words, whether I can now decide in favour of the plaintiff without having any other person before the Court. Now, that depends upon the construction of this will, which is couched in such terms as not to make the matter very clear. It is suggested that there may be four different persons, or classes of persons claiming as against the right set up by the plaintiff. It is first suggested that those three annuities, which are given by this will, are so given as that Louisa Webb is entitled to all those three annuities; in other words, that as each annuity dropped there was a survivorship of that annuity to the two survivors; and then when the second dropped the third survivor would take all the three annuities: at least, that it is questionable. The second is, supposing that not to be so, still the annuities given are so given as that although they did not survive upon the death of one they did terminate upon the death of one; and that upon the death of one his executors are entitled to his annuity so long as the annuity would last, which they say is, until the fund is given over; so that it is suggested that the representatives of the deceased annuitants would be necessary parties.

The third suggestion is this, that neither the one nor the other of these may be right, that is, that neither was there survivorship of the annuities nor did the annuities continue for the benefit of the executors of the deceased annuitants, but that Robert Samuel was entitled to all the dividends, including all the annuities that dropped, and that therefore his representative must

be here. And the fourth suggestion is, that neither of the first three alternatives is the real construction, but that this being a portion of the residue, that is, the intermediate payment of those dividends or annuities being a portion of the residue, it is undisposed of, and the next-of-kin of the testator ought to be here in order to discuss the matter.

Now, the gift is in very peculiar terms. First of all, there is a direction that the dividends of the stock in question, which amount to 129*l.* a year, were to be in trust to pay to three persons, James, Patience and Susannah, a clear annuity of 20*l.* sterling each during their lives, and the remainder of the dividends the testator directed to be paid to his nephew, Robert Samuel Hibberd, since deceased, during his life. Now, stopping there, there is no doubt that each of those three persons, James, Patience and Susannah, would have a life annuity during his or her respective life, and during the life of Robert Samuel he would have all the surplus, including what might have dropped in the shape of annuity, that is, he took the whole surplus, liable only to pay the current annuities. That, I think, is clear. The next gift raises the question—"That, as and when James, Patience and Susannah should depart this life, then he directs that the three several annuities of 20*l.* each should devolve," therefore contemplating that those were continuing annuities, although it is rather a question of words than of substance—that he considers that those annuities were still to continue, not for the benefit of the representatives of the deceased annuitant, but for the purpose which he now declares, that as and when James, Patience and Susannah should depart this life, then the three several annuities of 20*l.* should devolve and be paid to Louisa, Robert Samuel and Elizabeth. Stopping there for a moment, it is a gift of three annuities to three persons, without saying anything about tenancy in common, but in words which would import joint tenancy. It is given to the three and there is nothing to import what the portion of the three annuitants is to be. But, inasmuch as there is no gift over until the death of the survivor, I should say that if it stopped there, there would be a

strong ground for arguing that it was a gift to three persons during the life of the three, and the survivor and survivors, to continue so long as that. But it goes on thus:—"The eldest," that is, the eldest person of the second class, of them taking the first annuity that should fall, so that when one annuity falls,—say Susannah's, as she died first—she was one of the first class of annuitants when she died,—then the eldest of the three others—who appears to have been Louisa—Louisa then would take that annuity, and the others in like manner, by seniority. It appears to me that entirely excludes the idea of joint tenancy, because no one annuity is given to all the three, but one annuity is given to one of the three, and another annuity is given to another of the three, and so on. So far I clearly feel that there is no joint tenancy. Then, what is there to give the annuity over, I mean by survivorship, if there be no joint tenancy? I confess I do not see any words which would import that the annuity would survive to the other. I see nothing that would lead me to that supposition. But then comes the question, what is there to determine the annuity? I will take Robert Samuel, who took one of the annuities. On the death of Robert Samuel, what became of his annuity? What is there to determine it? There is nothing really in language to determine it, and it appears to me, therefore, that it is a question I ought not to determine in the absence of the representative of Robert Samuel.

Then, with regard to the question as to the next-of-kin, I really think it is quite clear that they cannot be entitled. It appears to me that either the representatives of the deceased annuitant are entitled or that Robert Samuel, that is, the representative of Robert Samuel, would be entitled, or else it belongs to Ann Beale, or to those claiming under her. Therefore, what I ought to require is, that you should, within a certain time, either get the concurrence of the representative of Robert Samuel to appear and consent upon such terms as you may be able to make with him, or bring him here adversely, so as to have the question decided.

WOOD, V.C. }
Dec. 15, 22; } PETERS v. RULE.
Jan. 15, 20. }

Practice—Issue—The Chancery Amendment Act, 1858—21 & 22 Vict. c. 27.

The Chancery Amendment Act, 1858, having expressly left it to the Court to say, whether the trial of a question of fact shall take place before a jury at common law, before a jury in Chancery, or before the Court without a jury, this Court will not at present, unless both parties concur in the application, or there is some special reason of delay, expense or otherwise, direct the trial to be before itself, the confidence of either suitor in the method established by long habit being a circumstance which ought to turn the scale, especially on the first experiment of a different system being required to be made.

Semble—The legislature did not contemplate the trial of issues before this Court as a general rule.

In this case, which involved a question of legitimacy, *Mr. E. F. Smith* applied for an issue to be tried at law.

The Solicitor General, Mr. Wickens, Mr. Dickinson and Mr. J. H. Palmer, for various parties, referred to the 21 & 22 Vict. c. 27, enabling the Court itself to summon a jury for the purpose of trying questions of fact, and objected that if such questions still continued to be sent for trial at Nisi Prius, the act would be inoperative.

Jan. 15. — WOOD, V.C. having consulted the other Judges of the Court, stated that he had decided to grant the application for an issue to be tried at law.

Jan. 20.—Some misunderstanding having occurred as to the expressions which fell from the Vice Chancellor, in giving judgment in this case, his Honour this morning read the following written statement:—"I have had laid before me, at the request (as I understand) of several gentlemen of the Bar, a printed statement of observations supposed to have fallen from me in a recent case, in which I declined directing an issue to be tried before

a jury in this court. It has been intimated to me, I need scarcely say as much to my surprise as my regret, that such supposed statement has occasioned pain to the gentlemen usually practising in the courts of equity rather than in the courts of common law. The statement is as follows, in its printed form :—

“ ‘ PETERS v. RULE.

“ ‘ In this case there had been a motion for an issue to be tried before his Honour by a jury, under the provisions of the act of last session (21 & 22 Vict. c. 27), enabling the Court of Chancery to summon a jury and decide issues of fact without the necessity of sending the suitors to a court of common law. In the course of Saturday his Honour mentioned incidentally that after consultation with the other Judges of the Court of Chancery, it had been determined that in cases where an issue was asked for the matter would be sent to a court of common law for trial if either party desired it, it being considered that from the greater experience of gentlemen practising at the common-law bar in cross-examination of witnesses and the conduct of jury cases such a course would be preferred.’

“ It appears to have been considered as expressing an opinion on the part of all the Judges of the Court of Chancery, that the gentlemen of the Bar practising in these courts are not competent to conduct cases before a jury. Perhaps such an interpretation of the words I have read may be the more natural one. If it be, I can only express my extreme regret that I can have been supposed to have uttered any expressions so entirely contrary to my sentiments; and I have lost no time in first correcting a very considerable error in the printed statement of what I am supposed to have said, and then in explaining more fully the short intimation (which alone occurred to me at the time as necessary to be given) of my reasons for sending the particular case before me to trial before a court of common law. First, then, I am certain that, whatever opinion was expressed by myself, I did not attribute to the other Judges of the Court any participation in it. On this point, I am sure that I intended to be, and that I was, very careful. I had before me a case in

which some persons of comparatively small means were claiming the property of an intestate who was by the Crown alleged to have been illegitimate. Both the claimants and the Crown agreed that it was a matter to be tried before a jury. The Solicitor General, for the Crown, pressed for the trial of the issue before this Court. The counsel for the claimants pressed for a trial before a Court of common law, alleging that counsel of the common-law bar had been retained, that such counsel were more experienced in the cross-examination of witnesses, and that much would depend on such cross-examination. At the hearing of the application, I stated that I should soon have an opportunity of consulting with the other Judges of the Court on the general question of the trial of issues directed by this Court. On Saturday last, I stated that I had consulted with the other Judges of the Court, and had found that it was extremely difficult to lay down any general rule as to whether a case should be tried by this Court or by a court of common law; but that I had come to the conclusion, that as the two parties did not concur in desiring the issue to be tried by this Court, and one party desired that it should be tried before a court of common law, on the ground of the greater experience of the counsel in those courts in cross-examination, I thought it was not right in such a case to order the trial to be in this court, and should not be disposed to do so in any case, unless both parties concurred in the request, without special grounds. Of the first part of the above statements I am certain—namely, that in which I make the expression of opinion my own alone, and not that of any other Judge. As to the second part, I cannot be so certain of the expressions as I am of the opinion which I intended to express. It never having occurred to me that what I said could be misconstrued, no special pains were taken to avoid misinterpretation. I found one party expressing more confidence in a trial before a court of common law, for the reason which he assigned of the greater experience in trials before a jury of the gentlemen practising in the courts of common law, and what I meant to express was, that if such were the wish of that

party, I did not think it desirable that either party in the case before me should be compelled to a new mode of trial. I do not believe that I expressed—I certainly did not intend to express—any concurrence in the view of the party—viz. that his case would be better tried before a Court of common law. I gave his reason, and, unquestionably, had he alleged the inexperience of the Judges of this Court in the conduct of the trial of cases before a jury, I should have repeated that reason also, and have said that I thought any person honestly entertaining that view ought not to be compelled to have the cases tried before this Court, unless some special reason as to delay or expense had occurred, as to which no question whatever arose in the case before me. It is a fact that the Judges of the Court have not as yet had such experience. It is a fact, I conceive, that most of the gentlemen practising in this court have not yet had such experience. The legislature has expressly left it to the Court to say, whether the trial shall take place before a jury at common law, before a jury in Chancery, or before the Court without a jury. I do not find in the act any indication of a preference. The legislature must be taken to have intimated that there are some cases in which the Court may find it more expedient to try the case itself. Probably, regard being had to the amount of business transacted by the Court, it was not contemplated that the other suitors should be delayed by the trial of issues as a general rule before the Court. Probably, also, it was thought that in many cases it would be more expedient to try them in the country. As a Judge of the Court I have, and ought to have, every disposition to give full effect to every provision of the legislature for improving the administration of justice. As regards the particular question of the expediency of conferring on this Court a power to summon a jury and to try issues itself I gave my hearty assent, as a member of the commission issued for inquiring into the proceedings of this Court, to a recommendation that such a power should be conferred; but it appears to me very inexpedient, and calculated to create dissatisfaction in the suitors, if in the administration of justice, without any special

reason founded on the saving of delay or expense, or, in fact, any special reason whatever, the Court were to force the suitor to adopt the new mode of trial. I have ever considered, that next to a correct decision, the most important object a Judge can keep in view is, that the suitor should be satisfied that his case has been carefully attended to. In the Chancery Amendment Act, an option is expressly given to either party with reference to taking the evidence on affidavit or orally. The choice of the mode of trial by the act of last session is not given to either party, but a discretion is left to the Court. It was felt, as I have said, by all the Judges, that any definite rule would be extremely difficult. The legislature probably felt the same difficulty. When both parties concur there can be no doubt; but I have come, whether erroneously or not, to the fixed conclusion, that where there is no special reason of delay, expense or otherwise, the consideration of the confidence of either suitor in the method established by long habit is a circumstance which ought to turn the scale, especially on the first experiment of a different system being required to be made. This and no more did I intend to express. I have never intended to intimate any concurrence in the view of the suitor who prefers the old method, nor in the reasons of the particular suitor in the case before me for that preference. I may now with propriety state, that I do not concur either in the one or the other. Experience will, no doubt, be readily acquired, when it shall become necessary to try issues before this Court, both by the Bar and by the Judge; and at the same time they will both be free from some evils which, from long-established habits, have, in my own opinion, grown up and been fostered in the present customary method of examining and cross-examining witnesses. But upon that subject I need scarcely dwell further. I cannot conclude without remarking that, however painful it may be to me to find that I could possibly be so little understood by any gentleman of the bar as to allow a suspicion even of my intending to treat disrespectfully a body to which I had, I hoped, on every occasion evinced not only cordial esteem, but deep gratitude for their assist-

ance, yet I have sincerely to thank those, whose frankness has conveyed to me the existence of such a feeling, for this opportunity of endeavouring at least to remove it."

STUART, V.C. }
 July 5, 6. }
 LORDS JUSTICES. } HELLING v. LUMLEY.
 Dec. 21.

Contract—Specific Performance—Forfeiture.

W, the lessee of the Opera House, assigned his lease, which contained a covenant for renewal, to a purchaser, reserving box No. 124 during the term mentioned in the lease, and the successive terms to be granted under the covenant for renewal, for himself, his executors, administrators and assigns, or his or their nominees. The assignee, at the expiration of the lease, took a renewal under the covenant from the landlord, which, like the original lease, contained a condition prohibiting the lessee from leasing any boxes, except certain specified boxes to the number of forty-one, not including box No. 124, for a longer term than from year to year. The specified forty-one boxes the lessee was allowed to deal with without restriction. *W*'s interest in box No. 124 afterwards became vested in *H*, for the benefit of *W*'s creditors. *H*, having filed his bill in this court for a declaration that he was entitled to the possession of box No. 124, as against the assignee of the lease, or to compensation in money for the same, one of the Vice Chancellors decided that the plaintiff was entitled to such declaration; and that it was no defence to the bill to say that, inasmuch as the assignee of the lease had disposed of the forty-one boxes specified in the renewed lease, a decree in the terms of the prayer of the bill would, in effect, compel him to dispose of more than such forty-one specified boxes, and therefore render him liable to a forfeiture of the lease; and, on appeal,—Held, affirming that decision, that, the defendant refusing to make compensation in money or otherwise, the plaintiff was entitled to the relief sought.

When a defendant resists specific performance of a contract on the ground that he would thereby incur a forfeiture, the Court

will look at the circumstance which gave rise to the danger of forfeiture, and if it arise out of the defendant's own acts subsequent to the contract, it will decree specific performance, and leave the defendant open to the consequences of his acts.

The facts of this case, as they appeared from the plaintiff's bill, were as follow:—In September 1816, Edmund Waters became the purchaser of leasehold premises in the Haymarket, constituting the Opera House, at a sale thereof, under the direction of the Court of Chancery, in a suit of *Waters v. Taylor*. One portion of the leasehold premises thus sold was vested in William Taylor, the defendant in the said suit, for the residue then to come of a legal term of forty-eight years therein, demised to him by an indenture of lease, dated the 1st of August 1792, and the other portion of such premises was also vested in the said William Taylor, for the residue of a term of twenty-two years therein, demised to him by another indenture, also dated the 1st of August 1792.

By articles of agreement dated the 25th of August 1821, reciting the above-mentioned indentures of lease to *W. Taylor*, a contract was entered into by the duly authorized agent of Edmund Waters, for the sale of all the above-mentioned leasehold premises to Abraham Henry Chambers, for the sum of 80,000*l.*, but subject, *inter alia*, to the right and interest of the several lessees and proprietors of the several boxes of the Opera House, and lettered as therein mentioned, and also subject "to the right of possession of the said Edmund Waters, his executors, administrators and assigns, to the box numbered 124, hitherto usually occupied by him, the said Edmund Waters, on the east side of the theatre, or his or their nominees, not exceeding in number six persons nightly, during the remainder of the said several terms granted by the hereinbefore-mentioned indentures of lease, and of the terms covenanted by the said indentures of lease to be granted." The contract contained a covenant by the agent of Edmund Waters, on behalf of his principal, that he, the said Edmund Waters, his executors or administrators, should and would procure and obtain an assign-

ment of the premises under the sale made by the order of the Court (which premises, and the residue of the respective terms therein, were then still remaining vested in the said William Taylor), and procure, at his and their own costs and charges, renewals of the two several leases therein-before mentioned, for the several terms of fifty-one years and sixty-six years, to commence from the expiration of the then existing leases, in pursuance of the covenants for renewal contained in the same several indentures of lease, and with the same privileges and liberties to the lessee as therein respectively contained.

By an indenture, dated the 15th of March 1823, Edmund Waters sold and assigned to Henry Winchester all that the said Opera House, and all buildings belonging thereto or occupied therewith; the same Opera House and buildings being held for the unexpired residue of two several terms of forty-eight years and twenty-two years, created by two several indentures of lease, dated respectively the 1st of August 1792, and renewable on the respective expirations thereof, for the respective further terms of fifty-one years and sixty-six years; to hold the same Opera House and buildings, and all other the leasehold property assigned for the residue of the said several terms of years unexpired, subject to the yearly reserved rents, and to the reservations and agreements in the several original indentures of lease thereof reserved and contained, and on the lessee's part to be observed, unto the said Henry Winchester, his executors, administrators and assigns, absolutely, or for the right and interest of the said Edmund Waters therein, upon trust that he, the said Henry Winchester, should sell and dispose of the same property and effects.

By another indenture of even date, made between Edmund Waters of the first part, Henry Winchester of the second part, and the several persons creditors of the said Edmund Waters of the third part, after reciting the said indenture of even date, it was witnessed that Henry Winchester, his heirs, executors, administrators and assigns, should stand possessed of the money to arise by the sale of the property thereby assigned, upon trust to apply the same in payment of the debts owing by Edmund

Waters to his creditors, and to pay the surplus, if any, to Edmund Waters, his executors, administrators or assigns.

Henry Winchester, acting in execution of the trusts of these two indentures of the 15th of March 1823, entered into the receipt of the rents and profits of the said opera-box, numbered 124, through his solicitor, and continued in such receipt until his death in 1838. After his death the same solicitor, who also acted as the solicitor of Edmund Waters until his death in 1839, continued to receive the said rents and profits of the said box, numbered 124, to the year 1850 inclusive, and applied the same towards payment of a large balance due to him on account partly of costs incurred by Edmund Waters and Henry Winchester, and partly of advances made to Edmund Waters. In February 1823 Abraham Henry Chambers instituted the suit *Chambers v. Waters*, in this court, against Edmund Waters and William Taylor, for a specific performance of the contract of the 25th of August 1821. This suit was afterwards revived against the legal personal representatives of William Taylor, then deceased, and in February 1826, on the occasion of the bankruptcy of Chambers, his assignees were made parties to the suit by supplemental bill. By the decree in these suits, dated the 21st of May 1829, it was declared that Edmund Waters ought specifically to perform the said agreement of the 25th of August 1821, and that Abraham Henry Chambers became, by virtue of such agreement, the purchaser of the leasehold premises therein comprised, called The King's Theatre, or Opera House, in the Haymarket, not only as against the said Edmund Waters, but also as standing in the place of Edmund Waters against William Taylor, and that the assignees were entitled to the benefit of the agreement in the place of Chambers, and that Chambers or his assignees was or were entitled to receive the rents and profits arising from the said leasehold premises comprised in the agreement, from the 29th of September 1820; and it was ordered that Edmund Waters should procure a renewal of the said two leases in the agreement mentioned, or otherwise that the assignees should be at liberty to procure a renewal of the said two leases,

and be permitted to retain the sums of money they might pay for such renewal and in respect of the costs thereof, out of the purchase-money to be paid by Chambers for the said Opera House, and the property and effects appertaining thereto, for the specific performance of the agreement. That decree was affirmed by the Lord Chancellor on the 6th of July 1833 (1).

On the 6th of November 1840, that suit was revived against the administrator of Edmund Waters, then deceased. The administrator subsequently appealed to the House of Lords against the said decrees and orders; but they were affirmed by the House on the 5th of September 1844. On the 13th of July 1853 those suits were finally disposed of, and an order made, whereby the balance found due from the estate of Edmund Waters to the estate of Chambers, in respect of the contract of the 25th of August 1821, was ordered to be paid, with subsequent interest and costs. Notwithstanding the pendency of the litigation above mentioned, Abraham Henry Chambers, soon after the contract of the 25th of August 1821, entered into the receipt of the rents and profits of the Opera House by virtue of such contract, and he or his assignees continued in such receipt to the year 1845, during the whole of which period he or they paid the rents and profits of the said box, numbered 124, to, or permitted them to be received by the solicitor and agent of Henry Winchester, and by virtue of the exception or reservation of the said box, which was contained in the contract of the 25th of August 1821. In the year 1845 the assignees of Chambers sold the Opera House to Benjamin Lumley for the then residue of the terms of years subsisting therein, in equity, by virtue of the covenants for renewal contained in the indentures of lease mentioned in the contract of the 25th of August 1821, the terms of years granted by such indentures having then expired; and by the contract for such sale it was provided, that the said sale was subject to such rights to boxes as the said premises were then subject to, as against the assignees of Chambers, under the

agreement of the 25th of August 1821. In completion of this contract Benjamin Lumley, by the direction of the assignees of Chambers, and by virtue of the covenants for renewal contained in the expired lease of the Opera House, obtained a renewed lease of the premises to be granted to him, for the term of years therein mentioned, by indenture of the 10th of July 1845, whereby the lessee was restrained, in the same terms as he had been in the original lease, from disposing of boxes for more than one year, except forty-one boxes, to be selected by him within five years, which he was to be at liberty to dispose of at pleasure; but provision was thereby made for his acquiring, with the assent of the lessors, and by exchange or otherwise, the right of disposing of any other boxes. By an order made on the 16th of February 1855, in a suit (*Wyatt v. Hazlewood*) instituted in 1854, for further carrying into effect the trusts of the indentures of the 15th of March 1823, Joseph Norris Helling was appointed a trustee of the lands, messuages and premises comprised in the said indentures of the 15th of March 1823, in substitution of Henry Winchester, deceased.

By an order made in that suit, on the 19th of March 1856, it was ordered that the said J. N. Helling should be at liberty to take such proceedings in equity or at law as he might be advised for the recovery of the possession of the box numbered 124, with the rents and profits thereof in arrear and unpaid.

By indenture, dated the 5th of May 1856, Benjamin Lumley, for the considerations therein mentioned, assigned his said lease of the Opera House to Lord Ward for the residue of the term therein.

The bill in the present suit was then filed by the said J. N. Helling, as plaintiff, against Lumley and Lord Ward, as defendants, alleging that they, the said defendants, respectively had, at the time of their respective purchases of the said lease of the Opera House, notice of the contract of the 25th of August 1821, which constituted the only title of the assignees of Chambers, and of the reservation of the said box, numbered 124, by such contract, and of the fact that the solicitor of Henry Winchester was, down to 1850,

(1) *Chambers v. Waters*, Coop. Cases temp. Brougham, 91.

in the receipt of the rents and profits of the said box by virtue of such reservation, and that accordingly Lumley had paid to such solicitor the rents and profits of the said box from the time of his purchase up to 1850. Since that he, as well as Lord Ward, since the assignment to him of the said lease of the Opera House by Lumley, had refused to permit the rents and profits of the said box, numbered 124, to be received by any person under the said reservation.

The bill also stated that the defendant Lumley had still some interest in the said Opera House and managed the same, and that the defendants alleged that the defendant Benjamin Lumley selected within the said five years mentioned in the renewed lease which had been granted to him, forty-one boxes to dispose of, not including the box numbered 124, and that they could not now let the plaintiff have that box without forfeiting the said lease, whereas the plaintiff charged that the defendants could, by purchase or exchange, obtain liberty to give up the said box to the plaintiff, or, at all events, ought to compensate the plaintiff for the same.

The bill prayed that it might be declared that the plaintiff, as the trustee of the indenture of the 15th of March 1823, was entitled to the said box numbered 124 in the Opera House, or, at all events, to an equivalent in money or otherwise, for the same, for the residue of the renewed term of years granted by the indenture of the 10th of July 1845, pursuant to the covenant for renewal mentioned in the contract of the 25th of August 1821, and to sell or let the same box, or an equivalent for the same accordingly.

The bill also prayed for an account of the rents and profits of the said box, and payment of the balance due, with interest, to the plaintiff; and that, in taking the account, the defendants might be charged with a rent for the said box on occasions when they had gratuitously given the use thereof.

The bill also prayed for an injunction against letting and selling, or disposing of or dealing with the box, and from assigning or underletting or dealing with the Opera House, except subject to the plaintiff's right to the box, and for a receiver

of the rents and profits; and in case the said box could not be given up to the plaintiff for the residue of the term without forfeiting the said term, that it might be declared that the defendants were equitably liable to compensate the plaintiff for the same by another box or a money payment, and that such compensation might be decreed accordingly.

Mr. Bacon and *Mr. W. H. Bagshawe* appeared for the plaintiff, and cited—

Denton v. Stewart, 1 Cox, 258.

Dacre v. Gorges, 2 Sim. & Stu. 454; s. c. 4 Law J. Rep. Chanc. 50.

Bennett v. Colley, 5 Sim. 181; s. c. 2 Myl. & K. 225.

Mr. Malins and *Mr. C. M. Roupell*, for the defendant Lumley, said that a decree for specific performance would be tantamount to an order upon Mr. Lumley to dispose of box 124, in addition to the forty-one boxes already selected and disposed of by him in exercise of the privilege conferred upon him in the renewed lease. This would at once enable the lessor to put in force the power of re-entry which he had under the lease, if Mr. Lumley disposed of more than such forty-one boxes. A forfeiture of the lease would thus be occasioned which would be attended with the loss to the plaintiff of the right which he claimed. That being so, they submitted that the Court would not decree a specific performance, but would leave the plaintiff to his remedy at law.—

Fain v. Brown, 2 Ves. 307.

Costigan v. Hastler, 2 Sch. & Lef. 160.

Harnett v. Yielding, Ibid. 549.

It was not a case for partial specific performance with compensation for that part which could not be performed.—

Howell v. George, 1 Madd. 9.

Wedgwood v. Adams, 6 Beav. 600.

Peacock v. Penson, 11 Ibid. 355; s. c. 18 Law J. Rep. (N.S.) Chanc. 57.

Mr. Craig and *Mr. Renshaw*, for the defendant Lord Ward, submitted that the plaintiff should have proceeded against Chambers, and not against the present defendants, and that his title was now gone by acquiescence and lapse of time.—They referred to—

Chambers v. Waters, 3 Sim. 42; s. c. on appeal, Coop. t. Brougham, 91.

Waters v. Groom, 11 Cl. & F. 684.

Taylor v. Waters, 1 Myl. & Cr. 266; s. c. 5 Law J. Rep. (N.S.) Chanc. 210.

Evans v. Jackson, 8 Sim. 217; s. c. 6 Law J. Rep. (N.S.) Chanc. 8.

Sainsbury v. Jones, 5 Myl. & Cr. 1.

STUART, V.C. said, that the bill, though, in a sense, a bill for specific performance, might be more properly described thus: it was a bill by a person seeking the assistance of the Court to preserve his possession of a right which could only be kept from him by a violation of contract on the part of the defendants. In such a case the right, if the assertion of it did not involve the violation of any principle of law, would, when proved, be protected by the decree of the Court. The right appeared to be reserved by the agreement of August 1821, in terms which were perfectly clear and effectual for the purpose; and the legality of such reservation was impeached solely by reference to the acts of those under whom the defendants claimed. The reservation was of a right to the box numbered 124 to Edmund Waters, his executors, administrators or assigns. There was nothing illegal in the nature of the right, and the reservation of it being in language perfectly clear, the plaintiff must be taken to have shewn a *prima facie* title under the deed of 1821 to the benefit of such reservation of right. That Chambers, who agreed to the reservation, and all those who claimed under him were bound by it, was perfectly clear. The defendants, however, urged, by way of defence to the claim of the plaintiff, that, by the acts of those claiming under Chambers, the property to which Chambers became entitled under the agreement of 1821 had been put into such a position that, if the Court were to decree the performance of the stipulation, it would put the defendants in peril of losing all which the contract of 1821 gave them, and that such a decree would eventually result in the loss to the plaintiff of that right which he now asserted. The decree of the House of Lords in the suit of *Chambers v. Waters*, proceeding upon the submission of the plaintiff therein to perform all the stipulations on his part in the agreement, gave to those

claiming under Chambers all the Opera House, reserving to Waters, and to those claiming under him, that which had been specifically reserved. The terms of the reservation in the agreement of August 1821 were to apply, not only to the then existing lease, since expired, but also to the renewed lease obtained under the covenant contained in the leases forming the subject of the sale by such agreement, and were equally binding upon the lessee under such renewed lease. In that state of things, the right of the plaintiff would appear free from doubt. It was argued, however, by the defendants that, since the renewed lease (which renewed lease, as well as the original lease, contained a prohibition to the lessees, under pain of forfeiture, against disposing of or alienating for a longer term than one season more boxes than the number of forty-one), the defendants or their predecessors in right claiming under Chambers, had disposed of forty-one boxes, and that this suit was one to compel them to dispose of one more box, making forty-two; and if they did so, it was said that the alienation of more than the forty-one boxes would involve the forfeiture of the whole lease. It was not, however, for those who had entered into a contract of this kind to say that they had done acts which made it impossible for them to perform their contract. In *Fonblanque's Treatise on Equity*, b. 1. c. 4. s. 3, it was said that, "Even at law a man is bound to do all that lies in his power; so that if part of the agreement becomes impossible by the act of God, that does not discharge the rest, although it were in the disjunctive, and he is deprived of his election. So if the whole were at first impossible, yet if it may become possible before he is compelled to do it, it is not void; for the law respecteth the right of possibility, and will have nothing to be void that by possibility may be made good." In the present case there was no impossibility, but the defendants said that, although it was possible it would be dangerous to perform the contract, as the defendants might thereby incur the forfeiture of their whole lease; and *Wedgwood v. Adams*, and other cases, were cited to shew that, under such circumstances, the Court would refuse to decree specific performance. The doctrine upon that sub-

ject was clearly and accurately laid down in that valuable treatise, the *Doctrine of Equity*, by the late Mr. John Adams. There, after referring to specific performance, and stating that it must be really important to the plaintiff and not oppressive to the defendant, the author proceeded to say, p. 83, "If its importance to the plaintiff be shewn, a material step is gained towards obtaining a decree. But the establishment of this fact is not conclusive; for, however important specific performance may be to the plaintiff, yet he has, at all events, another remedy, by damages at law; and it is therefore open to the defendant to contend that a wrong would be inflicted on him, by going beyond the ordinary remedy, greater than would be inflicted on the plaintiff by refusing to interpose." Now, would it, in the present case, be inflicting a greater wrong upon the defendants than upon the plaintiff to protect the right which the plaintiff had asserted and proved? The wrong and injury to the defendants were merely in apprehension; but the wrong and injury to the plaintiff were of the most glaring kind, for it was clear he would be deprived of that very thing to which he was entitled, and it would be left in the possession of the person who had stipulated that it should belong to the plaintiff. A more gross and flagrant violation of justice could hardly be imagined, and nothing but impossibility or illegality could justify the Court in refusing specific performance. As to forfeiture, that was merely in apprehension; but upon what that apprehension was founded did not so clearly appear, for it was not easy to see how the enjoyment of the right claimed by the plaintiff under the terms of this reservation would occasion a forfeiture, or how it could be considered in the light of an alienation at all. The plaintiff was not seeking to have a new title conferred by compelling the defendants to execute a conveyance, but only that they might be prevented by the order of the Court from violating the terms of a clear stipulation into which they had confessedly entered, and by which they had agreed to be bound. Further, the danger they apprehended, if worth attention, was of their own creation. The risk of forfeiture had been created by the deliberate act of the defendants themselves,

having at the time full notice of the stipulation by which they were bound. Upon the whole, he (the Vice Chancellor) was of opinion that the plaintiff had established a case for the protection of his right, and for a declaration by the Court for that purpose.

The declaration would be that, as against the defendants, the plaintiff was entitled to the benefit of the reservation of the box numbered 124, according to the stipulations in the deed of agreement of the 25th of August 1821 in the pleadings mentioned; and that the defendants, and all persons claiming under them, were bound to give the plaintiff and his nominees the occupation of such box, according to the terms of the said reservation, and decree the same accordingly; and there would be an order for an injunction to restrain the defendants, their servants or agents, from taking any step or doing any act which might obstruct the plaintiff and his nominees from occupying and enjoying the box numbered 124, according to the terms of the reservation; and an order that the defendants do pay to the plaintiff the costs, after taxation, of this suit. The decree to be without prejudice to any right which the plaintiff, or any person claiming under him, should assert to compensation, in case it should appear that the benefit and enjoyment of the said box numbered 124, pursuant to the said reservation, should have been lost through the acts of the defendants, or either of them, with liberty to apply; and for an account of all monies received by the defendant Lumley in respect of the rents and profits of this box.

Dec. 21.—From this decision the defendants severally appealed.

The same counsel appeared for the parties.

In addition to the cases cited on behalf of the defendant Lord Ward, his counsel referred to the following:—

Johnson v. the Shrewsbury and Birmingham Railway Company, 3 De Gex, M. & G. 914; s.c. 22 Law J. Rep. (N.S.) Chanc. 291.

Wedgwood v. Adams, 6 Beav. 600.

Croft v. Lumley, 4 Jur. N.S. 903; s.c. 27 Law J. Rep. (N.S.) Q.B. 321.

During the argument *Mr. Reashaw* read to the Court the recitals in the lease of 1845, which are commented on in the judgment.

LORD JUSTICE TURNER asked whether the defendant *Mr. Lumley* was willing to make compensation in money or otherwise to the plaintiff for the loss of the box No. 124.

Counsel for *Mr. Lumley* answered in the negative.

LORD JUSTICE TURNER.—This bill, which is filed by a trustee, under the deed of the 15th of March 1823, claims a right to the possession or occupation of the box, No. 124, in the Opera House, "or, at all events, to an equivalent in money or otherwise for the same, for the residue of the reserved term of years granted by the lease of the 10th of July 1845, pursuant to the covenant or covenants for renewal mentioned or referred to in the contract of the 25th of August 1821, and to sell or let the box, or an equivalent for the same accordingly." Then it prays that an account may be taken of the rents and profits of that box which have been received by the defendant *Lumley*, and seeks to enforce the right of possession and occupation of the box by an injunction to be granted by the Court to restrain the defendants, *Mr. Lumley* and *Lord Ward*, from otherwise dealing with the box contrary to the agreement between the parties. The case arises thus :—In 1792 there was a lease of the Opera House granted to *Mr. Taylor* (under which, in the first place, *Mr. Waters*, and subsequently the plaintiff became entitled), in which certain specified boxes, including No. 124, were prohibited from being leased for any term exceeding from season to season or from year to year. The lessee was to be entitled to let forty-one specified boxes, in which No. 124 was not included, without any such restriction. That lease having become vested in *Mr. Waters*, and there being also covenants for renewal contained in the original lease, *Mr. Waters*, on the 25th of August 1821, contracted to sell to *Mr. Chambers* the interest in the lease, and also the renewed terms. And in that contract there was contained a re-

servation in these terms :—"Subject to the right of possession of the said *Edmund Waters*, his executors, administrators and assigns, to the box No. 124, hitherto usually occupied by him, the said *Edmund Waters*, on the east side of the theatre, or his or their nominees, not exceeding in number six persons nightly during the remainder of the said several terms granted by the hereinbefore mentioned indenture of lease and the terms covenanted by the said indenture to be granted." So that it was reserved to *Waters* on the purchase by *Chambers* for 80,000*l.*, and also he was to have the right of possession of this box, No. 124, to him and his nominees during the term, and during any renewed term to be granted under that lease. *Waters* having that interest, afterwards, by the deed under which the plaintiff has now become a trustee, the deed of the 15th of March 1823, assigned all his interest in the Opera House to *Mr. Alderman Winchester* in trust for his creditors. At the hearing of the cause the Vice Chancellor was clearly of opinion that, as against the defendants, *Mr. Lumley* and *Lord Ward*, the plaintiff, the trustee under the deed, was entitled to the benefit of the reservation of the box No. 124, according to the stipulations of the deed of agreement of the 25th of August 1821, and that the defendants, *Mr. Lumley* and *Lord Ward*, and all persons claiming under them, are bound to give to the plaintiff and his nominees the occupation of it, according to the terms of that reservation. This decree granted an injunction to restrain them from interfering with the rights which the plaintiff was declared to be entitled to, and an account against *Mr. Lumley* of what has been received of the rents and profits of this box, and with a direction as to the payment of the costs of the suit, and a declaration that the decree is without prejudice to any right which the plaintiff would be entitled to in the event of the agreement not being carried into effect, and this appeal is from that decree.

Now, first, it is said that, if the Court enforces a specific performance of this agreement, the consequence will be a forfeiture of the lease, under which the landlord will be entitled to re-enter. No doubt Courts of equity do not in general

grant a specific performance of an agreement on which forfeiture will be the consequence. But when parties set up the consequence of forfeiture as against the right to a specific performance, the Court must be well satisfied, as I apprehend, that forfeiture would follow upon an agreement being decreed to be specifically performed. And I think also the Court must look to the fact, by whose act and by whose conduct that forfeiture would be entailed. The Court, I think, would never permit a defendant to put himself in a position of creating a forfeiture under a lease, and then, by virtue of having acquired that position by his own act, turn round and say, "Now you shall not decree specific performance of the agreement, because I, by my act, have enabled the landlord to enter for a forfeiture if that agreement is specifically performed." I think, that is conduct by a defendant which would prevent him setting up the case of forfeiture as an answer to the plaintiff's case for specific performance of the agreement.

Now, how does this case stand in that point of view? The original leases contained a contract that no boxes, except forty-one, which were specified, should be leased otherwise than from year to year, or from season to season. These leases have expired, and we have, therefore, not to deal with any breach of covenant under them. A new lease was granted in the year 1845, and in that new lease, from the recitals of it which have been read to us by Mr. Renshaw, although they do not appear on the pleadings, I collect that forty-one boxes are not in any way specified, and that the right was reserved to Mr. Lumley to deal with any one of the forty-one boxes which he might think fit to deal with, he having the power of selecting which of the boxes in the Opera House he would take as boxes which he might lease otherwise than from year to year or from season to season. In the year 1845, therefore, Mr. Lumley was in this position: he had a right to select the box No. 124 as one of the boxes which he might lease otherwise than from year to year or from season to season, of which he might make an unlimited lease, extending during the duration of his own term. He, therefore, was in the position in which, by selecting

box No. 124, he might have enabled himself fully to perform the contract which was contained in the reservation of the deed of the 25th of August 1821. He thinks proper, however, to select other boxes than box No. 124, and then, having made his selection, he says, "Now I cannot carry out the reservation which is stipulated for by the agreement of 1821, because I have made my selection of forty-one other boxes, and if I select No. 124 I shall select forty-two, and not forty-one boxes, as the subjects of alienation beyond the period of from year to year or from season to season." If, therefore, there be any forfeiture likely to arise under the covenants contained in the lease, that forfeiture is created by the act of Mr. Lumley, and not by the act of the plaintiff, or by the contract which was originally entered into by the plaintiff. Now, Mr. Lumley, it is admitted, takes with notice of the reservation which was contained in the agreement of 1821, and he, therefore, must be bound by the reservation; and if he has put it out of his own power to perform that reservation, the consequence which ensues must fall not upon the plaintiff, but upon him, by reason of his own act being the cause that he is unable to perform the agreement, if any consequences would arise from the granting of the lease. I am not, however, by any means satisfied that any performance of the contract which is contained in the reservation will in any way be a ground of forfeiture by the landlord (whose rights we can in no way deal with in this suit), for this contract will quite admit of this interpretation: that the lessee was to be entitled to let anybody occupy this box from night to night, during the several successive seasons, and I do not see anything on the face of the agreement which would prevent that. However, at the same time, if there were anything to prevent it, that prevention arises from the act of Mr. Lumley, and not from the act of the plaintiff. I think, therefore, on the ground first insisted on, that the consequence would be a forfeiture of the lease, the appeal cannot be maintained. Then, it is said, that there was, in truth, no such right existing in Mr. Waters at the time when the agreement was entered into; that the true meaning of this agreement

was only to reserve to Mr. Waters such right as he had at the time when the agreement of 1821 was entered into. Now, I think that that argument scarcely requires any answer, for the right which is referred to by the agreement is plainly the right to the possession of that box during the whole of the original and during the whole of the renewed term. Another argument was attempted to be maintained, on this ground: that the intention was simply that Mr. Waters should enjoy permanently the occupation of this box during the terms which are specified in the agreement. The terms of the agreement clearly do not admit of that construction, because it is not only to be occupied by Mr. Waters, but it is to be occupied by his executors, administrators or assigns, or their nominees, not exceeding six persons nightly during the remainder of the term. It is quite clear, therefore, that on the terms of this reservation, Mr. Waters might, if he pleased, have granted to any person a right to enter that box. I do not see anything which restricts the terms on which he could enter, or which would prevent him selling that right if he thought proper so to do. I think, therefore, the two arguments on that point wholly fail. Some argument has been attempted to be raised on the ground of delay, but there has been possession of that property, and enjoyment of it down to 1850. We are here upon a right and interest in real property, and I do not see how it can be said that there is any such waiver or any such delay or any such conduct as could at all displace the right created by that deed, when Mr. Lumley has taken, subject to the right which was thereby created. I think, therefore, that the appeal wholly fails. Undoubtedly we should have been anxious to avoid the possibility of any forfeiture under the lease arising. We should have been anxious to consult the defendants' wishes, if so expressed on that subject, by giving the defendants the right to make compensation, but as they decline to express that wish, the decree must be amended by insisting that "the defendants declining to make the compensation, which is prayed by the bill" (or any other terms expressing that circumstance), the Court declares that as against the defendants, Mr. Lum-

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ley and Lord Ward, the plaintiff is entitled in equity to the reservation mentioned. With that exception, I think the decree is right, and that these appeals must be dismissed with costs; at any rate, the appellants must pay the costs, for as we vary the decree, we cannot dismiss the appeals.

LORD JUSTICE KNIGHT BRUCE.—The decree will be varied as the Lord Justice has pointed out, but not the less is the cause, although elaborately contested, an undefended cause: not less would a single appeal have been frivolous and vexatious, nor the less are the two appeals before us doubly so. Of course, the appellants must pay the costs.

FULL COURT OF APPEAL. 1858. Nov. 23, 24; Dec. 6, 7, 8, 9, 10. 1859. Jan. 22.	}	<i>In re</i> THE ROYAL BRITISH BANK, <i>ex</i> <i>parte</i> NICOL.
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Company—Winding-up Acts—Contributory—Authority of Directors—Fraud.

A chartered banking company were empowered to extend their capital by the issue of new shares. A fraudulent report of the state of the affairs of the bank was made by the directors to a general meeting of the company, and by them adopted. The accounts had been audited by auditors appointed by the shareholders. In pursuance of the desire to have new shares taken, the directors issued a circular, which also contained false and fraudulent representations. N, upon the faith of the report and the circular, and also upon the representation of one of the directors, took shares, and received a dividend upon them. He afterwards employed his broker to dispose of the shares. According to the constitution of the company, the assent of the directors to a transfer of shares was necessary, the evidence of which assent was to be an indorsement on the deed of transfer. The broker employed by the bank purchased these shares, giving the name of E. as the purchaser. The transfer to E. was executed in the form which had been furnished at the bank, with E.'s name

inserted as purchaser. E. was not aware of this transfer, but he had given authority to the principal manager to use his name in transfers, and he had accepted some transfers in which his name had been so used. The purchase-money for N.'s shares was paid by the bank. The next dividend was treated as part of the assets of the bank, and the shares were subsequently found in the principal manager's possession, and given up by him to the solicitor of the bank as part of their property. The bank having stopped payment, N.'s name was sought to be placed on the list of contributories, and it was held, that N. was not exempted from liability by reason of the false representation in the report and the circular, as the directors were not agents of the company for the purpose of making fraudulent representations, or beyond the scope of their authority as limited by the charter; but that the assent of the directors to the transfer of the shares by N. had been sufficiently shewn, and therefore his name must be removed from the list of contributories.

This was an appeal, by the official manager of the Royal British Bank, from a decision of Kindersley, V.C., removing the name of Mr. William Nicol from the list of contributories.

The Vice Chancellor's chief clerk certified that Mr. Nicol ought to be placed on the list of contributories, on the ground, which was the only one taken before him, that there had been no complete transfer of his shares so as to absolve him from his original liability. Upon the question being brought before Vice Chancellor Kindersley, it was insisted, on the part of Mr. Nicol, that he never could have been liable to contribute as a shareholder, as he had been induced to take his shares by the false and fraudulent representations of the company. The Vice Chancellor, on the latter ground only, and following his own decision in *Brockwell's case* (1), and without argument, removed Mr. Nicol's name from the list of contributories. The case was brought before the Court of Appeal and argued, both upon the original agreement for shares and also upon the

question whether, if Mr. Nicol was originally liable, his liability had not altogether ceased by the transfer he had made.

Mr. Nicol became the proprietor or allottee of twenty shares in the Royal British Bank, on the 8th of March 1855, on the faith, as he alleged, of the report of the company of December 1854, and of a circular issued by the directors, dated the 6th of March 1855, and also of the representations of Mr. Alderman Kennedy, one of the directors. On the purchase of the shares he paid a deposit of 10*l.* a share, amounting to 200*l.*, and afterwards paid other sums upon them, amounting in the whole to 50*l.* on each share. The shares so purchased by Mr. Nicol were part of the shares authorized by a supplemental charter, procured by the company in February 1855, which empowered the bank to raise additional capital, by the issue of new shares. Mr. Nicol after his purchase executed the supplemental deed, which referred to and incorporated into it the terms and provisions of the original deed. He received a dividend on his shares in January 1856, which he retained and never offered to return. In the month of February 1856 he employed Mr. Braddock, a broker, to sell his twenty shares, and Mr. Braddock sold them accordingly to another broker, named Scott, who acted for the buyer. The shares were, in fact, bought by the order of Cameron, the manager of the bank, on account of the Royal British Bank, the name of Mr. Empson being used by him, and given to his broker as the buyer. Mr. Empson was a solicitor, and was the London agent of the solicitor of the bank. He had some time before these transactions been informed by Mr. Cameron that the bank had taken certain shares, which it would be a convenience if he would permit to be transferred into his name on behalf of the bank, and Mr. Empson consented, on the understanding that he was not to be treated by the company as the holder or owner of the shares. A share account was opened in Mr. Empson's name in the bank books, which contained a regular debtor and creditor account of the shares bought and sold, and he was from time to time called upon to execute, and he did execute, the transfer of some of the shares.

(1) 4 Drew. 205; s. c. 26 Law J. Rep. (N.S.) Chanc. 855.

The money which was paid to Mr. Nicol for the purchase of his shares was supplied to the broker out of the funds of the bank; and from this source Mr. Nicol received the price of his shares, amounting to 1,000*l.*, which he had never returned. There was a share account of Mr. Nicol in the books of the bank, but no entry was made in it of the transfer of his shares. There now appeared written in pencil against the shares "query—transferred to the bank," but no evidence was offered as to the time when those words were added. In Mr. Empson's account these twenty shares were nowhere to be found, the last entry of his account being of the date of January 1856, and the alleged transfer of the shares having taken place in the following month. There was no direct evidence of any express consent having been given to this transfer by the directors, nor of its having been submitted to them for their approval; but one of the questions discussed was whether there were not circumstances from which that consent might be reasonably, if not strictly, inferred. After the transfer by Mr. Nicol, a dividend having been declared, the dividend warrant of the shares was made out in the name of Cameron, but the amount of the dividend was carried to the credit of the bank in an interest account.

The bank stopped payment in September 1856, and an order was obtained for winding up its affairs under the Winding-up Act.

The Attorney General, Mr. Glasse and Mr. W. D. Lewis, for the official manager, the appellant. — Whatever might have been the fraudulent misrepresentations upon which Mr. Nicol took these shares, whether made by the circular and reports of the directors, or by Mr. Kennedy in his conversation with Nicol, the company was not responsible for them, and, therefore, Mr. Nicol's contract with the company, in respect of these shares, could not be treated as void. The directors were the agents for the company, but could not be considered as such for the purpose of committing a fraud.—

Parbury's case, 3 De Gex & Sm. 43.

Dodgson's case, Ibid. 85.

Sharpus's case, Ibid. 49.

Bernard's case, 5 De Gex & Sm. 283; s. c. 21 Law J. Rep. (N.S.) Chanc. 468.

Lord Mansfield's case, 3 Ibid. 58; s. c. 2 Mac. & G. 57.

Bell's case, 22 Beav. 35; s. c. 26 Law J. Rep. (N.S.) Chanc. 137.

Holt's case, 22 Beav. 48.

Powis v. Harding, 1 Com. B. Rep. (N.S.) 533; s. c. 26 Law J. Rep. (N.S.) C.P. 107.

The National Exchange Company v. Drew, 2 Macqueen, 103.

In the latter case, at p. 136, Lord St. Leonards' observations were here applicable, to shew that the charges of fraud should be more definite than the evidence in this case endeavoured to establish, as that on which the respondent acted. His Lordship said, "We do not admit of general charges of fraud as even a defence, but we expect a party to set forth what is the precise ground upon which he makes out the fraud. For example, in a court of equity a man cannot simply say that he has been deceived and defrauded, but he must tell the Court how he has been deceived and defrauded; and then the Court is enabled to form its own judgment whether the facts alleged do make out the alleged fraud or not." But if it were assumed that the directors were the agents of the company, and that through their misrepresentations Mr. Nicol had entered into the contract, the contract, at best, was voidable only, and not void. Mr. Nicol had done nothing to repudiate the contract, but he had accepted dividends and otherwise taken the benefits of the contract, so that other interests had become involved and other rights had arisen which could not now be repudiated. There were cases at law which shewed that independently of any knowledge or notice of fraud, a voidable contract could not be repudiated after the rights of other persons had become involved. If a man became a member of a joint-stock company, and his deposit formed part of the capital of which his contract authorized the publication to the world, and others had acted upon the faith of his being a shareholder, his contract could not then be avoided, and that upon the fraud of six or seven persons happening to fill the office of directors.—

The Deposit and General Life Assurance Company v. Ayscough, 6 E. & B. 761; s. c. 26 Law J. Rep. (N.S.) Q.B. 29.

Daniell v. the Royal British Bank, 1 Hurl. & N. 681.

Henderson v. the Royal British Bank, 7 E. & B. 356; s. c. 26 Law J. Rep. (N.S.) Q.B. 112.

Clarke v. Dickson, 27 Law J. Rep. (N.S.) Q.B. 223.

It was also to be remembered that after Nicol became a member of the company, equally false representations were made, by which, if the company were bound by them, he, as one of the company, was bound. As to the alleged sale, there was no assent of the directors to the transfer as required by the 10th article of the deed of settlement, recited in the charter, which article had been framed pursuant to the 23rd section of the 7 & 8 Vict. c. 113 (2). Empson, also, the alleged transferee, knew nothing of the transaction. Any right against Empson might or might not depend upon his knowledge, but as to any rights affecting the bank, Empson's knowledge was immaterial.—

Shaw v. Fisher, 2 De Gex & Sm. 11.

Wynne v. Price, 3 Ibid. 310.

Jacques v. Chambers, 4 Rail. Cas. 499.

If Empson did not give the necessary

(2) The 10th, 11th and 17th sections of the deed of settlement, as recited in the charter, were as follows:—

10. That it should be lawful for every proprietor and every person claiming in his or her right in any way howsoever, with the consent of the court of directors, to sell and transfer by deed duly stamped, in which the consideration should be truly stated, the shares to which he or they should be entitled, or any of them, to any person or persons, subject nevertheless to the conditions or restrictions therein contained, and that the same, when duly executed, should be delivered to the secretary or other proper officer of the company, and be kept by him, and that he should enter a memorial thereof in a book to be kept at the said banking-house aforesaid, and to be called "The Register of Transfers," and should indorse such entry on the deed of transfer, and that for every such entry and indorsement the company should be entitled to 2s. 6d., and that such deed so indorsed should be sufficient evidence of the consent of the court of directors.

11. That the person or persons proposing to make any transfer of shares, or the person or persons to whom the same was proposed to be made, should, seven days at the least before the making or executing any such transfer, deliver to the court of

authority, there was an end of the question of transfer.—

Walton and Hue's case, 26 Law J. Rep. (N.S.) Chanc. 545.

Chartres' case, 1 De Gex & Sm. 581.

In all the cases as to the validity of the transfer of shares, the distinction was drawn between the provisions which were considered to be of substance and those which were of form only. In the present case, the forms which had not been observed were clearly substantial and most important.

Mr. Giffard appeared for the creditors' representative, and proposed to argue in favour of the appeal; but

Their LORDSHIPS considered that he could not be heard.

The Solicitor General and *Mr. H. Stevens*, for Mr. Nicol.—The questions to be considered were: first, whether or not the original taking of these shares by Mr. Nicol was under circumstances which would enable him to refuse any further contribution; and, secondly, if the former question were determined against the respondent, whether he had not effectually transferred his shares. First, the fraudulent representations were contained in a circular by the directors of the 6th of March 1855, and the report of December 1854. The representations contained in those documents had been abundantly shewn in the proceedings connected

directors, at the head banking-house aforesaid, a notice in writing, specifying the number of shares proposed to be transferred, and the name or names, residence or rank, profession or trade (and if representatives their character or title as such) as well of the person or persons so proposing to transfer as of the person or persons to whom such transfer was proposed to be made, and the price or consideration (if any) proposed to be given for the same.

17. That whenever any shares should become forfeited, or duly and effectually transferred to or vested in a new proprietor, qualified to hold the same, the former proprietor, except as thereafter provided, be freed and released from all future responsibility and obligations to the company in respect of such shares, and exonerated and discharged from all subsequent claims and demands of the company in such respect, and from all future observance and performance of the covenants, conditions, stipulations and agreements in the now being recited or in any supplemental deed contained, and that the person to whom any transfer should be made should take the shares subject to the obligations of the person transferring the same.

with the Royal British Bank to be false and fraudulent. The representations made by Alderman Kennedy to the respondent were in accordance with these documents, and not contradictory. Were, then, the statements in these documents the statements of the individuals who were the directors, or were they the statements of the company? It was the business of the directors to make reports to the shareholders; and any act done by them in discharge of that duty, when acquiesced in and sanctioned by the company, became the act of the company, and ceased to be the mere act of the directors. It was said that the directors were not the agents of the company to commit a fraud; but if a person employed an agent, and the agent, in the necessary transaction of the business, committed a fraud, the employer was responsible. In *Ranger v. the Great Western Railway Company* (3), Lord Cottenham said:—"Strictly speaking, a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." The accounts in this report were signed by the auditors, who were appointed by the shareholders, not by the directors. There were two cases which shewed how far agency might be considered to go: *Burnes v. Pennell* (4) and *The National Exchange Company v. Drew*. In the latter case Lord Cranworth (p. 126) said:—"For the present purpose I will assume that, in order to raise the value of the shares, the company fraudulently misrepresented the real state of the concern, the real amount of its assets, and the real amount of the demands upon it. The question is, what is the consequence of the company receiving such a report (if you can separate the company

from the directors) and publishing it to the world? I confess that, in my opinion, from the nature of things and from the exigencies of society, that must be taken as between the company and third persons as a representation by the company. The company, as an abstract being, can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently (for I assume this to be so), for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company. Otherwise, companies of this sort would be in this extraordinary predicament: that they might employ, nay, must employ agents to carry on their concerns, and that those agents might make representations, be they ever so false and ever so fraudulent, and yet, nevertheless, that the company might and must benefit by those misrepresentations, without being at all liable to be told, that is your fraud. It was plausibly argued that these reports were not made *by* the company, but *to* the company. In form, that is so; no doubt they are reports made to the company. But I assume for the present that they were made to the company under such circumstances that what they so report is known, and intended to be known, not only to the shareholders, but to all persons who may be minded to become shareholders, just the same as if they were published to the world. I repeat that I think the exigencies of society demand that the reports so made and so circulated should be deemed the reports of the company." Lord St. Leonards' observations also in that case were to the same effect. Different considerations might apply to the circular and to the report; but on the authorities cited, it was submitted that the company was answerable for the fraudulent statements in the report. If, however, there were a doubt as to the report, there could be none as to the circular of March 1855. The directors were authorized to take the

(3) 5 H.L. Cas. 72.

(4) 2 Ibid. 497.

necessary steps for selling shares; and in doing so they had made a fraudulent statement, for which the company, whose agents they were, must be responsible. As an objection why relief should not be given to the respondent, it was said that this contract was with other persons, some of whom were innocent; and therefore the contract could not be set aside. This must refer either to innocent persons who afterwards became shareholders, or to persons who, at the time the shares were taken, were innocent of the fraud. If the objection referred to the former class, it was denied that the contract was entered into with them; the contract was simply with the company as it then stood. Then, as to shareholders at the time of the contract, who were innocent, that was reviving the discussion whether the company were bound by these statements of the directors. It was the duty of the directors to make a true statement; but it was in their power to make a false statement. The respondent had a right to defend himself against any alleged liability under the contract, and to proceed against the company for deceit.

[The LORD CHANCELLOR referred to *Pilmore v. Hood* (5).]

But this circular was intended to be delivered to every person: The cases which were said to be against the respondent were mainly decided with reference to the prospectuses and representations of incipient railway companies and provisional committees; but these had not the remotest analogy to an incorporated company acting by its directors. No case had been cited in which shareholders, having been induced to take shares by the misrepresentation of directors, had been refused relief or held bound. As to the rights of innocent persons, who might have been induced to take shares after the respondent's name appeared as a shareholder, the onus lay on the appellant to shew that there were any such. In reply to the argument as to the contract having been confirmed by the respondent, it was sufficient to say that he had not confirmed it after the fraud had been discovered. Neither the receipt of dividends nor the dealings with Empson could be treated as

(5) 5 Bing. N.C. 97; s. c. 8 Law J. Rep. (N.S.) C.P. 11.

a confirmation, as at that time the respondent was not cognizant of the fraud.—

Wilde v. Gibson, 1 H.L. Cas. 605.

Blake v. Mowatt, 21 Beav. 603.

Then as to the transfer, the evidence as to Empson's acceptance was shewn by the general authority given by him to Cameron. The assent of the directors must, under the circumstances, be assumed. The names of the vendor and purchaser were sent to the office; the transfer clerk returned the form of transfer, with the purchaser's name filled in. The money of the bank, under the controul of the directors, was paid for the shares. Scott, the broker for the bank, paid the amount, entered it in his accounts, and this item was allowed in his accounts with the bank. After the transfer a dividend was declared, and the bank took possession of it, and treated it as part of the assets; and this was passed by the auditors, who were appointed by the shareholders themselves. Unless, therefore, there was knowledge on the part of Nicol, he had nothing to do with the appropriation of the shares. No memorial, which was to be prepared by the directors, returned the name of Nicol; but in 1856 Cameron absconded, and Mr. Paddison then, on behalf of the directors, obtained from him these shares. The assent, therefore, of the directors was proved, though not by the certificate required in the 10th article. Where substantially it was shewn that the assent had been given, the form would be dispensed with.—

Watson v. Eales, 23 Beav. 294; s. c.

26 Law J. Rep. (N.S.) Chanc. 361.

Gordon's case, 3 De Gex. & Sm. 249.

Maguire's case, Ibid. 31.

—As to the 17th section of the charter, they referred to—

Cockburn's case, 4 De Gex & Sm. 177

(6).

The Attorney General, in reply.—The result of the evidence was, that the directors did not give their assent to the transfer, but that they did not know of it until Empson applied to them for indemnity,

(6) Before the conclusion of *Mr. H. Stevens's* address, upon the application of *The Attorney General*, Mr. Empson was cross-examined upon his affidavits, and re-examined.

and then they refused indemnity and repudiated the transaction. The consent was to be a personal consent of the directors, exercising a discretion for the benefit of the shareholders; and therefore any subsequent consent was not sufficient.

Jan. 22.—The LORD CHANCELLOR (after stating the case) said:—Upon these facts, three questions have been raised: first, was Mr. Nicol induced to become a shareholder in the bank by such fraudulent representations as to entitle him to repudiate his contract? if so, secondly, has he, by any act which he has done, or by any *laches* of which he has been guilty, estopped himself from not insisting upon the fraud? and in the event of the first question being decided against Mr. Nicol, upon which the second depends, thirdly, has Mr. Nicol divested himself of his original liability by the complete transfer of his shares?

Upon the first question the Attorney General contended, that Mr. Nicol, having once taken shares, was absolutely bound under the definition of the word "contributory" in the 3rd section of the Joint-Stock Companies Act, 1848, as he thereby became a member of the company, or, at all events, liable to contribute to the payment of the debts due to the creditors of such company. Of course, if it is a fraud which vitiated the contract, to say that Mr. Nicol is not a contributory is the same thing as to say that he is not a member of the company for the purpose of contributing; but although he might not be able to exonerate himself from liability to creditors, yet I think the words "liable to contribute to the payment of debts," &c. applies to the members of the company *inter se*, and is not meant to apply to the liability to creditors, the original form of expression indicating that it is intended to include those only who were bound with others in mutual obligations to settle and discharge the debts. If this case could be disposed of by a summary appeal to the interpretation clause in the act, a great deal of time must have been unnecessarily consumed in this case in which shares having been taken in a public company, the holders would have endeavoured to avoid their liability to contribution on the

ground of the purchase of the shares having been induced by fraud. This question cannot, therefore, be determined without considering the question, whether Mr. Nicol has receded from the ordinary liability as a shareholder by reason of the fraudulent representations alleged to have been made to prevail on him to purchase shares in the bank. For this purpose it becomes necessary to ascertain precisely what are the representations upon which Mr. Nicol relies. According to his further affidavit, he states that he was furnished with, before he purchased, a printed copy of the report and balance-sheet of the bank ending December 1854, and a circular letter of the directors of the 6th of March 1855. It was admitted that these documents contained false and fraudulent representations of the state of the bank; but Mr. Nicol having stated in his evidence that the reports and accounts, joined with Mr. Alderman Kennedy's importunities, were the inducements upon which he took the shares, it was contended that the influence exercised over his mind was not due to the reports and accounts only, and as he had not distinguished how much ought to be attributed to Alderman Kennedy's importunities, and how much to the reports of the directors, he failed to prove that he was drawn in to purchase the shares by the false representations of the directors alone, which was essential to entitle him to rescind the contract. But supposing the reports and other statements formed a material portion of the inducement to him to take the shares, without which that purchase never would have been made, I cannot think that the effect of them is destroyed, because other influences were at the same time at work, which either incidentally or intentionally contributed to the success of those false representations. It will be better, therefore, in the first place, to treat the case as if the report of December 1854 and the circular letter of March 1855 were the only representations by which Mr. Nicol was persuaded to take shares in the bank, which will enable me to consider the effect of the false and fraudulent representations made by the directors of the company, upon the contract of a person who was induced by them to become a shareholder. Unfortunately, this case is

not in a satisfactory state upon the authorities. The Vice Chancellor proceeded in this case entirely upon his own previous decision in *Brockwell's case*. He there held, that the very report of the directors of December 1854, upon which Mr. Nicol partly rests his objection to liability as a shareholder, must be considered as the representations of the company, and that Mr. Brockwell having taken his shares in reliance upon the representations made in that report, and they being false, and in that sense fraudulent, he ought not to be placed on the list of contributories. His Honour treated this question as settled by the decisions of the House of Lords, or rather by the opinions expressed by the Lord Chancellor and Lord St. Leonards in giving their reasons—for that is the more correct way of putting it—in the case of *The National Exchange Company v. Drew*. I shall have occasion presently to consider the effect of this decision as a binding authority upon this point, but in the mean time I must observe that the opinion expressed by the Vice Chancellor in *Brockwell's case*, and applied by him to this case, is not to be reconciled with some previous decisions in the Court of equity. In *Dodgson's case* the present Lord Justice, then Vice Chancellor Knight Bruce, said, "the directors only are liable for their conduct: if Mr. Dodgson could associate the whole body in any plan to entrap him into taking shares, I should probably know what to do with such a case;" and, again, in *Bernard's case*, he supported his opinion previously expressed in *Dodgson's case*, that the directors cannot be the agents of the company to commit a fraud. In *Parbury's case* a new ground for holding a party who had taken shares in a company to be liable was adopted, that the false and fraudulent representations relied upon were contained in the prospectus of the company, which was, in fact, an invitation to the public to join the undertaking, and was the inducement to Parbury to take his shares, and the Vice Chancellor said, "If in this company there are persons in a similar situation to his, and equally innocent with him, he is liable to contribute equally with them. It seems to be a just inference that there were various persons in the same situation with Mr. Par-

bury, and as innocent as himself, and I cannot hold that he is not a contributory. If it were established that the only other persons interested in these affairs were the persons who made the alleged misrepresentations, the case might be different." It was upon this last ground that the Master of the Rolls decided *Bell's case*, which he afterwards explained in *Holt's case*. In *Bell's case*, after the company had suspended business, and was known by all to be in an insolvent state, circulars were issued containing misrepresentations, and offering advantages to canvassers for obtaining other persons to become shareholders. His Honour thought, and no doubt correctly decided, that this was a fraud committed by the company to induce the public to share in the losses; that it was the act of the whole company and of all the shareholders. But with reference to the effect produced upon the individual party by other innocent persons in a similar predicament, the Master of the Rolls, in the argument addressed to him in *Bell's case*, considered that none of the shareholders who became such in consequence of the misrepresentation could be compelled to contribute. Vice Chancellor Kindersley, in *Brockwell's case*, in answer to a similar argument, said that this might be a ground for entitling the other shareholders to be discharged from their liability, but it could not have the effect of continuing Brockwell's liability. I own I should feel great difficulty in holding Mr. Nicol to be a contributory on this ground, because if other innocent persons were prevailed upon to join the company by fraudulent misrepresentations similar to those which induced him to take his shares, they would be equally entitled if they pleased to exonerate themselves from liability, and if they abstained from doing so that could be no reason why a person should be made a contributory who chooses to rely upon the fraud which vitiated his contract. I pass by several cases cited, because in them the alleged misrepresentations were made by individuals, and could in no sense be regarded as the act of the company. I proceed at once to consider, whether the decision in the case of *The National Exchange Company v. Drew* has concluded this question in Mr. Nicol's favour. Of course,

if the House of Lords has determined that directors making fraudulent representations whereby persons are induced to become shareholders in a company, are to be considered agents of the company for this purpose, every Court in the kingdom is bound by that decision; but upon a careful examination of the report of that case, I do not find those were the grounds upon which the House proceeded, or that it was necessary to the conclusion at which it arrived. The proceedings in that case were in the Court of Scotland, for the purpose of recovering the amount alleged to have been advanced by the company to the defenders for the purchase of certain shares in the company,—what is called in this country an action for money lent. It appeared that the affairs of the pursuers were in a desperate condition, and the defenders, being already shareholders, were solicited by the manager, with a view of raising the price of shares, to purchase additional shares, he assuring them that the company would advance the necessary funds for purchasing the shares, and that the stock would be held until it could be sold at a profit without the defenders being called upon for any contribution in money. Lord Chancellor Cranworth was of opinion that, quite independent of the question of fraud, a reasonable defence was stated which entitled the defenders to resist the demand, for that in his opinion, there was no loan at all, and, of course, if there was no loan no action could be brought to recover back the money alleged to have been lent. Lord Brougham concurred with the Lord Chancellor, although not without great difficulty, and Lord St. Leonards, although differing from the two other noble lords, so far as to consider there was a loan, yet thought the loan and purchase one transaction, and, consequently, that there was no separate and independent advance of money that the company was entitled to recover back. It is obvious that the question of agency of the directors is not involved in the decision of that case, and that the opinions expressed on the subject may be regarded as extra-judicial. Those opinions, however, are very strong, and although not binding as authorities upon my judgment, are entitled to the greatest respect and deference. Lord Cranworth

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said, “for the present purpose I will assume that, in order to raise the value of the shares, the company fraudulently misrepresented the real state of the concern, the real amount of its assets, and the real amount of the demands upon it. The question is, what is the consequence of the company receiving such a report (if you can separate the company from the directors) and publishing it to the world? I confess that, in my opinion, from the nature of things and from the exigencies of society, that must be taken as between the company and third persons as a representation of the company. The company, as an abstract being, can represent or do nothing. It can only act by its managers. When, therefore, the directors, in the discharge of their duty, fraudulently (for I assume this to be so) for the purpose of misleading others as to the state of the concerns of the company, represent the company to be in a different state from that in which they know it to be, and the persons to whom the representation is addressed act upon it in the belief that it is true, I cannot think that society can go on without treating that as a misrepresentation by the company. Otherwise, companies of this sort would be in this extraordinary predicament: that they might employ, nay, must employ agents to carry on their concerns, and that those agents might make representations, be they ever so false and ever so fraudulent, and yet, nevertheless, that the company might and must benefit by those misrepresentations, without being at all liable to be told, that is your fraud.” And Lord St. Leonards said, “Now I have certainly come to this conclusion, that if representations are made by a company, fraudulently, for the purpose of enhancing the value of their stock, and they induce a third person to purchase stock, those representations so made by them for that purpose do bind the company; I consider representations by the directors of a company as representations by the company, although they may be representations made to the company: it is their own representation.” To these opinions must be added the weight of Lord Campbell, in the case of *Burnes v. Pennell* and *The Deposit and General Life Assurance Company v. Ayscough*. It is unnecessary

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for me to say that it is with the greatest distrust of the correctness of my own judgment I venture to differ with so many high authorities, but after a careful and repeated consideration of the subject I am compelled to take a different view of the relation which exists between the directors of a company and the shareholders. The difference between joint-stock companies and an ordinary partnership is clearly pointed out by Lord Campbell, in the case of *Burnes v. Pennell*, and also by Lord Wensleydale in a recent case in the House of Lords—*Ernest v. Nicholls* (6). The law of ordinary partnership, so far as relates to the power of one partner to bind another is, as Lord Wensleydale says, a branch of the law of principal and agent, but to apply that law and carry it throughout as regards the relation between the directors and shareholders of a company would lead to innumerable difficulties. To illustrate my meaning, I will take the present case of a banking company, incorporated under the provisions of the 7 & 8 Vict. The deed of partnership is required to contain, amongst other provisions, one for the management of the affairs of the company by directors. In other words, the powers and authorities to be exercised by the governing body are to be limited and defined by the deed, and it is further required by the act that the deed shall contain a provision for the yearly communication of the directors' report and balance-sheet, and the profit and loss account to every shareholder: the object of this of course being that each shareholder may be made acquainted with the state and affairs of the bank. Every person, therefore, dealing with the directors, or acting upon any statements they may publish, has notice by the act of parliament that they possess only a restricted authority, the extent of which by proper inquiry may be ascertained. He would know with respect to the reports of the directors and the balance-sheets that they were only for the information of the shareholders, and that if the directors publish them to the world they are doing an act which cannot be an exercise of the powers conferred on them, but that they are thereby exceeding the limits of their duty. Supposing that

after having deceived the shareholders with false reports, the directors thought proper, either for the more speedy communication of them to shareholders at a distance, or for the purpose of attracting public attention to the flourishing state of the affairs of the company, to circulate those statements by means of the newspapers through the country, is it to be said that each and every person who is to be attracted by the publication, and tempted by it to become a shareholder, may afterwards charge the company with deceit practised upon him individually, and repudiate his liability on that ground alone? If the proposition can be maintained to this extent, can you stop short of holding that the directors are in all respects and to all intents and purposes the company, and that, whether they act honestly or fraudulently, within the limits of their duty or beyond it, it is the company acting throughout? Can a person then who has trusted to the reports, and has bought shares in reliance upon their truth, maintain an action for damages for any loss he may sustain by his contract against the company?—or if an innocent shareholder has ordered shares to be sold by his broker, and the purchaser was influenced by the false reports of the directors to become a purchaser, can he rescind the contract on the ground of the false representations? The Master of the Rolls answers, in *Duranty's case* (7), that he cannot; but if the principle that the statements of the directors are those of the company, is to govern this, then each member of the company is party to the false representation, and a contract induced by it cannot be maintained. If this is the law, it is in vain that the shareholders should try to bind the hands of the directors by carefully specifying the powers to be exercised in the direction of the company. The moment they invest them with the managing authority, they are at the mercy of every act they may do in their official character. I cannot help thinking that the true principle will be found to be, that in all cases, except such extreme cases as that of *Bell's*, where the whole company was considered to have been party to the fraud, if the directors, in the course of the performance of

(6) 6 H.L. Cas. 401.

(7) *Ante*, 37.

their duty, make any false or fraudulent representations to the shareholders, and afterwards think proper to give them unauthorized circulation beyond the limits of the company, a stranger who chances to act upon them, and suffers loss in consequence, must either submit or bear what his own voluntary acquiescence in representations which are not addressed to him has brought upon him; or, if he has any remedy at all, it must be against those who, seeking to deceive the public generally, have entitled him to make a case against them out of his own individual deceptions as one of the public. But, assuming that the representations of the directors, although beyond the scope of their authority, must in all cases be taken as those of the company, and may be adopted against them by any person who meets with them in the mode of publication that the directors have sanctioned, Mr. Nicol's case falls short of proof of this description, and contains nothing to shew that any representations were made to him, or authorized to be made to him by the directors, by means of any such publication. It was through Alderman Kennedy that he became acquainted with the report and the circular, for he says that it was on the representations made to him by Alderman Kennedy that he was induced to take shares in the concern, that is to say, upon the representations as to the soundness and prosperity of the concern in the printed papers which he handed to him. It is possible that but for this introduction of them to his notice, he might never have seen the report and the circular letter at all; and in order to make this communication the act of the directors, it is necessary for Mr. Nicol to prove that Alderman Kennedy acted with their authority and their knowledge and sanction, according to the case of *Pilmore v. Hood*, which I mentioned in the course of the argument. But there is not the smallest proof of any authority given by the directors to Alderman Kennedy to communicate this document, either generally or to Mr. Nicol in particular, or any knowledge by them of any such communication having been made. Now, the case is, therefore, like that of *Holt's case*, and nothing more than a representation by an individual director,

for which he might be responsible, but which could not be considered as an act of the company, upon which alone Mr. Nicol would be entitled to be relieved from being a contributory on the ground of fraud. But even if he established the fraud against the company, still he would preclude himself from taking advantage of it in consequence of the stage at which the affairs of the company had arrived before he attempted to avail himself of it. If a fraud was practised upon him, it was at his own option to use it, as Lord Campbell said, in the case of *The Deposit Assurance Company v. Ayscough*, "It is now well settled that a contract tainted by fraud is not void, but only voidable at the election of the party defrauded." But Mr. Nicol never, until the last moment, attempted to repudiate his contract: he received a dividend on his shares, which was a benefit to him, out of the common fund, to the prejudice of the other shareholders, and he dealt with the shares so vested in him, and sold them in the market, receiving the purchase-money. The stoppage of the bank happened, and found him in this position. The petition for winding up was presented, and still he did nothing, relying upon what he had done to divest himself of the shares; and it was not until he was sought to be made a contributory that he brings forward his great case of fraud, which he had permitted to lie dormant so long, that, no doubt, he had precluded himself at law from availing himself of fraud, as appears from the case of *The Deposit Life Assurance Company v. Ayscough*, and more clearly from *Clarke v. Dickson*, where it was held, that the doctrine of repudiation cannot prevail where a man, by his own act, has put it out of his power to place parties in the same position they were in at the time the contract was made. Mr. Nicol might, within reasonable time after he had discovered the fraud, have filed his bill and offered to return the dividend and claimed to avoid the contract *ab initio*. But I do not think, either at law or in equity, a person who has a knowledge, or means of knowledge, that a fraud has been committed, can be permitted to hold his shares down to the time when the business of the company is at an end, and its affairs are

about to be wound up under the act of parliament, and then for the first time seek to discharge himself upon this ground from all liability as a contributory. Mr. Nicol, then, not being able to avail himself of any misrepresentation to avoid the contract, or having lost his opportunity of doing so by delay, his liability must continue, unless he has divested himself of it by some transfer of his shares to some other person; and whether he has done so or not is the last question to be considered. Although it should appear to the Court that Mr. Nicol has completely transferred his shares, although he is not to be held as a contributory, the previous considerations as to original liability are not altogether unnecessary, as under certain circumstances specified in the Joint-Stock Companies Banking Act, Mr. Nicol might continue liable on his shares for three years from the time that he ceased to be a shareholder. In considering the question of the transfer, I should not consider it necessary to go into the different provisions of the act of parliament to which the attention of the Court was directed, because it appears to be conveniently determined upon the requisitions of the deed of settlement alone. The clauses which regulate the transfer of shares are the 10th and 11th. The 10th clause enables "every proprietor of shares and every person claiming in his or her right in any way howsoever, with the consent of the court of directors, to sell and transfer." Then the 11th clause requires "that the person or persons proposing to make any transfer of shares, or the person or persons to whom the same was proposed to be made, should, seven days at the least before the making or executing any such transfer, deliver to the court of directors, at the head banking-house aforesaid, a notice in writing, specifying the number of shares proposed to be transferred, and the name or names, residence or rank, profession or trade (and if representatives, their character or title as such) as well of the person or persons so proposing to transfer as of the person or persons to whom such transfer was proposed to be made." It is unnecessary to consider the authorities which were cited, on the provisions of this description in the deed of settlement of the company, establishing, first,

the distinction between what is formal and may be dispensed with, and what is substantial and must be complied with, because there can be no doubt, that if the consent of the directors to the transfer of shares is required, that is intended as a protection to the shareholders against the introduction of improper persons into the company; and, therefore, without such previous consent, no valid transfer can be made. Before considering the evidence that establishes this consent, it would be necessary to ascertain whether there was a proper transferee of Mr. Nicol's shares. The transaction, by which the company are stated to be the transferee of these shares through Mr. Empson, was illegal, and contrary to the provisions in the deed of settlement; which in this respect is founded on the 7 & 8 Vict. c. 113. s. 4. art. 5. But Mr. Nicol knew nothing of the private arrangements between Mr. Cameron and Mr. Empson; and, through his broker, dealt with Mr. Empson as the real purchaser. Mr. Empson allowed his name to be used in these transactions; and the only consequence of the illegality of them would probably be to make him the responsible holder of the shares. As far as that was concerned, the transaction was completed; and it is immaterial that it is not noticed in Mr. Nicol's share-account as the one made in Mr. Empson's name. He had originally given his consent to his name being used in the purchase of shares for the company. He had recognized the transaction by transferring the shares which had been so purchased. He had never withdrawn the consent originally given; and under these circumstances, it was quite unnecessary for him to give express sanction to this particular transaction, in order to render it complete as a purchase by him. Mr. Nicol, therefore, had transferred to Mr. Empson, and he had accepted the transfer; and to render it effectual it was only necessary that the consent of the directors should be given. No formal consent is prescribed by the deed; and therefore anything from which it may be inferred that consent must have been given will be sufficient. The arrangement for the purchase of shares in Empson's name was made by Cameron, who was the general manager of the

company, and conducted all its business and affairs under the superintendence and controul of the directors. By the 18th clause of the deed of settlement, the entire, sole and exclusive controul, management and disposal of the funds of the company are vested in the directors. No agreement for the purchase of shares in the company could have been entered into on their behalf by Mr. Cameron without their sanction or knowledge. No portion of the funds, for the purpose of being applied to shares, could be obtained without their authority, for they possessed the exclusive controul and disposal of the funds; and it seems impossible to come to any other conclusion than that they were consenting parties to that transaction, and not only consented to it, for without their having authorized the application of the fund it could not be carried into effect; and if further evidence of their consent were wanting, I think it would be found in their receipt of the dividend, which was paid after the transfer of the shares by Mr. Nicol, the dividend warrant for which was made out in the name of Cameron, and the amount carried to the credit of the interest account in the books of the company, which so became part of the funds at the disposal of the directors. I entertain no doubt that these circumstances supply ample evidence of the requisite consent of the directors, and that the transfer of Mr. Nicol's shares, being in all other respects complete, he had ceased to be a shareholder at the time of the stoppage of the bank; and upon these grounds alone, I am of opinion that his name ought not to be placed on the list of contributories, and that the appeal ought to be dismissed.

LORD JUSTICE KNIGHT BRUCE.—Had it, in my opinion, been necessary, in order to arrive at the conclusion reached by the learned Vice Chancellor, to take the ground taken by that able Judge, I should at least have hesitated before doing so. With deference to him, I acknowledge myself not persuaded, not satisfied with its stability. I agree, however, with the Lord Chancellor in thinking that his Honour's orders should be affirmed, for another reason, namely, on the ground of the consent of Mr. Empson and the court of directors to the transfer made by Mr. Nicol to Mr.

Empson. The evidence satisfies me that before the stoppage of the company Mr. Empson sanctioned and acceded to the use of his name in the transaction, and became accordingly the purchaser and owner of the shares in question, the directors, as directors, having also before the stoppage, as the evidence convinces me, consented to the sale and purchase. It is not material for any present purpose whether it was with an improper view or an illegal object, that the purchase was made by Mr. Empson, or in his name, or was on the part of the directors, or any of their officers, consented to, for neither Mr. Nicol nor his broker appears to have been aware, or to have had notice of any such improper view or illegal object. I think that the order under appeal cannot be disturbed.

LORD JUSTICE TURNER.—There are two questions in this case: the first, whether the respondent, Mr. Nicol, was bound by his purchase of the shares in the bank; and, secondly, whether, if he was bound by his purchase of the shares, he was discharged by the sale of them. The decision of either of these points in favour of the respondent would dispose of the case; but both the questions were fully argued at the bar, and are of so much general importance, that I think it better to state my opinion upon both questions.

As to the first question, the respondent's argument, that he was not bound by his purchase of these shares, rested on this ground: that he was induced to purchase them by false and fraudulent representations affecting their value, made to him by or on the part of the directors of the company. The directors, it was said, were the agents of the shareholders for the issuing of these shares; and it was insisted, therefore, that the shareholders must take the consequence of these misrepresentations. On the other hand, it was contended, on the part of the appellant, the official manager, that the shareholders of the company cannot be affected by any false or fraudulent misrepresentations of its directors. The shareholders, it was said, gave no authority to the directors to make false or fraudulent representations. They are themselves the victims of the fraud of the directors. This argument, on

the part of the appellant, seems to me to be based on a false view of the question. Directors of a company are not, it must be admitted, directly authorized by the shareholders to make false or fraudulent representations, but they are authorized by the shareholders to manage their affairs; and the true question is not the broad question which the argument on the part of the appellant has assumed, but the more limited question whether, if the directors of the company, in the course of managing its affairs, make false and fraudulent representations, whereby persons are injured, the shareholders in the company are, or are not, responsible for the injury. In this particular case, the case of contribution, the question may be stated in more narrow terms, whether the shareholders of the company can maintain a claim for contribution against persons who had been drawn in by the false and fraudulent representations of their directors. Looking at this question upon the general principle, there can, I think, be little, if any, doubt. It cannot be denied that persons must be responsible for and can take no benefit under false and fraudulent representations made by themselves. Are they, then, to be responsible for and take benefit under the same false and fraudulent representations, if made by those to whom they have intrusted the conduct and management of their affairs? On general principle, I think they must be equally responsible in the one case as in the other. The law of this country does not, as I conceive, give any countenance to the doctrine contended for by the appellant. That doctrine is met, as it seems to me, by the rule, which is general, *qui facit per alium facit per se*. It is at variance with what was said in the House of Lords, in the case of *Ranger v. the Great Western Railway Company*, and it is besides well known in equity, and I take it in law also, that even an innocent party cannot derive benefit from the frauds of others. I am not disposed, therefore, to withhold my assent from the limited proposition, that, generally speaking, shareholders of a company are responsible for and are not entitled to derive benefit from false and fraudulent representations made by their directors—a proposition which I

consider to be fully borne out by what was said, in the House of Lords, in *Burnes v. Pennell*, and in *The National Exchange Company v. Drew*. I adopt this proposition, however, only as a general rule, the application or non-application of which to any particular case must depend on the circumstances of that case. Adopting, then, this limited proposition, it is to be considered whether this case falls within the proposition. It appears that, in December 1854, the directors of the company issued a report to the shareholders, containing false and fraudulent representations as to the state and prospects of the bank; and that shortly before the respondent purchased his shares—which are new shares, issued by the company under the powers of a supplemental charter obtained for the purpose—which the respondent purchased direct from the company, the directors also, with a view to the issue of those new shares, put forth a circular letter containing similar false and fraudulent representations. But these documents were produced to the respondent by Mr. Alderman Kennedy, one of the directors of the company, and it was on the statements found in the documents, confirmed by the assurance given, that the respondent purchased his shares. It is not disputed that the statements contained in these documents were false and fraudulent. But much was said at the bar upon the question whether the respondent in making the purchase acted upon the faith of those statements; the appellant contended that the respondent purchased mainly, if not wholly, upon the faith of Alderman Kennedy's statement. These documents were undoubtedly produced to the respondent with a view to his becoming a purchaser of the shares; and where false representations are made for the purpose of inducing a purchase, it is, in my opinion, incumbent on those who claim the benefit of the purchase to prove to demonstration that those representations were acted upon. It is not, in my judgment, sufficient for them to prove that there were other representations by which the purchase may have been induced. I attach no weight, therefore, to this objection on the part of the appellant; and if the case rested on this point, I should not hesitate, so far as my

voice is concerned, in deciding in favour of the respondent. But the case cannot be disposed of on this ground. It is necessary to consider what was the origin and purpose of these false representations, through whom and under what circumstances they were made to the respondent, and what is the effect of the time which has elapsed, and the acts which have been done, since the respondent completed his purchase. The report of December 1854 was no more than the ordinary report of the directors of a company made to shareholders at or preparatory to the general meeting, with a view to a dividend being declared. It had no connexion with the sale or purchase of shares, and certainly it had no immediate connexion with the purchase made by the respondent. The statement contained in it might, indeed, affect the value of the shares, but it was not the object or purpose of the document so to affect it. Any increase in the price of shares consequent upon the statement contained in this document would be an indirect and not a necessary result. The circular, indeed, is more immediately connected with the sale of the shares, but it is addressed to the shareholders and customers of the bank, a class within which the respondent did not fall. As to both these documents, as far as they reach beyond the persons to whom they were addressed, they could not, I think, be considered otherwise than as in the nature of advertisements issued by the directors. Independent of any special circumstances, they would reach the purchasers only as part of the public, and would not be considered as entering into a contract for the purchase or sale of shares. It is said, however, in this case, that they, in fact, entered into the respondent's contract, for they were produced on the occasion of and in reference to the purchase of his shares. But by whom were they produced? Not by the directors, or in pursuance of any resolution, but by Alderman Kennedy, one of the directors only; and however much the shareholders are to be bound by the representations of their directors, they surely cannot be responsible for the acts of one another. Whatever authority is given by the shareholders to their directors is given to them as a body, not to each of them; and undoubtedly

Mr. Alderman Kennedy's acts, his representations, could not, in my opinion, bind the shareholders; and to hold the shareholders bound would be, in truth, to hold that if a body of directors prepare a document for one purpose, and one of them takes it and applies it to a different purpose, shareholders are liable for the consequences of its having been so applied. I am not prepared to go that length. Looking at this case, therefore, simply with reference to the representations made to the respondent, I think that the argument on this part of the first question cannot be maintained.

There remains on this part of the case a consideration of very great importance—the lapse of time, and what has been done by the respondent since his purchase of these shares. The respondent purchased shares in March 1855, he received a dividend upon them, and he made no complaint of having been defrauded until the company stopped payment, in September 1856. It cannot be denied that if the respondent thus acquiesced in and acted upon the purchase with a knowledge of the fraud practised upon him, he could have had no claim to relief. But it was said that he had no such knowledge; these frauds were not discovered until the failure of the bank. But there are auditors of this company appointed by the shareholders; these auditors were, within the scope of their duties, at least as much the agents of the shareholders as the directors were, and the false and fraudulent representations were discoverable by them. It cannot therefore, I think, be stated that the respondent was without the means of knowledge; and I think in a case of this description, the respondent, if he had the means of knowledge, can be in no better position than he would have been if he had had actual knowledge. Supposing, however, the respondent had not even the means of knowledge, by whose authority was he precluded from these means? Simply by his own act in having executed a deed which precluded him from these means and placed him at the mercy of the directors; and I am not prepared to say that persons who think proper to execute deeds by which they preclude themselves from obtaining information, can, as against

third parties, equally innocent with themselves, set up the want of information which they have precluded themselves from obtaining. Some argument in support of the respondent's case was attempted to be drawn from the definition of "contributories" in the Winding-up Acts and the respondent's assumed liability to creditors; but I think the definition referred to does not affect the case. But the respondent, although he may be liable to creditors, and perhaps he may be liable to them under the Banking Acts for the limited period before he parted with his shares, is not therefore a contributory. Upon the whole, for the reasons I have stated, I am of opinion that the respondent's argument on the first point fails, and that he is bound by the purchase of these shares.

The question then arises, whether he was discharged by the sale. As to this point, it is first to be observed that no want of *bona fides* is in any way attributed to the respondent. He sold these shares in open market, and executed transfers of them to Empson, whom he fully believed to be a *bona fide* purchaser. But it is said, on the part of the appellant, that Empson knew nothing of the purchase or of the transfer, and that the formalities required by the deed were not duly observed; and on these grounds it is insisted that the respondent remains liable in respect of the shares.

Now, as to the first of these points, I take it to be perfectly true that Empson did not personally know of the purchase of these particular shares; but upon the evidence before us, I feel bound to conclude that he had authorized Cameron, the manager of the bank, to use his name for the purchase of shares, and that his name was used for the purchases in pursuance of that authority. The evidence seems to me to establish that Empson knew that shares were from time to time purchased in his name without his previous knowledge, and that he accepted transfers of shares so purchased whenever he was asked so to do. He tells us in terms that the relation in which he stood to the bank, that of conducting their common-law business, obliged him to do so; and if upon these facts we are not justified in concluding, as between him and third persons who

were unacquainted with the real state of the case, that he authorized his name to be used for the purchase of shares, I know not what amount of evidence would justify us in drawing that conclusion. This second point of the case, therefore, must, in my opinion, depend upon whether there was such a non-observance of the provisions of the 7 & 8 Vict. c. 113. and of the company's deed as would vitiate the transfer. Several of the sections of the act were referred to in support of the appellant's argument on this point, but the provisions of the act seemed to me to favour the respondent's more than the appellant's case. By the 21st section the persons who are made liable are those whose names appear in the last delivered memorial. Mr. Nicol's name was not in that memorial. By the 23rd section shareholders may transfer; transfers are to be delivered to the secretary; the secretary is to enter them in the register of transfers and to indorse them on the deeds of transfer: and it was argued, for the appellant, that the transfers could not be completed until the indorsement was made. But the statute does not say so; on the contrary, the latter part of this very section, the 23rd, represents the rights of the purchaser as commencing from the time of the delivery of the transfer to the secretary, and not from the time of the indorsement itself. These provisions, therefore, as to the entries of transfers and the indorsements upon them, seem to me to point rather to purchasers than to vendors, and I am much disposed to think that they were intended simply for the purpose of securing the purchasers as against companies in the acknowledgment of their titles. At all events, I think they are of no weight against the respondent under the circumstances of this case. The appellant's argument on this point was attempted to be fortified by a reference to the practice which appears to prevail upon the Stock Exchange upon the sale of shares, to require in doubtful cases undertakings from the purchasers to register; but this fact proves no more than the prudence of such registration: it does not shew it to be necessary—besides the practice of the Stock Exchange cannot govern law.

A further argument was founded on the act of parliament, by the 4th section of

which the company were prevented from becoming purchasers of shares; but however much this argument might have availed the company as against Empson, it cannot, I think, avail them as against the respondent, for he dealt with Empson without any knowledge whatever that the company had any concern in the transaction.

Turning, then, from the act of parliament to the company's deed, the 10th clause of the deed was relied upon on the part of the appellant as requiring the consent of the court of directors to the transfer of shares; and it was insisted that there was no such consent. Neither this clause nor any provision of the deed requires or points out any particular form of consent. The clause, indeed, contains the same provision as to the delivery of the transfer to the secretary, and the entry of it by him, and the indorsement of the deed of transfer, as I have also adverted to as having been contained in the act of parliament; and it provides that the deed so indorsed shall be sufficient evidence of the consent of the directors. But it does not provide that no other evidence of such consent shall be sufficient. Nor could it be the intention of the legislature so to provide, for there might obviously be cases in which the specified evidence of consent could not be produced. The deed, therefore, leaves open the proof of consent, and the question we have to consider is, whether in this case there is sufficient proof. The transfers of these shares to the bank were sent to the bank; they were filled up there in the name of Empson; they were returned to the respondent so filled up after his execution of them; they were again returned to the bank and remained there; the purchase-money for them was paid from the monies of the bank; Empson was debited in the books of the company with the money so paid, and was credited, as I think, with these shares; dividends accrued upon the shares after the transfers, and the bank received the dividends. Whatever might have been the effect of any of these acts separately considered, I think that collectively they constitute a body of evidence which renders the conclusion irresistible, that there was consent on the part of the directors to the transfer of these

shares. It was said that there is no minute of the court of directors consenting to the transfer, but the deed requires no such minute. Suppose this had been the case of a private banker, with whose consent the sale was to be made, and his books had contained the same series of entries as the books of this company contain, could it for one moment be doubted that he must be held to have consented to the sale? In such a case no statement on his part short of the most clear proof that his consent could not possibly have been given could, I think, countervail such evidence. In this case I think there is not any proof that could warrant us in holding that consent was not given; and on this question of proof of consent I cannot see that the directors of the company, having the management of its affairs, can stand in any different position from that of a private bank. The observations which I have already made upon the acts of parliament render it unnecessary to revert to the arguments on the remaining part of this 10th clause of the deed, as to the registration of the transfer and the indorsement by the company. But it is said that by the 11th clause of the deed seven days' notice in writing ought to have been given to the directors of the proposed transfer, and that no such notice was given; and it is sought to invalidate the transfer on that ground. The object of this clause is merely to enable the directors to form a judgment on the question, whether the transfer ought to be allowed, and if they have formed a judgment upon that question, as I think they must be taken to have done, I do not think that the transfers can be invalidated on the ground that particular provisions that were made to enable them to form that judgment were not resorted to. It cannot, I think, be said that if an eligible transfer were proposed the directors could not allow it without seven days' notice, and if they had dispensed with the notice in one case they could in others, and the provision must be one of form merely. The cases referred to on this point do not, I think, govern it. There is another point upon this part of the case which was not much, if at all, adverted to in the argument, which would seem to me to be deserving of some consideration. It would appear

from the evidence of Mr. Empson that attempts were made to put him upon the list of contributories with respect to these shares, and that a compromise has been effected with him. I am by no means satisfied that, as between him and the respondent, he would not in any event be primarily liable; and I very much doubt whether, if this be the case, and the appellant has released Empson, he can be entitled to prosecute his claim upon the respondent. Upon the whole, although dissenting from the terms, I agree in the result, and I am of opinion, therefore, that this appeal must be dismissed.

Appeal dismissed, with costs, to be paid out of the estate.

Mr. Giffard, for the creditors' representative, applied for his costs, he having been served with notice of the appeal; and

The LORD CHANCELLOR allowed them, to be paid out of the estate.

M.R. }
Nov. 16; } JOLLY v. ARBUTHNOT.
Dec. 6. }

Mortgage — Receiver — Attornment — Bankruptcy — Subsequent Distress — Estoppel.

*A receiver of an estate was appointed, in compliance with an agreement made between a mortgagor and mortgagee. They both joined in the appointment, and gave him power of distress and entry, and the mortgagor attorned as tenant from year to year to the receiver, at a rent of 3,500*l.* The deed recited all the facts relating to the mortgage, and provided that nothing in the deed should abridge the rights of the mortgagee. The mortgagor afterwards became bankrupt, and the receiver distrained for 3,500*l.* Upon this being claimed by the mortgagee, by a party under a bill of sale, and by the assignees of the mortgagor,— Held, that the powers of distress and entry were determined by the bankruptcy of the mortgagor, and that the distress was invalid, inasmuch as it was executed against the goods of the mortgagor after they had vested in the assignees.*

If a co-defendant has an interest in the

property claimed by the plaintiff, upon which he intends to rely, he must, upon the pleadings, bring his case before the Court. If he merely disclaims, the Court will decide the case between the litigating parties, and leave the co-defendant to such other remedy as he may have.

Col. Waugh, on the 14th of October 1853, purchased Branksea Island, situate in the harbour of Poole, in the county of Dorset, with its castle, lands and hereditaments, containing in the whole about 700 acres. On the following day he reconveyed the greater part of the estate to Sir Frederick George John Foster, the vendor, and his heirs, by way of mortgage to secure a sum of 10,000*l.* and interest. On the 20th of October 1853 Col. Waugh again mortgaged the same estate to Messrs. Hussey, Kane & Pemberton, to secure a further sum of 10,000*l.*; and on the 16th of March 1855 he again mortgaged the estate to John Jolly, the plaintiff, to secure a further sum of 5,000*l.*

On the 18th of April 1855 Sir F. G. J. Foster, upon payment of what was due to him, transferred his mortgage, and at the same time conveyed the estate to John Jolly and his heirs, to secure the 10,000*l.* and interest.

On the 12th of October 1855 Messrs. Hussey, Kane & Pemberton transferred their mortgage to John Jolly, who paid them 10,100*l.* for principal and interest, and at the same time lent to Col. Waugh a further sum of 4,900*l.* This increased his mortgage upon the estate to 30,000*l.*

By another indenture, of the 12th of October 1855, and made between William Petrie Waugh of the first part, John Jolly of the second part, Weston Aplin of the third part, and William Cary Faulkner and George Bonner of the fourth part, after reciting the indenture of the 18th of April 1855 and the deed of even date, and that it had been agreed that, for securing the regular and punctual payment of the interest of the sum of 30,000*l.*, and also for providing a fund for better securing the gradual repayment of the principal sum, Weston Aplin should be appointed receiver of the rents and profits of the hereditaments and premises comprised in the mortgage securities; and reciting that the hereditaments

and premises were at present in the possession and occupation of W. P. Waugh, and that it had been agreed that he should attorn tenant in respect of the same to Weston Aplin, at one entire yearly rent of 3,500*l.*, part of which, (that is to say) 1,500*l.*, was intended to be for securing the punctual payment of the interest on the mortgage debt, and 2,000*l.*, the remaining part thereof, was intended to be applied in forming a fund for the ultimate discharge of the 30,000*l.*: it was witnessed, that W. P. Waugh and J. Jolly did each of them constitute and appoint W. Aplin to be the receiver, agent and attorney of them and each of them, and in the names or name of them, or either of them, or otherwise, to ask for, demand and receive of and from all the present and future tenants and occupiers of the castle, lands and hereditaments mentioned in the schedules to that indenture, all the yearly and other rents, royalties, issues and profits then due and thereafter to become due from them respectively, and in default of payment to use and exercise all such remedies, by entry, distress or otherwise, and generally to do and perform all such other acts as should be requisite or expedient for the receiving and recovering of the rents, royalties, issues and profits: and W. P. Waugh and J. Jolly respectively did thereby direct and require the several tenants and occupiers to pay unto W. Aplin all the rents, royalties and reservations due and to become due from them respectively for the premises, or any part thereof respectively, for which they declared that the receipts of W. Aplin should be effectual discharges. And it was thereby declared that the rents, issues and profits should be applied by W. Aplin as thereafter expressed. And it was further witnessed, that for the consideration aforesaid, he, W. P. Waugh, did thereby attorn and become tenant from year to year to W. Aplin in respect of such parts of the estate and hereditaments as were then occupied by W. P. Waugh, at the yearly rent of 3,500*l.* clear of all deductions, by half-yearly payments at the times therein mentioned. The indenture afterwards contained a proviso, that if W. P. Waugh should make default in payment of the principal sum of 30,000*l.*, or the interest thereof, at the days and in manner

mentioned and appointed for payment thereof in the indenture of even date, then and at any time thereafter it should be lawful for J. Jolly, his heirs and assigns, upon giving fourteen days' notice, to enter upon the premises whereof W. P. Waugh had attorned tenant as aforesaid, and that thereupon the tenancy created thereby should absolutely determine. And it was thereby declared, that if the said W. P. Waugh should from time to time keep down the interest of 1,500*l.* per annum, on the mortgage debt, then during such time the yearly rent should be reduced to 2,000*l.*, but without prejudice to the right of J. Jolly, in the event of subsequent default being made by W. P. Waugh, to require payment of the full rent. It was also declared, that the rent of 3,500*l.* should be applied in keeping down the interest on the mortgage money, and that the surplus should be paid to Messrs. Faulkner & Bonner as a kind of sinking fund, to be applied as it should amount to 10,000*l.* in payment of the principal sum of 30,000*l.* And the deed contained a proviso for appointing another person as receiver in the place of W. Aplin in case of his death or his refusing or declining to act, and that such new receiver should have all the powers and authorities thereby granted to W. Aplin. The deed also contained a proviso that nothing therein contained should lessen or abridge the rights, powers and remedies of J. Jolly, his heirs, executors, administrators and assigns, under the therein recited indentures of mortgage, or prevent him or them from realizing the mortgage securities either by foreclosure or sale, or otherwise.

On the 13th of October 1855 Col. Waugh again mortgaged the estate to John Edward Stephens, to secure certain monies then due from him; and by another deed of the same date he covenanted with J. E. Stephens to grant a lease to a trustee of certain parts of the Branksea estate, and the sea-shore contiguous, for thirty years from the 1st of May 1855, at a yearly rent of 1*l.*

The London and Eastern Banking Company was incorporated by letters patent, dated the 20th of January 1854; and on the 2nd of November 1855 W. P. Waugh mortgaged the same estate to them and

their successors as a security for money lent or which might become due on any account; and on the 6th of March 1857 Messrs. Waugh and Stephens and the London and Eastern Banking Company joined in further charging the estate to J. Jolly, to secure to him a further sum of 7,000*l.* in priority to the company. On the 14th of March 1857 Col. Waugh gave further powers to the London and Eastern Banking Company, whose debt amounted to 244,000*l.* On the 9th of April 1857 the London and Eastern Banking Company transferred their mortgage (with the exception of a bill of sale of the goods and chattels on the estate, dated the 14th of March 1857) to Archibald Francis Arbuthnot, upon trust for raising and paying into the Union Bank the debt due to the London and Eastern Banking Company.

On the 15th of April 1857 Col. Waugh was declared a bankrupt; and William Bell was appointed the official assignee, and William Samuel Price Hughes, William Chickall Jay and William Pearce were appointed the creditors' assignees.

On the 28th of April 1857 W. Aplin, as receiver, distrained the chattels on the Branksea estate for 3,500*l.*

On the 25th of November 1857 Wood, V.C. made an order for winding up the London and Eastern Banking Company; and on the 21st of December 1857 Charles Fife Stuart and W. Bell were appointed the official managers.

On the 22nd of April 1858 the London and Eastern Banking Company were declared bankrupts; and W. Bell was appointed official assignee, and James Thomson the creditors' assignee.

The right to the 3,500*l.* distrained for by W. Aplin was disputed; and it was paid into the London and Westminster Bank, in the names of John E. Coleman, W. Bell and W. Aplin, as severally representing the London and Eastern Banking Company, the assignees of Col. Waugh, and J. Jolly.

The plaintiff claimed the 3,500*l.*, under the terms of the deed of the 12th of October 1855, in part payment of his mortgage.

The official manager of the London and Eastern Banking Company also claimed it,

by virtue of the bill of sale of the 14th of March 1857. This deed, however, was only referred to casually in the bill; and it did not appear whether it was registered or not.

The assignees of Col. Waugh also claimed it as part of the bankrupt's estate; and they alleged that the bill of sale was itself an act of bankruptcy, and that at the time the goods were in his order and disposition.

The bill prayed for a declaration of the rights of the parties, and for payment of the 3,500*l.* and interest. It also prayed that the estate might be foreclosed.

Mr. R. Palmer and Mr. Bevir, for the plaintiff.—The legal estate in the hereditaments was in the plaintiff. He had joined with Col. Waugh in the appointment of, and in the attornment to W. Aplin as receiver; the *reddendum* was to W. Aplin, or any future receiver. He had full right to take the goods for the rent reserved; and Col. Waugh and his assignees were therefore estopped, not only from disputing the distress, but also from claiming any interest in the goods.—

Dancer v. Hastings, 4 Bing. 2; s. c. 12 B. Mo. 34; 5 Law J. Rep. C.P. 3.

Cornish v. Searell, 8 B. & C. 471; s. c. 1 Man. & Ry. 713; 6 Law J. Rep. K.B. 255,

Clarke v. Waterton, 2 Moo. & R. 87; s. c. *nom. Clark v. Waterlow*, 8 Car. & P. 365.

Mr. Dickinson, for W. Aplin, supported the distress he had made.

Mr. Follett and Mr. Tindall, on behalf of parties representing the London and Eastern Banking Company.—Col. Waugh, by a deed, dated the 14th of March 1857, assigned the goods distrained to the company. They had given priority to the plaintiff for 7,000*l.* lent to Col. Waugh, and so far they disclaimed any interest in the 3,500*l.*

Mr. Selwyn, Mr. Giffard and Mr. J. Brown, for the assignees of Col. Waugh.—No tenancy was created by the deed executed by Col. Waugh; neither could any right of distress exist against the goods of Col. Waugh after his bankruptcy, by

virtue of any act or deed done by him previous to the bankruptcy. The act of bankruptcy rendered null and void against the assignees any act done or deed executed which related to goods and chattels in the order and disposition of the bankrupt. The interest of the tenant was less than that of a tenant at will. Col. Waugh could determine it by paying off the mortgage, and the mortgagee could also put an end to it on the breach of any of the covenants in his security. The whole facts relating to the receivership and the appointment of the receiver were stated upon the deed; all parties had full notice of the dealings and of the non-existence of any actual tenancy. It was a sham: a means to an end, to be wrought out through a multitude of securities. If there was any estoppel in the case, it was against the plaintiff and his agent W. Aplin. They could not deny the facts stated in the deed, and they knew that Col. Waugh had no reversion in the estate which could enable him to create any estate to support a distress against his goods. The whole transaction rested in contract and covenant, which by leave and licence might enable W. Aplin to seize the goods of the party for a breach of that contract. It gave no interest in the goods either to Mr. Jolly or to his agent. They remained the goods of Col. Waugh, and by his bankruptcy they passed to and became the property of the assignees, and could not be made available, except by his assignees on the general administration of his estate. In *Dancer v. Hastings* the party took a lease from a receiver of the Court of Chancery, and having done that he could not deny his title or plead that he had not held the estate.—

Frontin v. Small, 2 Ld. Raym. 1418.

Right d. Jeffery v. Bucknell, 2 B. & Ad. 278; s. c. 8 Law J. Rep. K.B. 304.

Pargeter v. Harris, 7 Q.B. Rep. 708; s. c. 15 Law J. Rep. (N.S.) Q.B. 113.

Gaunt v. Wainman, 3 Bing. N.C. 69; s. c. 3 Scott, 413; 5 Law J. Rep. (N.S.) C.P. 344.

Preece v. Corrie, 5 Bing. 24; s. c. 2 M. & P. 57; 6 Law J. Rep. C.P. 205.

Smith v. Mapleback, 1 Term Rep. 441.

— *v. Cooper*, 2 Wils. 375.

Pascoe v. Pascoe, 3 Bing. N.C. 898; s. c. 5 Scott, 117; 6 Law J. Rep. (N.S.) C.P. 322.

Freeman v. Edwards, 2 Exch. Rep. 732; s. c. 17 Law J. Rep. (N.S.) Exch. 258.

Chapman v. Beecham, 3 Q.B. Rep. 923; s. c. 3 G. & D. 91; 12 Law J. Rep. (N.S.) Q.B. 42.

Ward v. Shew, 9 Bing. 508; s. c. 2 Mo. & Sc. 756; 2 Law J. Rep. (N.S.) C.P. 58.

Mr. Rodwell, for J. Thomson.

Mr. Goren, for a subsequent mortgagee, who disclaimed any interest in the fund in court.

Mr. R. Palmer, in reply.

THE MASTER OF THE ROLLS.— This question depends on the relative position of the parties. In order to constitute a good distress, it was admitted that the relation of landlord and tenant must subsist between the parties distraining and distrained upon; and, on behalf of the plaintiff, it was argued that this relation was expressly created between Col. Waugh and Mr. Aplin by the deed of the 12th of October 1855, not only by the attornment, but also by an actual demise and other express provisions. It is also argued that if the relation of landlord and tenant did not in reality subsist, still that Col. Waugh and all persons who claim under him are estopped from alleging the contrary by the express words of the deed executed by him, and *Dancer v. Hastings* is relied upon to support that proposition. In that case a tenant had accepted a lease from a receiver appointed by this Court. The Court of Common Pleas unanimously decided that he was estopped from disputing the right of the receiver to distrain. On the other side it is argued, that the relation of landlord and tenant did not subsist in the present case, and that as the right to distrain was incidental to the reversion in the land, subject to the lease, so no right to distrain existed in W. Aplin, inasmuch as no reversion was vested in him, and that Col. Waugh and those claiming under him were not estopped from alleging this fact, as the deed which is supposed to create the tenancy shews, on its face that W. Aplin

had no interest in the reversion or in the lease. It is admitted that the covenants contained in the deed will bind Col. Waugh, and that, consequently, his goods and chattels are liable to any distress made by W. Aplin; but that this covenant cannot go further, and that the peculiar rights attaching to landlords against what have been the goods of the tenant, but have ceased to be such when the distress is levied, do not apply; and that, consequently, although it be true that the goods and chattels of Col. Waugh are liable to the distress, yet as soon as he became bankrupt these goods became the property of his assignees, and could not be taken through a distress levied by W. Aplin by virtue of the power given to him. Upon examination *Dancer v. Hastings* seems to be less favourable to the plaintiff than it might at first appear. The person distrained on had accepted a lease from the receiver of the Court of Chancery *simpliciter*, and the Court of Common Pleas held, that he could not afterwards say that the receiver had not demised the land to him. Here, Col. Waugh has attorned to the receiver, but he has done so under the deed, which sets forth and explains the rights and interests of all parties; and by so doing it shews that the relation of landlord and tenant did not actually subsist between Col. Waugh and W. Aplin. On the contrary, it shews that the relation of landlord and tenant existed, if at all, between the plaintiff and Col. Waugh. If the plaintiff, instead of joining in the appointment of W. Aplin as receiver, had, under his mortgage-deed, entered into possession of the property, and had distrained upon Col. Waugh for non-payment of rent, it would have been very difficult for the assignees to have maintained any claim against the validity of that distress. This case, however, depends solely on the effect of the deed. It is necessary to bear in mind the distinction between a distress made by a person in the character of landlord, and the taking of the goods of the tenant under a covenant; this last, though it be called a distress, must be clearly distinguished from the former. The right of distraining incidental to the right to the reversion which exists in the property, subject to the lease

to the tenant, is not disputed; if it should be, it is established by an abundance of authority, of which — *v. Cooper* is an instance. Here the receiver had no beneficial interest in the reversion, and none such was created by this deed. By virtue of his own title, therefore, W. Aplin could not make a valid distress. Is it, then, open for Col. Waugh, or any person claiming under him, to allege this fact? The same occurred in *Dancer v. Hastings*. The person there distraining had no interest in the reversion; but although this was so, yet it was held, that the tenant was estopped from alleging this fact by reason of the terms of the lease, which was a demise of land from the receiver to the tenant. Two distinctions, however, are to be noticed between that case and the present, one of which seems to have been suggested by one of the Judges at the close of that case, but I cannot say it was that upon which their judgment proceeded. Gazelee, J. observed that, "Probably it was not decided who was interested in the property, so that if the receiver were excluded, there would be no one who could distrain." A distinction was suggested by one of the Judges, which may possibly establish that a receiver appointed by the Court of Chancery stands in a different relation to a receiver appointed by the actual owners. A receiver appointed by the owners is merely their agent, and it may be inferred that a receiver appointed by the Court of Chancery is so appointed in consequence of the right to the property being in litigation and prior to its being determined who is the real owner; so that, unless some person can be appointed who shall have authority to receive and enforce payment of the rent, a portion of the property on which the Court is about to adjudicate may be lost. Whether this is a distinction which can be relied upon in all the cases I forbear to say. But the other distinction is, the difference between the deed in *Dancer v. Hastings* and the deed creating the right to distrain in the present case. The deed in that case must be inferred from the case itself to have been a simple demise from one person as owner to another as tenant. The deed is not set out, but I infer that must have been so from the terms of the case. But here the recitals and cove-

ments contained in the deed shew that the real owner at law was the plaintiff, and in equity Col. Waugh's right was subject to the mortgage vested in the plaintiff. It was held in *Dancer v. Hastings* that the tenant is estopped by the deed from alleging the real state of the title—that he could not, in fact, go beyond the deed. But in this case no such estoppel arises. It is not necessary to go beyond the deed, because the deed itself, which alone is supposed to create the right to distrain, discloses what the real title is. In fact, the estoppel cannot be stated in this case without an obvious inconsistency. Estoppel is defined by Lord Coke to be when a man is concluded by his own act from alleging the truth. Accordingly, in *Dancer v. Hastings* the tenant was estopped by his own act, viz., the execution of a deed accepting a lease from the receiver, and thereby admitting the receiver to have a right to demise the land as landlord, from alleging that the receiver had not the reversion in the land at the expiration of the tenancy. I consider that to have arisen because the indenture of demise contained nothing except a demise, as from the owner of the land to the tenant. But here all the facts are fully set forth in the deed itself, which is supposed to create the right to distrain, and it shews, not only that W. Aplin had no reversion in the premises, but further, that the reversion at law was in the plaintiff. How can a party be estopped from alleging what appears on the face of the deed? This seems to be established by *Pargeter v. Williams*. But the distinction between the cases does not rest here; for this deed expressly provides that nothing alleged in it shall abridge the rights and interests of the mortgagee; but a lease from W. Aplin to Col. Waugh would very materially abridge these rights, if W. Aplin should grant a lease to Col. Waugh, which he might do if the relation of landlord and tenant *simpliciter* existed between them. W. Aplin is appointed receiver, not by the plaintiff or his agent, or to stand in his place alone to do what he, the plaintiff, might have done, but he is appointed by both, as the person who under the deed is to receive the rents from the tenants, and in particular the rent from Col. Waugh. *Dancer v. Hastings*, therefore, does not

govern the present case, and under this deed the relation of landlord and tenant was not created between Col. Waugh and W. Aplin; and further, this deed shews that it was not the intention of the parties to create such a relation. The intentions of the parties to the deed are well expressed therein. They amount to this, that Col. Waugh shall pay his rent to W. Aplin for the purposes stated in the deed, but not for his benefit; and that if Col. Waugh do not so pay, W. Aplin is to be at liberty to distrain the goods of Col. Waugh; but that is not in the character of landlord as against the tenant, but by virtue of the covenant contained in the deed. This is then a licence to enter upon the lands of Col. Waugh and take his goods for the rent due; and then, as incidental to the covenant, this consequence follows, that the goods and chattels must be the property of Col. Waugh when taken, and that the moment, by his bankruptcy, they became the goods of his assignees, that moment the licence to W. Aplin became inoperative, and the covenant ceased to apply to the new state of things. It is not sufficient to support the case of the plaintiff to satisfy the Court that the parties to the deed intended to invest W. Aplin with the same powers as those which would have attached to him as landlord, if that character had been created. The law does not admit of that. If the relation of landlord and tenant had been created by deed between W. Aplin and Col. Waugh, the right to distrain would necessarily have been incidental to that character, although nothing was said about distress. It goes even beyond this, for if the relation of landlord and tenant did not in reality exist, but the apparent relation had been created by a deed which estopped the parties to it and all parties claiming under them from alleging the contrary, the distress would still have been valid. But, on the other hand, when the relation of landlord and tenant does not in reality exist, and when the deed which creates the relation between them, such as it is, discloses the real state of the title and of that relation, and, therefore, does not estop any party to the deed from alleging the real state of the title, then the distress levied on goods not the

property of the tenant at the time when the distress is made is invalid, notwithstanding that the covenant contained in the deed be to the effect that the receiver shall possess the same powers of distress and entry against the tenant of which the landlord was possessed. And it is invalid for this reason, that it is not in the power of the parties to invest one another with that right and with that liability. A person who fills the character of landlord is entitled, for the purpose of obtaining payment of his rent in arrear, to distrain upon the goods and chattels in the possession of the tenant, or which had been the property of the tenant, but which at the time of the distress had ceased to be so. But such a right and corresponding liability are conferred upon landlords and imposed upon tenants only, and are confined to them; and accordingly, persons who do not fill that character cannot be clothed with those powers, or be made subject to those liabilities. It is true that W. Aplin could, up to the time of the bankruptcy of Col. Waugh, have distrained upon the goods of Col. Waugh for rent in arrear, but not because he was his lessor or landlord, or had any interest in the reversion, but because Col. Waugh by that covenant had enabled him to do so; but Col. Waugh's covenant only bound his own property, and the moment, by operation of law, property of this kind was transferred to the assignees, at that moment it ceased to be a matter which the covenant of Col. Waugh could affect. *Freeman v. Edwards* seems distinct: there a man seised in fee of certain copyhold lands, mortgaged them to the defendant by a covenant to surrender, and in the mortgage-deed he covenanted that if the interest should be in arrear, it should be lawful for the defendant to enter upon and distrain upon the land for the interest so in arrear, in the same manner as a landlord is authorized to do in respect of distresses for arrears of rent reserved upon leases for years. The defendant was duly admitted to the copyholds. The mortgagor then became bankrupt, and immediately afterwards the mortgagee distrained for half a year's interest then in arrear. It was held, that the relation of landlord and tenant did not subsist between the mortgagor and the mortgagee, and that although

under the deed the mortgagee might distrain upon the goods of the mortgagor, still, upon the bankruptcy, these goods became the property of his assignees, and the right to levy a distress upon them failed. I am of opinion, therefore, that the distress made by W. Aplin was invalid, and that the 3,500*l.* is the produce of property which, when taken, was the property of the assignees of Col. Waugh, and was not affected by Col. Waugh's covenant, and that, except by means of the covenant contained in the deed, neither W. Aplin nor the plaintiff had any power over it. The money must therefore be paid to the assignees of Col. Waugh, unless, in consequence of any arrangement, they ask that the bill should be dismissed.

Mr. Follett.—The official managers of the London and Eastern Bank hold a security on these goods; as between them and the assignees of Col. Waugh they are entitled to the goods. They had a bill of sale from Col. Waugh, but subsequently, to the extent of 7,000*l.*, they gave the plaintiff a priority. The goods were not in Col. Waugh at the date of his bankruptcy. As between co-defendants the Court will not decide the right to this property. The disclaimer of right against the plaintiff cannot establish a right in a co-defendant, so as to enable the Court to make a decree. The official managers ask, therefore, to have that part of the bill dismissed, or otherwise for an inquiry upon it, so that the question may be raised between the co-defendants. Neither the bill of sale nor the title of the official managers to possession are stated in the pleadings; no issue, therefore, has been raised between the co-defendants. This is not a question of foreclosure or redemption.

The MASTER OF THE ROLLS.—I cannot accede to your request. The Court requires a defendant, if he makes a case not as against the plaintiff, but as against some other person, to state that case; and then, though the Court does not decide the point at the hearing between the co-defendants, still it puts it in a course of litigation, similar to what is done when a bill of interpleader is filed. But when a bill is filed against a defendant, and another party who might have a claim is made a party, and

that third person disclaims all other title and interest in it, then that person is simply dismissed, and the Court determines the rights and interests in both the other parties only. Whether the disclaimer will affect any proceeding which may be taken hereafter, or whether they are to be treated as if they had not been made parties to the bill, is a question on which I shall not express an opinion. On this state of the record, however, I shall make a decree, declaring that the assignees of Col. Waugh are entitled to the 3,500*l.*, and the plaintiff must pay the costs, but I shall not allow him to add them to his security. In an interpleader suit the person who holds the fund retains his costs, but the litigants claiming the fund pay costs. Mr. Coleman, Mr. Bell, Mr. Aplin and Mr. Thomson must also have their costs paid by the plaintiff.

M.R. }
Dec. 15. } WYNNE v. HUMBERSTON.

Production of Documents — Trustees — Cestui que Trust.

A testatrix devised an estate to trustees for fifteen years, and directed them to deliver up possession to such person as within that time should, to the satisfaction of her trustees, make out a right to the estate as heir-at-law to her uncle, who died owner of the estate; but in default of any such right being made out, the testatrix devised the estate to L. W. There were two claimants to the estate; but the surviving trustee, after laying various cases before counsel and taking their opinions, was satisfied with neither. After the expiration of the fifteen years, L. W. filed his bill against the trustee and the two claimants to obtain possession of the estate; and upon a motion by one defendant, a claimant,—Held, that the trustee was not bound to produce the cases laid before counsel, or their opinions, or any of the documents affecting the title to the estate.

Elizabeth Giffard, by her will, dated the 17th of January 1837, devised an estate, called Pont y Gwyddel, to Frederick Charles Philips, Philip Humberston, and Philip Stapleton Humberston,

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their executors, administrators and assigns, from the day of her decease, for the term of fifteen years, and until the 26th of March next following, upon trust to receive the rents, issues and profits, and apply the same for various purposes therein specified; and she directed that in case any person should at any period during the fifteen years establish his, her or their right and title to the Pont y Gwyddel estate, as heir-at-law of her late uncle, Edward Williams, who died the undoubted owner, to the entire satisfaction of the trustees of her will for the time being, then she directed her trustees to deliver up possession to such person or persons who might have established his, her or their claim to the satisfaction of her trustees for the time being, at the end of the term of fifteen years thereby granted: and she devised and appointed the same estates, subject to a mortgage-debt upon them, to such person and persons, to be settled by her trustees upon them in strict settlement. But in case no person should establish a claim to the same estates to the satisfaction of her trustees for the time being during the period of fifteen years, or if any person whose claim should be negatived by her trustees, and considered not duly established, should file a bill against her trustees, or apply in any way to a Court of equity or law to endeavour to compel her trustees to come to a different conclusion, and to give him, her or them possession of the same last-mentioned estates, then and on such proceedings being taken, she authorized and empowered her trustees for the time being, if they should so think fit, to convey such estates to the uses thereinbefore expressed concerning her estate called Nerquis Hall, and her other estates in the counties of Flint and Chester thereinbefore devised, for the benefit of Loyd Wynne and his family: and she gave, devised and appointed the same accordingly. And in order to assist her trustees in coming to a right conclusion in executing the trusts, and to prevent recourse to the Court of Chancery, she thereby declared that in case her trustees for the time being should have any doubt as to the validity of any claim brought before them with respect to the Pont y Gwyddel estate, it should be lawful for her trustees for the time being

to consult any three barristers of eminence whom they might select as to the validity of such claim; and if her trustees should act upon the advice of any two such barristers, the judgment of her trustees for the time being, sanctioned by two of such three barristers, should be final and conclusive on the parties. And she thereby gave, devised and appointed her estates called Pont y Gwyddel to such person or persons who should during the period thereinbefore granted be the object of such determination and final selection of her trustees for the time being; but if none should be so selected during the period aforesaid, then the Pont y Gwyddel estate was to unite with her Nerquis Hall estate as before directed. And the testatrix appointed F. C. Phillips and P. Humberston executors of her will.

The testatrix died on the 19th of March 1842, and her trustees took possession of the Pont y Gwyddel estates.

William Thomas Williams and John Hughes Ellis, with others, sent in claims. Each alleged that he was the heir-at-law of E. Williams, whom the will mentioned as having died owner of the Pont y Gwyddel estate; the trustees, however, laid some cases before counsel and took their opinions, and afterwards intimated that they were not satisfied that the relationship was proved. Upon the expiration of the term of fifteen years the Rev. Loyd Wynne, the devisee of the estates in the event of no claim being established in accordance with the directions in the will, filed his bill in this court against P. S. Humberston, the surviving trustee of the will, and against W. T. Williams and J. H. Ellis, praying that it might be declared that the Pont y Gwyddel estate, notwithstanding the claims of the defendants, became on the 26th of March 1857 united with the Nerquis Hall estate and subject to the same uses and limitations. The plaintiff also prayed that he might be let into the receipt of the rents and profits.

In compliance with an order made on the 2nd of August 1858 by the chief clerk, by consent, upon the application of the defendant W. T. Williams, P. S. Humberston, his co-defendant, filed an affidavit with a schedule attached, setting out the cases and opinions, and the several docu-

ments in his possession. He, however, insisted that the cases which as trustee he had submitted to counsel upon the claims made to the estate, with the opinions thereon, and also the copies of certain papers and documents sent with the cases, were privileged and ought not to be produced.

The chief clerk, however, upon application being made to him for production, refused to entertain the objection, and ordered the documents to be produced.

Mr. C. Hall now asked that the order of the chief clerk might be varied: first, because W. T. Williams, as a defendant, was not entitled to ask a co-defendant to produce the documents; and secondly, because the case of W. T. Williams was not known, and the opinions were taken in contemplation of some proceedings, and were within the privilege claimed in such cases.

Mr. Woodroffe, for W. T. Williams, claimed the production of the documents because the defendant P. S. Humberston was a trustee of the estate, and, as such, a trustee for the claimant. W. T. Williams, as *cestui que trust*, was interested in seeing that the inquiries were duly carried into effect in accordance with the directions of the will. The cases could only be prepared with reference to the claim and to assist in the investigation of the truth; they contained the facts on which a right was to be determined. W. T. Williams, therefore, had a direct interest in both the cases and the opinions, and also in the documents accompanying them. If they established the defendant's position, the trustee had no right to suppress the result; his discretion did not extend so far. If the production were refused on the ground that the applicant was a defendant, it would simply drive him to file a cross-bill — *Wood v. Wood* (1).

THE MASTER OF THE ROLLS.—The defendant has not established any claim to an inspection of these documents. It is the rule that where the relation of trustee and *cestui que trust* is established, all cases

(1) 3 Hare, 65; s. c. 12 Law J. Rep. (N.S.) Q.B. 141; 4 Q.B. Rep. 397; 4 Y. & C. 135; 7 Beav. 183.

and opinions taken by the trustee to guide himself in the administration of the trust, and not for the purpose of meeting any litigation against him, are open to be seen by the *cestui que trust*. They are then considered as not merely taken for the trustee to assist him in the execution of the trust, but for the benefit of the persons who are the objects of the trust. This case arises from the position in which the trustee is placed. It is apparently a judicial position, in which his mere decision is to determine the rights of the parties. Without, therefore, regarding the circumstance that W. T. Williams as defendant makes this application against P. S. Humberston, a co-defendant, but considering the application as made by a plaintiff against a defendant, still he is not entitled to see these documents as the relation of trustee and *cestui que trust* is not established. It is the case of a person who has not made out his title. If his right to inspection were admitted, it would be sufficient for any stranger to claim the estate, and then require the production of all the cases and opinions which had been taken as well as all the papers and documents submitted to counsel. This might be very injurious to the parties who were entitled to the estate. P. S. Humberston, therefore, is not bound to produce the documents, and in that respect the chief clerk's order must be varied.

M.R. }
Jan. 11, 24. } WYNNE v. HUGHES.

Jurisdiction—Courts, General and Local—Stay of Proceedings.

Parties to a suit in a local court of limited jurisdiction cannot apply to stay proceedings in a court of general jurisdiction, when a part of the property in question is situate out of the limits of the local court.

The bill in this case was filed, on the 8th of November 1858, by Richard Lifton Wynne and Mary, his wife, she being one of the next-of-kin of John Edwards, who died on the 20th of November 1854, intestate, against Thomas Hughes, another of the next-of-kin, who had obtained letters of administration on the 7th of December

1854, and who also claimed to be the heir-at-law of the deceased, and against Har-mood Walcot Banner, praying for the administration of the real and personal estate of the deceased; the bill also prayed for a receiver, and for an account, including that of the net monies to arise from the conversion of divers real estates.

Two other suits were subsequently instituted in the Duchy Court of Lancaster, the one *Banner v. Hughes*, and the other *Read v. Hughes*; the bills in both these suits were filed on the 25th of November 1858. The suit of *Banner v. Hughes* was instituted by H. W. Banner against Thomas Hughes, for the execution of the trusts of two several indentures, dated the 28th of August 1848, which had been made by John Edwards, and that the rights of all parties might be ascertained in the unsold real estate. The bill also prayed for general accounts. In this suit a question was raised, whether certain real estates, conveyed by John Edwards, upon trust for sale, had been converted into personalty, and if so, whether it had by subsequent acts been reconverted into real estate. In case there had been no reconversion, it would be necessary to sell the real estate. A great part of the real estate was situate in the county of Chester, out of the jurisdiction of the Duchy Court.

The suit of *Read v. Hughes* was instituted by Margaret Read, one of the next-of-kin of John Edwards, against T. Hughes and H. W. Banner, in order that the personal estate of the deceased might be administered; that the trusts of the two deeds, so far as they were subsisting, might be executed; that the rights of the heir-at-law and the next-of-kin might be ascertained; that accounts might be taken of the personal estate of J. Edwards, and of his debts, &c., and of the property comprised in the indentures, and of the rents and profits, and of the proceeds of the sale, and that the net residue might be ascertained. The bill also prayed for a receiver, and that all sums of money, might be paid into the Duchy Court.

On the 29th of November 1858, there being no opposition, a decree was made in the Duchy Court, in both the suits of *Banner v. Hughes* and *Read v. Hughes*;

it was immediately enrolled, and was then served on the plaintiff in this suit, and advertisements were published for the heir-at-law and next-of-kin, and several persons claiming to be next-of-kin of the deceased appeared by local solicitors, who entered their names at the registrar's office; but before any further proceedings were taken, Messrs. Banner and Hughes gave notice of motion, asking the Court to stay all further proceedings in this suit of *Wynne v. Hughes*.

Mr. Selwyn and *Mr. Little*, in support of the motion.—Messrs. Banner and Hughes have made the application in this court to avoid a discussion of whether the Duchy Court could stay the proceedings in this court; but had the Duchy Court made any such order, it could only operate *in personam* to the extent of the person's interests within the Duchy Court. The Duchy Court had clear jurisdiction over lands within its limits; it could also affect lands out of the jurisdiction, provided the parties having the legal estate were subject to the jurisdiction of the Court. It might order a sale of the lands out of the jurisdiction, and enjoin the parties to obey the decree. If these estates were not reconverted, such a decree would, in effect, make *Mr. Hughes*, who claimed to be the heir-at-law, and *Mr. Banner*, who had the legal estate in the lands, trustees for the next-of-kin, and upon a sale they could convey the estate to a purchaser. If a testator died in this country possessed of property here, and also seised of real estate in Ireland, this Court would make an order respecting the real estate in Ireland, when once it had ascertained that it had all the parties interested in the testator's estate before the Court.—

Toller v. Carteret, 2 Vern. 494.

Tulloch v. Hartley, 1 You. & C. C.C. 114.

Penn v. Lord Baltimore, 1 Ves. 444.

Damer v. Earl Portarlington, 2 Phill. 30; s. c. 15 Sim. 380; 15 Law J. Rep. (N.S.) Chanc. 405.

Rigby v. Strangways, 2 Phill. 175.

Kinsey v. Kinsey, 2 Ves. 577.

Mr. Lloyd and *Mr. Haynes*.—There was no instance of parties to proceedings in a court of limited jurisdiction having ever

applied to stay proceedings in a suit in Chancery. To give jurisdiction to a local Court, it was essential that it should have both the parties and the land within its limits. If the land was out of its jurisdiction, a decree appointing a receiver could avail nothing if the tenants refused to attorn. The Court, so far as the parties to the suit were concerned, might act *in personam*, but it could not act *in rem*, especially if there were any derivative interests existing in the property out of the jurisdiction.—

4 Inst. 204.

Lord Coningsby's case, 9 Mod. 95.

Davis v. Davis, Finch, 451.

Chalmers v. Laurie, 10 Hare, App. xxvii.

6 Vin. Abr. 570, R, 'Courts-Duchy.'

Fisher v. Batten, Vent. 155; s. c. 2

Keb. 826; 2 Lev. 24.

13 & 14 Vict. c. 43. }

17 & 18 Vict. c. 82. } Duchy Courts.

ss. 7, 8, 11. }

15 & 16 Vict. c. 86. }

s. 42. rule 8. s. 66. } Chancery

Amendment.

Mr. Selwyn, in reply.

Jan. 24.—THE MASTER OF THE ROLLS.—This was a motion to stay proceedings in a cause in this court, by reason of a decree having been pronounced in the Duchy Court of Lancaster. There can be no question but that if the two Courts have co-extensive jurisdiction, and the two suits are so constituted that all that is required in one may be obtained in the other, this Court will stay the proceedings in the suit in which no decree has been pronounced, and will allow the other to proceed. But it is necessary to consider what the circumstances of this case are. *Mr. Edwards*, the intestate in the cause, in the month of August 1848, executed two deeds, which were, in point of fact, for one purpose only; one was for the sale of his real estate, and the other declared the trusts of the money which arose from the sale; they were, in point of fact, for the purpose of paying his debts. In the result, a large surplus remained of the property for the benefit of the settlor, and a considerable portion of it was not sold, and though by the deed it was absolutely

converted into personal estate, it is alleged that a reconversion took place by the settlor, as he was desirous that it should be reconverted; and in consequence of that the question is, whether the property which now remains is to be distributed as real or as personal estate, in other words, whether it goes to the heir-at-law, or whether it goes to the next-of-kin. The same question arises in both suits, but in the course of the proceedings, and certainly, if the next-of-kin are declared entitled, it may become necessary to sell the real estate for the purpose of distributing the proceeds amongst the next-of-kin. A part of this real estate is situate in the county of Chester; it is out of the jurisdiction of the Duchy Court of Lancaster. I, therefore, cannot say that the suit in this court ought to be stayed. I should, however, not hesitate in staying the proceedings if the Duchy Court of Lancaster had complete and entire jurisdiction over the whole matter. It was argued that the decree of the Duchy Court acts *in personam*, and that, although it has no authority over the land itself, yet as it had authority over all the persons who are interested in the land in any manner whatsoever, it could, when all those persons were parties to the suit, pronounce a complete and effectual decree in the matter. It was also argued that no receiver could be appointed over the entire real and personal estate. It was also clear that a sale under a decree or order of the Duchy Court of land over which it had jurisdiction was a perfectly different and distinct thing from what it was where it directed persons who were before the Court to sell land over which the Court had no jurisdiction. Questions would arise of payments of money into court, of opening biddings, if the land were sold by the decree of the Court; in fact, the sale cannot take effect under a decree of the Duchy Court of Lancaster; and without going into long details familiar to every person accustomed to the practice of the High Court of Chancery and the various questions that arise out of it, I am of opinion that the plaintiff in *Wynne v. Hughes* might be put to considerable difficulties if I were to say that he was not to proceed with the suit at all. The proper course, therefore, is not to stay the suit of *Wynne*

v. Hughes, but to refuse this motion. At the same time, I shall reserve the costs of the motion until I see the course that may be taken, and the mode in which the suits of *Banner v. Hughes* and *Read v. Hughes* are conducted (1).

WOOD, V.C. { TAYLER v. THE GREAT
Dec. 2; Jan. 13. { INDIAN PENINSULAR
RAILWAY COMPANY
AND OTHERS.

Vendor and Purchaser—Deed executed in Blank—Negligence.

T, being the holder of certain shares in a company upon which 20*l.* each had been paid up, and being also entitled to other shares in the same company upon which 2*l.* each had been paid, instructed his broker to sell the 2*l.* shares. The broker sold the 20*l.* shares, and brought to *T*. for execution by him deeds of transfer in which blanks were left for the name of the transferee, and for the number and numbers of the shares. The deeds bore stamps high enough to carry the 20*l.* shares, and were executed in blank by *T*. The deeds were delivered in this condition, together with the share certificates for the 20*l.* shares, which had been fraudulently obtained by the broker, to bona fide purchasers, who filled up the blanks. Upon a bill filed by *T*.—Held, that the deeds of transfer were void, and that he was entitled to the shares expressed to be transferred thereby, and to have his name restored to the register.

The bill in this case was filed for the purpose of having it declared that certain transfer deeds of shares in the Great Indian Peninsular Railway Company signed by the plaintiff were void, and for an injunction to restrain the registration of the deeds or any other dealing with the shares, and for other relief.

The plaintiff, a barrister, was the owner and registered holder of 120 shares in the company, upon each of which 20*l.* had been paid up, and he afterwards became entitled to sixty new shares in the same company, subject to the payment of 2*l.* deposit per share, making altogether 120*l.*, for which he gave his broker, Mr. Bour-

(1) See post.

dillon, a cheque, with instructions to pay the deposit. Shortly afterwards, being desirous of selling the new shares, he instructed Bourdillon to sell them, and Bourdillon afterwards informed him that he had sold them, and brought him two printed forms of deeds of transfer, which the plaintiff signed, believing them to be deeds of transfer of the sixty new shares; but the name of the transferee was not then inserted in either of the deeds, and in each deed a blank space was left for the name of the transferee as well as for the number and numbers of the shares purported to be transferred, and the broker then informed the plaintiff that the blanks could not be filled up until it was known how the shares were to be divided. These deeds, when executed by the plaintiff, were stamped respectively 5*l.* and 3*l.*, and when the blanks were filled up, the deeds appeared to be transfers of 20*l.* shares; one of the deeds being for fifty such shares, and the other for thirty.

On receiving notice from the secretary, that these transfers had been presented for registration, the plaintiff discovered that the blanks had been filled up with 20*l.* shares, and that the deposit upon the 2*l.* shares had never been paid by Bourdillon, though the cheque for 120*l.* was returned by the bankers as cashed. The plaintiff thereupon wrote to the secretary, requesting that the transfers might not be acted upon, and filed the present bill against the company and the transferee.

The defendants, the purchasers of the shares, by their answer stated, that when the deeds of transfer were handed over to them by Bourdillon, they contained the number and description of the shares; but admitted that the numbers of the shares as well as the consideration, 1,000*l.* and 600*l.* respectively, were added by their authority. They insisted that the purchase-money was really paid in full to Bourdillon, by whose acts, as the accredited agent of the plaintiff, the plaintiff must be bound.

With regard to the blanks for the names of the transferees, it appeared that the purchasers, who were stock-jobbers, purchased the shares to sell again; but not having re-sold them by the settling-day, they, in accordance with the long-established usage of the Stock Exchange, desired

Bourdillon not to fill in the name of the transferee, which they would fill in themselves when they had disposed of the shares; the object of this being avowedly to save the expense of the extra stamp.

It further appeared that, at the time of delivering over the deeds of transfer, Bourdillon had also handed to them the share certificates of the eighty 20*l.* shares, which he had fraudulently obtained from the company.

It was not disputed that the shares had been *bona fide* purchased from Bourdillon, who had misappropriated the money, and the only question was, upon whom, under these circumstances, the loss should fall.

The account of the transaction which was given by the defendants, the purchasers, and which was adopted by the Vice Chancellor, was as follows:—"We are stock and share dealers, and members of the Stock Exchange, London, and I, the said Stephen Spurling, for several years past, have carried on business extensively as a dealer in stock and shares, and from the month of January last we have carried on such business in co-partnership together. In and for several years previously to the month of July last, Charles Bourdillon carried on business as a stock and share broker, and was also a member of the Stock Exchange. Previously to the 28th of July 1857 we had had various transactions with the said Charles Bourdillon in the way of his business as a stock and share broker, and the said Charles Bourdillon was, on the said 28th of July, and for several weeks subsequently, in full credit as, and was a duly qualified and accredited broker, carrying on business on the Stock Exchange. On the said 28th of July last, the said C. Bourdillon as such stock and share broker as aforesaid, offered to me, the deponent, S. Spurling, for sale on the Stock Exchange, sixty Great Indian Peninsular Railway 20*l.* shares, which he represented he had for sale as a broker, and I accordingly agreed with him for the purchase of such sixty shares, at the price of 19½ per share, being the then market price of such shares, and a note of such purchase was entered in our books, according to the usage of the Stock Exchange. In the latter part of the same 28th day of July last the said

C. Bourdillon offered to sell to me twenty more of the said Great Indian Peninsular Railway Company 20*l.* shares, which he represented he had for sale as a broker, and I agreed with him for the purchase of such further 20*l.* shares, at the price of 19½ per share, being the then market price of such shares, the market having in the course of the day somewhat declined, and a note of such last-mentioned purchase was made in our books; the said purchases were made on account of me and my said co-partner in the usual course of our partnership business. . . . According to the usual course of business, as between brokers and dealers on the Stock Exchange, we, on the then next settling-day, being the 30th of July, adjusted our account with the said C. Bourdillon for the said eighty shares, and for some other transactions we had had with him during that month, when there appeared to be a balance in his favour, including the purchase-money of the said shares, of 1,624*l.* 4*s.* 5*d.*, which last-mentioned sum, on the following day, being the 31st of July, was paid by us to the said C. Bourdillon, by a cheque on our bankers, and which cheque was duly paid when presented. Contemporaneously with such payment, and in exchange for the said cheque, the said C. Bourdillon delivered over to us the certificates of eighty 20*l.* shares in the said Great Indian Peninsular Company, together with two deeds of transfer of the said shares executed by the plaintiff, one of such deeds of transfer being on a 5*l.* stamp, and purporting to be a transfer of fifty shares in the said company, and the other being on a 3*l.* stamp, and purporting to be a transfer of thirty shares in the said company. We say that we, being dealers in shares, purchased the said shares to sell again, and not intending to hold them; but not having resold them by the settling-day, we, in accordance with the long-established usage of the Stock Exchange, desired the said C. Bourdillon not to fill into the transfers the name of the transferee, but to leave it in blank, and we would fill in the name ourselves when we had disposed of the shares; and a few days afterwards, having a loan open with Messrs. J. H. Spurling & Son, we, with their consent, filled in the name of the defendant P. Spur-

ling into the said two deeds of transfer, as the transferee of the said shares, and in part satisfaction of the said loan, and at the same time added thereto the numbers of the shares, according to the certificates which had been delivered to us."

With regard to the practice on the Stock Exchange, several dealers made affidavits to the following effect:—"It is the constant practice of brokers and dealers on the Stock Exchange to have the transfers of shares which they have to sell executed by the vendors in blank, and to fill in the name of the purchaser, the amount of the consideration-money and the particulars of the shares intended to be sold, after the bargain is made with the purchaser. A broker having in his possession the certificates of the shares proposed to be sold, and a blank deed of transfer executed by the party in whose name the shares stand, is, according to the invariable practice and usage of the Stock Exchange, considered and dealt with as the authorized agent of the party in whose name the shares stand, to sell and receive the purchase-money for the shares. This usage and custom is so firmly established that it is daily acted upon. I have myself frequently acted upon it, and bought and sold shares upon the credit of blank transfers signed by the vendors; and it would, as I verily believe, most materially interfere with the course of business on the Stock Exchange, and introduce great delay and difficulties in the transaction of business, if the practice should be interfered with."

The following passages occurred in other affidavits made by dealers:—

"As far as I know, this transaction would be considered amongst the jobbers a regular and usual transaction. I cannot speak about the brokers. In my opinion, it would make no difference in the regularity of the transaction, if the consideration and the numbers of the shares were omitted, with such men as Spurling and Bristowe; with other men the omission of the name of the transferee might make a difference. With some men I would not enter into a time bargain at all. If the stamp were on the transfer that would represent the amount of consideration that must be filled in. In this case an 8*l.* stamp was on the transfer, which would

shew that the shares were meant to be 20*l.* shares. If there was a stamp on the name of the transferee, and the number or numbers of the shares omitted, I think that would make no difference, because the certificates would have to be delivered with the transfer, and these would give the numbers. All the difference would be, that the buyer's clerk would enter the numbers instead of the seller's. We only know the broker. We know no one else in the transaction. It is for the accommodation of the jobber, and usually at his request, that the transferee's name is omitted."

"I have known many instances of such practice. The jobbers, for their own convenience, are always desirous to make use of this practice. . . . As far as I have seen blank transfers, the name of the shares and the numbers of them are generally filled in, but not invariably so. The consideration-money most frequently is not filled in. If the numbers are not filled in, but the certificates are handed over, the only practical difficulty is, that there might be a mistake. It would also be a satisfaction to the seller to see that he is only signing a transfer for the shares of which he has given up the share certificates. The number is inserted for the seller's protection."

Mr. Rolt, Mr. W. M. James and Mr. Walford, for the plaintiff.—The deeds of transfer are absolutely void. Bourdillon could have no authority to fill up the blanks without a power of attorney; and if the purchaser, leaving the documents with all the blanks, had filed his bill for specific performance he must have failed.—

Hatch v. Searles, 2 Sm. & G. 147; s. c., on appeal, 24 Law J. Rep. (N.S.) Chanc. 22.

Hibblewhite v. M'Morine, 6 Mee. & W. 200; s. c. 9 Law J. Rep. (N.S.) Exch. 217.

The Companies Clauses Consolidation Act (8 Vict. c. 16), ss. 14, 15.

Mr. Willcock and Mr. G. M. Giffard, for the transferees.—The loss has been occasioned by the negligence of the plaintiff, and where a loss must fall on one of two innocent persons, the person through

whose negligence the loss has been occasioned must be the sufferer—Per Ashurst, J., in *Lickbarrow v. Mason* (1), *Perry-Herrick v. Attwood* (2), and *Rice v. Rice* (3). With respect to the blank transfers they cited—

Humble v. Langston, 7 Mee. & W. 517; s. c. 10 Law J. Rep. (N.S.) Exch. 442.

Young v. Grote, 4 Bing. 253; s. c. 5 Law J. Rep. C.P. 165.

Schultz v. Astley, 2 Bing. N.C. 544; s. c. 7 Car. & P. 99; 5 Law J. Rep. (N.S.) C.P. 130.

Horsfall v. Fauntleroy, 10 B. & C. 755; s. c. 8 Law J. Rep. K.B. 259.

Mr. J. Hinde Palmer appeared for the company.

Mr. Rolt replied.

Jan. 13.—WOOD, V.C., after stating the facts at some length as narrated above, said that, undoubtedly, Mr. Tayler was guilty of considerable negligence in executing the transfers in blank, as of course he expected the transaction to be completed through the operation of the instruments so signed by him in blank, and also in not noticing that the stamps were sufficient to carry the 20*l.* shares. As soon, however, as he had by a fortunate accident received from the secretary notice that the two transfers had been left for registration, he immediately wrote a reply, saying he had only signed transfers for sixty 2*l.* shares, and also wrote to Bourdillon for an explanation. There was no laches after this, and the question now was, whether he was entitled to have these transfers declared void as against himself, and several authorities had been cited to shew that he must be held to have lost his right with respect to the shares in question. The first question raised was, whether the transfers themselves were operative. Upon that there could hardly be the shadow of a doubt after the decision in *Hibblewhite v. M'Morine*. It would be absurd after that decision to contend that the transfer was valid. In that case *Tayler*—

(1) 2 Term Rep. 63, 70.

(2) 2 De Gex & Jo. 39; s. c. 27 Law J. Rep. (N.S.) Chanc. 121.

(3) 2 Drew. 73; s. c. 23 Law J. Rep. (N.S.) Chanc. 289.

v. Evans (4), where Lord Mansfield held that a bond was valid which was given with the name of the obligee and sum in blank to a broker to obtain money upon it, was cited as an authority for the validity of a transfer deed executed with the name of the purchaser in blank; but the Court of Exchequer expressly overruled the decision. It is said that *Hibblewhite v. M'Morine* was decided on merely technical grounds, but if the policy of the law is to be maintained it follows that before an agent can legally fill up blanks in an instrument, he must be authorized to do so by an instrument equally solemn in form. There is no question whatever, therefore, that when these instruments were delivered to the purchasers they passed on the face of them no legal interest. The question then arises, how far the plaintiff is answerable for his own negligence. The case of *Schultz v. Astley* was the case of a bill of exchange, and it was held no objection to its validity that the acceptance and indorsement were written before the bill was drawn. But no seal is required to a bill of exchange, and the Court considered that there was an implied agency. *Young v. Grote*, which was cited on the question of negligence, was a case where a person having an account at a bank left with his wife certain blank cheques signed by himself, with directions to her to fill them up, and she caused one to be filled up with the words "fifty-two pounds two shillings," the "fifty" being commenced with a small letter, and placed in the middle of the line and the figures "52, 2" being also placed at a considerable distance from the printed £. The person to whom the check was delivered having inserted the words "Three hundred and" before the "fifty," and the figure "3" before the "52," and the banker having paid the 352*l.* 2*s.*, the question was upon whom the loss must fall, and the Court held that it must fall upon the customer, proceeding partly on the ground of negligence and partly, by analogy to the doctrine applicable to bills of exchange, on the ground that the banker was bound to pay to the order of his customer. In that case the alteration was made in such a manner that no person

using due and ordinary diligence could have discovered that it had been made improperly. But if the added words had been interlined or badly written, the banker would not have been exonerated. These are the sort of cases that have been cited for the defendants. Then the rule laid down by Ashurst, J., in *Lickbarrow v. Mason*, has been cited, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. Of course there can be no doubt about that proposition; but the contention of the defendants is, that, through the negligence of the plaintiff, though they have no legal title, they have acquired the equitable right. I think they have plainly no right. They must be taken, as everybody must be taken, to have known the law; and when Bourdillon presented to them these transfers they knew that both the numbers of the shares and the name of the purchaser were left in blank. But then it is said that, according to the custom prevailing between brokers and jobbers, the person holding the share certificates is considered as having the title, and it is the universal practice to accept transfers signed in blank. But how can the Court recognize that as a custom of trade which is plainly illegal? One of the witnesses states candidly in his affidavit that it is done for the purpose of avoiding the stamp. Surely no Court can recognize such a custom as that as a legal one, or one which Tayler was bound to take notice of.—[His Honour referred at some length to the evidence adduced as to the custom, the effect of which is already stated, and proceeded:]—The defendants have themselves been guilty of great negligence in taking a transfer in such a form as this. For all they knew, Bourdillon might have had in his hand the certificates for the 2*l.* instead of the 20*l.* shares. Tayler's negligence was unquestionably very great, but if these defendants had done what the law required them to do, they would have had nothing to complain of; and, therefore, though Tayler's negligence was the primary cause of the misfortune, yet, as they have preferred following an illegal practice to one which would have made them safe, they must abide by the consequences of their own acts. Then, it

(4) Cited in *Master v. Miller*, 1 Anst. 228.
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is said further, that the plaintiff is not entitled to come into equity for relief, but must stand on his legal rights alone; but he is obliged to come here for the injunction, and also for the purpose of having the shares re-delivered to him. It must be declared that the several deeds of transfer are void, and that the plaintiff is entitled to the shares expressed to be transferred thereby, and to have his name restored to the register. He trusted Bourdillon to the extent of the sixty 2*l.* shares, and he must give up the money received in respect of them; and upon his submitting to that, he will have his costs of the suit.

LORDS JUSTICES. }
 Nov. 23; Dec. 4. } BIDDLES v. JACKSON.
 Jan. 11, 24. }

Ward of Court—Marriage after Twenty-one—Settlement—Fund in Court—Jurisdiction.

A female ward of Court married a fortnight after attaining twenty-one. Upon a joint petition of herself and her husband, asking for payment of a fund in court, part of her fortune, to her husband, the Court refused to examine the lady, who offered to attend for that purpose, and it also refused to accede to the prayer of the petition, but made an order directing the dividends of the fund to be paid to the husband during the joint lives of himself and his wife, without prejudice to any question. The order of the Court was made precisely on the same footing as if the lady had been examined in court, and had expressed in the strongest manner her desire that not any part of the fund should be settled.

The facts of this case are reported *ante*, p. 40. Application was made to the Lords Justices, by way of appeal from the order made by the Master of the Rolls, or rather that their Lordships would be pleased to hear the petition without the parties being put to the trouble and expense of a formal petition of appeal.

Mr. Dean supported the application.

LORD JUSTICE TURNER.—The Master

of the Rolls has made the order; it is therefore impossible to hear the petition without the parties being at the trouble of presenting an appeal.

LORD JUSTICE KNIGHT BRUCE.—If, upon application to the Master of the Rolls, his Honour shall think fit to withdraw the order, and express a wish that we should hear the original petition, we may be able to do so.

Mr. Dean, on the same day, stated that the Master of the Rolls had consented to withdraw the order, and requested the Lords Justices to hear the petition.

Their Lordships ordered the case to be put into the paper on the first petition day after the term.

Dec. 4.—*Mr. Dean* read from the affidavits of the mother, daughter and husband that the intimacy had lasted for two years, and that the property to which the daughter was entitled in possession was 483*l.* consols, 96*l.* reduced, and 1*l.* 8*s.* 5*d.* cash; that there was due to her mother for her support about 400*l.*, which all parties had agreed should be paid to that lady; that the husband was fully competent to support his wife, and that the mother was the tenant for life of a considerable sum of consols, which at her death would be divisible among her three daughters, of whom Mrs. Jackson was one.

[LORD JUSTICE KNIGHT BRUCE.—My impression is that a contempt has been committed, though I do not give any conclusive opinion. I have no objection, however, to the husband receiving out of court the sums to which his wife is entitled at once, if he expresses a willingness to execute a settlement, if called upon, of the reversionary property to which she will become entitled in possession on her mother's death.]

[LORD JUSTICE TURNER.—If the small sums are paid out, I think the easiest way will be for the lady to appear before us, and that at the same time a draught of a settlement of the reversionary property should be submitted to the Court. I give no opinion whatever on the question of contempt.]

[LORD JUSTICE KNIGHT BRUCE.—Mrs.

Jackson can communicate to us when it will be agreeable to her to appear for examination, and her husband to say whether he accedes to the views expressed by this Court as to the settlement.]

Mr. Dean said that their Lordships' pleasure should be communicated to the parties; and though he would not trouble the Court with any statement of the cases on this important subject, yet he might say that in those of marriage, even so soon after an infant had attained twenty-one as one day, a contempt was held not to have been committed.

Jan. 11.—*Mr. Dean* stated that the pleasure of their Lordships had been communicated to the parties, but that *Mrs. Jackson* positively declined to accede to the proposition made by the Court as to a settlement, and expressed her desire that the prayer of the petition should be acceded to. It was in total ignorance on the part of the lady, of her mother and of her present husband that the young lady was a ward of Court; that that gentleman made her an offer of marriage, but the mother objected that her daughter ought not to marry under the age of twenty-one, and in that decision the young lady concurred. The marriage was accordingly postponed until August last, and then, a fortnight after she attained her majority, the marriage took place.

[*LORD JUSTICE KNIGHT BRUCE* observed that it seemed quite clear that where a ward of Court married during infancy, the Court would retain its hold over the property of the ward, and, if a female, would pay no regard to her wishes, but settle the property as in its discretion it thought most for her benefit. What, however, was doubtful to his Lordship was, whether, where an infant ward of Court receives proposals of marriage during her infancy, and a marriage takes place after her majority on the footing of the proposal before made, such a marriage did not stand in all respects as regarded property on the same footing as if it had taken place during minority.]

Mr. Dean then proceeded to argue that if the rule was to be established according to the intimation just thrown out by the Lord Justice Knight Bruce, that when a marriage takes place with a female ward of

Court after her majority upon the footing of an engagement or understanding entered into while she was under age, the parties should be treated in precisely the same way as if they had married while she was an infant, it would be carrying the doctrine much further than any previous authorities had placed it. The rule regarding such a subject was thus distinctly stated by Lord Eldon, in the case of *Austen v. Halsey* (1), which was a leading case. His Lordship said, "He wished it to be understood that though a female ward of the Court, when of age, might make whatever settlement of her property she pleased, and might effectuate this by consenting personally in court, or under a commission for the purpose; yet that, where this was not done, her property would never be discharged from the protection of the Court, except by the order of the Court, and, consequently, until such proceeding, she and her property must always be considered as having the protection of the Court still around her." If a female ward of Court could make whatever settlement of her property she pleased, what difference, it might be asked, could it make that she chose to make no settlement at all? That case was followed by Sir John Leach, in *Long v. Long* (2), where the marriage took place the day after the ward attained twenty-one, and yet it was held that no contempt was committed, and that that portion of the lady's property, to the payment of which she had given her consent in court, was bound by that consent. The same principle was recognized by Vice Chancellor Kindersley, in *Money v. Money* (3), where the marriage was purposely postponed until a few days after the ward attained twenty-one. So also their Lordships, sitting in the full Court of Appeal, had, in an unreported case, decided on the 5th of March 1858 (4), followed the same rule, and had overruled a decision of the Master of the Rolls, directing a settlement on the ground that the marriage had taken place three days after the ward attained the age of twenty-one years.

(1) 2 Sim. & S. 123, in note to *Long v. Long*.

(2) *Ibid.* 119.

(3) 3 Drew. 256; s. c. 24 Law J. Rep. (n.s.) Chanc. 684.

(4) *Longbottom v. Pierce*.

[LORD JUSTICE KNIGHT BRUCE.—I have totally forgotten that case.]

[LORD JUSTICE TURNER.—I have examined my note book of the day, and find nothing of such a case.]

The registrar's book of the 5th of March 1858 was handed up, but the only note of *Longbottom v. Pierce* was, that the full Court agreed with the Master of the Rolls that no examination was necessary.

Mr. Everitt Stiffe, counsel in *Longbottom v. Pierce*, said that the full Court of Appeal appeared to think that the rule ought to be settled, and that if the Court had jurisdiction over the property of a ward after majority for one day, it had jurisdiction indefinitely. He also stated that the order was made on the mere volition of the lady. The sum there was small.

[LORD JUSTICE KNIGHT BRUCE, for himself, said, if he had expressed himself differently in *Longbottom v. Pierce* to what he had said in the case before the Court, he considered that he was in error.]

Mr. Dean.—If the rule laid down by Lord Eldon, and followed by Sir John Leach and Sir Richard Kindersley, and supposed to have been followed by their Lordships, were not to be adopted as the settled rule of the Court, where is the line to be drawn? There must be some time when a woman, whether married or single, becomes the absolute mistress of her property under the controul, or at least in the custody of the Court; and it is difficult, if not impossible, to say that any time could be fixed, except that recognized by the law of the country, as the period of majority. At that time a lady may dispose of her real estate by deed, acknowledged in conformity with the Fines and Recoveries Abolition Act (3 & 4 Will. 4. c. 74), and it has been held, that she may equally dispose of her personalty by giving her consent in court, after being duly examined as to her wishes on the subject. The only cases in which the rule of Lord Eldon has been departed from are when a contempt of the Court has been committed, or when, if no actual contempt has been committed, yet so strong a case of concert has been established to defeat its intentions, and in some instances the positive directions of the Court; in all which cases the Court has held the parties bound —

Re Anne Walker (5) (a gross case of contempt), *Martin v. Forster* (6), *Ball v. Coutts* (7). In the present case there can be no question the Court has done all it can to obtain a proper provision for the wife, but both she and her husband at present positively decline to accept the benefits intended for her by the offer their Lordships had already made. She again tenders herself for examination, and will hear, respectfully, the suggestions the Court may kindly throw out for her guidance. If, however, their Lordships should refuse to examine her as to her understanding of her rights, and as to her wishes on the subject of her property, it will be depriving her of the advantages of the highest advice which, even at this late stage of the proceedings, she might have to induce her to alter her determination. If she, even then, should still refuse to have a settlement, it is submitted that the Court has no jurisdiction to settle her property against her own wishes; and if it has not the power to direct a settlement, there is no reason why she should not have the same enjoyment of it and controul over it as she would have over any real estate she may have. In conclusion, he (Mr. Dean) was instructed to say that the parties declining, as they did, to make the settlement proposed by the Court, would, rather than accept the offer of their Lordships on a former occasion, have the whole matter referred into chambers on the question of settlement. It was extremely desirable that the Court should at once state its opinion whether the parties were bound, in the circumstances of the case, to make a settlement.

[LORD JUSTICE KNIGHT BRUCE.—No. We are not about to make any such declaration. We shall not say you are bound to make a settlement, nor are we about to give the money.]

[LORD JUSTICE TURNER.—If a settlement be made of the reversionary property, we shall have no difficulty about the money in court.]

Their Lordships then, on the application of Mr. Dean, allowed the petition to stand over.

(5) L.L. & G. temp. Sugd. 299, 323.

(6) 7 De Gex, M. & G. 98; a. c. 24 Law J. Rep. (N.S.) Chanc. 519.

(7) 1 Ves. & B. 292.

Jan. 24.—*Mr. Dean* asked that the Court would also name a day on which the lady might appear and be examined by their Lordships, and state whether she still objected, as she did at present, to make a settlement of her property, and if it should appear that she still objected, their Lordships would then decide whether they would think fit to hold the property to which she was entitled until the death of herself or her husband.

LORD JUSTICE KNIGHT BRUCE.—If there were no objection to a settlement, of course there would be no difficulty in the matter. The lady's declaration, that she objects to a settlement, will make no difference whatever; so far as I am concerned, it will not have the least weight with me.

LORD JUSTICE TURNER.—You have the opinion of the Master of the Rolls against you, *Mr. Dean*, on the principal point in the case. His Honour's order was discharged by himself, but the opinion remains the same.

The order made was:—"Let the cash in court arising from the dividends of the stock be paid to the petitioner, *Mr. Jackson*, the husband, as also the dividends to accrue in future during the joint lives of himself and *Mrs. Jackson* until the further order of the Court, without prejudice to any question, with liberty to apply in the mean time."

LORD JUSTICE KNIGHT BRUCE.—You should understand, *Mr. Dean*, and the parties themselves should be informed, that the order now made is precisely on the same footing as if *Mrs. Jackson* had been examined in court, and had expressed in the strongest manner an opinion against having any part of the funds settled.

M.R. }
Nov. 25; } AUDSLEY v. HORN.
Dec. 6. }

Legacy—Gift to A. R. and her Children.

A testator gave leasehold premises to M. R. for life, and at her death to A. R. and her children; but if they should die without issue, in that case the property was to be divided between four persons, nominatim. A. R. had no children either at the death

of the testator or of the tenant for life:—Held, that A. R. took only an estate for life, with remainder to her children.

Held, also, that the rule in Wild's case has no application to personality.

By a lease, dated the 25th of June 1803, certain leasehold property, now the site of Hanserd Place, Blackfriars Road, was demised to Thomas Hanserd and his assigns, from the 24th of June 1803, for the term of ninety-five years, at the rents and subject to the covenants therein mentioned.

Thomas Hanserd, by his will, dated the 18th of August 1818, bequeathed Hanserd Place to his daughter, Mary Rossiter, during her life, and at her death to the defendant, Amelia Rossiter, and Amelia Rossiter's children; but if they should die without issue, in that case the property to be divided between William Hanserd, John Tuttle and John Learry and Maria Learry.

The testator died on the 6th of February 1819, and his will was proved by his widow, Mary Hanserd, and by William Hanserd and John Tuttle, whom he appointed his executors. On the 1st of July 1834, Amelia Rossiter intermarried with Joseph Horn.

On the 9th of January 1835 Mary Rossiter died, at which time there was no child born of Amelia Horn.

By an assignment, dated the 6th of December 1843, Joseph Horn and his wife and William Hanserd mortgaged the premises comprised in the lease, with the appurtenances, to secure to John Audsley the repayment of 220*l.*, with interest at 5*l.* per cent.

On the 21st of January 1849 John Audsley made his will, and appointed the plaintiffs, Elizabeth and James Audsley, his executor and executrix. He died on the 27th of February 1849, and they proved his will.

On the 24th of March 1852, J. Horn and his wife and W. Hanserd further charged the same premises to secure to the plaintiffs the sum of 198*l.* 5*s.* and interest, in addition to the 220*l.* and interest, and declared that the premises should not be redeemable until both sums were paid.

Joseph Horn died on the 17th of April 1857, leaving his widow and six children

surviving, and then in possession of the premises.

The bill in this case was filed, by the executors of J. Audaley, against Amelia Horn, and by amendment against her children, praying for a declaration that she was absolutely entitled to the leasehold premises, and that in default of payment of what was due upon the mortgage, she might be foreclosed from all equity of redemption.

Mr. R. Palmer and Mr. Cory, for the plaintiffs, referred to—

Wild's case, 6 Rep. 17.

Stokes v. Heron, 12 Cl. & F. 161.

Goldney v. Crabb, 19 Beav. 338.

Chandless v. Price, 3 Ves. 99.

2 Jarman on Wills, 334.

Mr. Fischer, for Amelia Horn.

Mr. Eddis, for the children of Amelia Horn.—*Wild's case* does not apply to personalty. After the decease of their mother, the children of Amelia Horn are entitled to the leasehold estate absolutely.

Heron v. Stokes, 2 Dru. & W. 89;
s. c. 3 Irish Equity Rep. 163.

Doe d. Gigg v. Bradley, 16 East, 399.

Buffar v. Bradford, 2 Atk. 220.

Morse v. Morse, 2 Sim. 485; s. c. 2 Hag. Ec. 608.

Stone v. Maule, Ibid. 490.

Snowball v. Procter, 2 You. & C. C.C. 478.

Gordon v. Whieldon, 11 Beav. 170;
s. c. 18 Law J. Rep. (N.S.) Chanc. 5.

Dawson v. Bourne, 16 Beav. 29.

Dec. 6.—THE MASTER OF THE ROLLS.—

As an ordinary rule, nothing ought to be determined in such a suit as this but the validity or invalidity of the mortgage. The parties to the mortgage-deed, or those claiming under them, are usually the only parties to the cause, but by an arrangement, or at least by a proceeding on the part of the plaintiffs, acquiesced in by the defendants, persons not parties to the mortgage are made defendants to the bill, that they may argue and have determined a question arising upon the will of Thomas Hanserd as to what estate or interest Amelia Rossiter took in the leaseholds mortgaged to the plaintiffs. The

gift was to her and her children, but if they should die without issue then over. Amelia Rossiter had no children at the date of the will or at the testator's death, or at the death of Mary Rossiter. It is contended that the gift was either a *quasi* estate tail in Amelia Rossiter, upon the principle of *Wild's case*, or that it was an estate to Amelia Rossiter and her children as joint tenants; and that upon the latter assumption, as there were no children alive at the time when the gift took effect, Amelia Rossiter took the whole absolutely. *Wild's case*, however, cannot apply to the present case. The devise there was to R. W. and his wife, and after their decease to their children. Here the gift is to Amelia Rossiter and her children, but if they should die without issue then over; and this distinction seems to have been noticed in *Sugden's Law of Property*, 237, in the comment upon the decision of *Stokes v. Heron*; but, with the exception of that case, it does not appear to have been laid down or even stated *obiter* that the rule in *Wild's case* applies to personal estate. In *Stokes v. Heron* this point was not decided by the House of Lords, though Lord Brougham expressed his opinion to that effect strongly, and he held that it applies equally to personal as to real estate; but it should be observed, that it was not necessary for the decision in that case, and that the applicability of this rule to bequests of personalty has been disputed in a great variety of cases, as *Knight v. Ellis* (1), *Buffar v. Bradford* and *Stone v. Maule*. Upon a review of all the cases, and setting aside some not easily reconcileable, I think the tendency of modern authorities has been, in cases like the present, to hold that in personalty the bequest gives an interest for life in the mother, with an interest in remainder to the children. Thus, in *Crawford v. Trotter* (2), a bequest to one and her children was held to give an interest for life to the mother, and a remainder to her children. In *Morse v. Morse* a bequest of a sum of money to the testator's daughter and her children was held to give an interest for life in the daughter, with remainder to all her children. This, notwithstanding there

(1) 2 Bro. C.C. 570.

(2) 4 Madd. 361.

are cases not easily reconciled, is the view most consonant with the line of modern cases, and their tendency generally, and most in accordance with the spirit and intention of the testator. In *Dawson v. Bourne* and in *Jeffery v. De Vitre* (3) I adopted this view.

In this case, I must hold, that the bequest gave a life interest to Amelia Rossiter only, and that upon her death the leaseholds are divisible among her children, and, consequently, that all that the plaintiffs are entitled to is to foreclose the life interest of Amelia Horn. Therefore, as against the defendants who have been added by amendment, the bill must be dismissed, both because they are no parties to the mortgage-deeds, and also because the only question on account of which they have been made parties, has been decided in their favour.

M.R. }
Jan. 29. } *In re MATTHEWS.*

Trustees — Appointment — Separation Deed.

Upon a separation between husband and wife a deed was executed, in which a trustee covenanted that, in the event of the husband allowing the wife to live separate and have the custody of their children, the trustee would indemnify the husband against the debts, &c. of the wife. Upon the decease of the trustee,—Held, as the deed contained no power to appoint new trustees, that the Court, under the Trustee Acts, had jurisdiction to appoint new trustees of the property.

By a settlement, dated the 19th of July 1844, made in contemplation of the marriage of Ann Clark with George Matthews, a sum of 1,000*l.*, secured by a promissory note, was vested in Stephen Clark and Benjamin Whitford, upon trust to invest the produce when got in and pay the income to arise therefrom to Ann Clark for her separate use for life, with remainder to G. Matthews for life, and after the decease of the survivor, upon trust for the children of the marriage, and in default thereof for the appointees or next-of-kin of Ann Clark.

(3) 24 Beav. 296.

In 1845 G. Matthews assured his life in the Provident Life Assurance Society, for a sum of 1,500*l.*, payable on his death, in consideration of the annual premium of 39*l.* 3*s.* 9*d.*

G. Matthews subsequently borrowed of William Brooks a sum of 750*l.*, upon mortgage of a real estate at Dorn, in the county of Worcester, of which he was seised, and upon an assignment of the policy of assurance on his life.

In 1852 S. Clark purchased the equity of redemption of the real estate at Dorn from G. Matthews. At the same time he agreed to pay and relieve him from certain debts he had contracted. In the April previous he had also paid 39*l.* 3*s.* 9*d.* for keeping the policy on foot.

On the 1st of October 1853, in consequence of differences, a deed of separation between G. Matthews and his wife was executed, and, after reciting the facts above stated and that there were two children of the marriage, viz., Sarah and Stephen Clark Matthews, it was witnessed that, in consideration of being indemnified from the debts of his wife, of the sum of 39*l.* 3*s.* 9*d.*, and of himself and family having been maintained by S. Clark, he, G. Matthews, assigned the policy of assurance on his life, and also his reversion in the income to arise from the 1,000*l.* settled upon his marriage, to Stephen Clark, his executors, administrators and assigns, upon trust either to keep the policy on foot or at any time thereafter, except in the event thereafter specified, to sell or surrender the same and stand possessed of the money or other the sums payable on account of the policy, upon trust, after reimbursing himself all money and costs which he should have incurred in keeping the policy on foot, inclusive of the 39*l.* 3*s.* 9*d.*, with interest at 5*l.* per cent., to invest the money on government or real securities, and pay the income to Ann Matthews for life for her separate use, and after her decease for the children of the marriage and of their issue born in his lifetime, as she should appoint, with remainder in default for the children of the marriage equally, and in default of any who should attain a vested interest, upon trust for such persons as Ann Matthews should appoint by will, with remainder in default to her next-of-kin.

The deed also, in the event of the death of Ann Matthews, contained powers to maintain and educate the children. It also declared that the income to arise from the 1,000*l.* should be applied in payment of the premiums on the policy, and subject thereto as Stephen Clark, his executors, administrators or assigns, should in his or their discretion think fit, for the benefit of the children of the marriage, and, subject thereto, upon trust for G. Matthews and his assigns.

The deed also declared that it should be incumbent upon S. Clark to keep the policy on foot, unless the income of the monies assigned should be sufficient for that purpose, or to effect a fresh policy in case it should have been sold before the income of the monies assigned fell into possession, but he was to keep the policy on foot in the event of its not being sold when the income fell into possession.

G. Matthews then covenanted that so long as S. Clark, his executors, administrators and assigns, performed his covenants thereinafter contained, he, G. Matthews, would permit his wife to live separate as a feme sole, and to have the custody, charge and entire controul over the children, and that he, G. Matthews, without the consent of S. Clark in writing, would not take up his abode or permanent residence at any place within twenty miles of Chipping Norton, or come within five miles thereof for a temporary residence, or visit oftener than twice in any one year, and would not remain within the town or five miles thereof on the occasion of such visit or temporary residence longer than one week; and that in the event of any breach he would pay to S. Clark, his executors, administrators or assigns, 50*l.* within a month after demand.

Stephen Clark then covenanted that so long as G. Matthews should observe and perform his covenants, he, S. Clark, his heirs, executors and administrators, some or one of them, would at all times keep G. Matthews, his heirs, executors and administrators, indemnified against all liability or obligation to provide for and maintain his wife, and against her debts and engagements, and all actions, suits, claims and demands in respect thereof.

This deed contained no power to appoint new trustees.

Stephen Clark died on the 18th of October 1858 intestate, and no person had taken out letters of administration to his estate.

Mrs. Matthews from the time of the separation had, with the assistance of her brother, maintained herself and her infant children, and she now presented this petition under the Trustee Acts, 13 & 14 Vict. c. 60, and the 15 & 16 Vict. c. 55, praying the Court to appoint John Edwin Jenkins, John Warland and Thomas Haynes trustees of the deed of the 1st of October 1853, and to vest the property in them upon the subsisting trusts.

Mr. Charnock, in support of the petition.

Mr. Selwyn, for George Matthews.—There is no ground for asking the Court to appoint new trustees; it would in effect subject the husband to be harassed doubly, by the administrator of the deceased trustee and by the new trustees. The assignments made by the deed were, in consideration of covenants made by the deceased trustee, for the protection of the husband: the new trustees would not be liable to these. The petition, therefore, ought to be dismissed, and the costs paid by the next friend.

Vansittart v. Vansittart, 2 De Gex & Jo. 249; s. c. 27 Law J. Rep. (N.S.) Chanc. 222, 289.

Hope v. Hope, 26 Law J. Rep. (N.S.) Chanc. 417.

THE MASTER OF THE ROLLS.—I am not asked to carry the provisions of this deed of separation into effect. It has been entered into between the parties and the property was vested in a sole trustee, who is since dead, and the deed contains no power to appoint new trustees. I am now asked to appoint three other persons to be trustees in his place, and I think the jurisdiction given by the acts enables me to make the appointment. This will neither alter the rights of the parties nor vary their interests under the deed: it will not affect the covenants entered into or the liabilities of the parties under them: it will merely appoint parties whose duty it will be to protect the property. I shall therefore make the order.

M.R. }
Jan. 11. } SCOTT v. JOSSELYN.

Legacy for Life—Power to appoint.

A residuary estate was bequeathed to trustees upon trust to permit the testator's wife to receive the income for life, and also to apply such parts of the capital to her own use as she should think proper, and after her decease to apply the residue to such persons as she by will should direct. The widow used no part of the capital, but by her will she directed that the property should be distributed as directed by the will of her husband:—Held, that the widow took a life interest only in the fund, with power to apply the capital for her own benefit, and if not so disposed of, with a power to appoint it by will.

The Rev. Charles Lionel Scott gave all the residue of his estate and effects, of what nature or kind soever, unto his wife, Sarah Scott, and James Josselyn (whom he appointed executrix and executor of his will), upon trust to permit his wife to receive or retain the annual produce thereof for her own use and benefit during her life, and also to apply to her own use and benefit so much and such parts of the capital thereof as she should think proper; and after her decease the testator directed that James Josselyn, or the trustees for the time being of his will, should stand possessed of the residue of his estate and effects, or so much thereof as should remain after such application of any portion thereof by his wife in manner aforesaid, upon trust for such person and persons, and for such intent and purposes in all respects as his wife by her will, or by any testamentary paper by her legally executed, should direct or appoint, and, in default of such appointment, he directed that the residue of his estate and effects, or so much thereof as should remain as aforesaid, should be holden upon trust to pay thereout the sums of money therein specified unto the several persons therein named, viz., amongst others, the sum of 1,500*l.* to his nephew, the plaintiff Thomas Edward Scott, and 1,600*l.* to his niece, the plaintiff Sarah Anne Stuart; and as to all the surplus of the residue of his estate and effects, the testator gave

the same upon trust for the defendant, James Josselyn, his executors and administrators, for his and their own use and benefit absolutely. The testator died on the 18th of April 1845. The testator's widow received the annual produce of all the residue of the testator's estate and effects during her life, but she did not apply to her own use and benefit any part of the capital thereof. By her will, dated the 11th of May 1854, she expressly declared her mind and will to be that nothing therein contained should be deemed or construed to be an execution or exercise of the power of appointment given or reserved to her in and by the last will and testament of the said Charles Lionel Scott, her late husband, deceased, as to the residue of his estate and effects, or in any manner alter or affect the directions, trusts and dispositions, in the said will expressed, declared and contained thereof, in default of appointment, but that, on the contrary, the same trusts, directions and dispositions should be and remain in full force and effect; and the testatrix thereby nominated and appointed her brother, the above-named defendant, James Josselyn, and her nephew, James Josselyn, executors of her will. The testatrix died on the 29th of April 1858. The plaintiffs, as legatees under the will of the testator, instituted this suit, praying that their legacies might be paid out of the testator's estate. A question, however, was raised as to the extent of interest which the widow took in the estate of her husband.

Mr. R. Palmer and Mr. Elderton, for the plaintiffs.—A limited interest only was given to the wife. This was followed by words giving her a power to dispose of the fund. She, therefore, took no absolute interest in the fund, but had merely a power of appointment.—

Reith v. Seymour, 4 Russ. 263; s.c. 6 Law J. Rep. Chanc. 97.

Surman v. Surman, 5 Madd. 123.

In re Sanderson's Will, 3 Kay & J. 597; s.c. 26 Law J. Rep. (N.S.) Chanc. 804.

Mr. Selwyn and Mr. R. Moore, for the defendants.—The gift in the first instance was absolute, and the intention was ex-

plained by giving her power to dispose of the capital. Another power of appointment was then given, with a gift over in default, but this was inconsistent with the prior gift, and it was consequently void.—

Holmes v. Godson, 2 Jur. N.S. 383; s. c.

25 Law J. Rep. (N.S.) Chanc. 317.

Hughes v. Ellis, 20 Beav. 193; s. c.

24 Law J. Rep. (N.S.) Chanc. 351.

Barton v. Barton, 3 Kay & J. 512.

THE MASTER OF THE ROLLS.—In this case the residue was given to trustees for the wife for life, with a power to dispose of the capital in her lifetime, that is, they were authorized to pay it to any person she might direct. This was followed by a power enabling her by will to appoint what might remain. Her will merely referred to the gift to the plaintiff and others, in default of appointment. It appeared, therefore, to be plain that the widow took a life interest in the property, with a power to appoint the principal by her will. By her will she directed the funds to go in such manner as they had been disposed of by the testator in default of appointment. I must, therefore, make a declaration that the plaintiffs are entitled.

STUART, V.C. }
 July 13, 15. } EDWARDS-WOOD v. MAR-
 LORDS JUSTICES. } JORIBANKS AND OTHERS.
 Dec. 17, 18. }

Vendor and Purchaser — Advowson — Charge under Queen Anne's Bounty — Compensation.

A contract for sale, by the defendants to the plaintiff, of an advowson was entered into, subject to conditions of sale, one of which provided that if any objections and requisitions should be made which the vendors were unable or unwilling to comply with, the vendors might, notwithstanding any treaty or discussion in reference thereto, or any attempt to remove or comply with the same, annul the contract, without payment of costs. After the purchaser had accepted the title, disclosed in an abstract delivered to him by the vendors, and his solicitor had sent to their solicitor a draft conveyance for the vendors' approval

*and execution, the purchaser's solicitor, upon a search at the office of Queen Anne's Bounty, discovered that the rectory was subject to a mortgage or charge payable to Queen Anne's Bounty, of which upwards of 600*l.* then remained undischarged. The vendors having refused to comply with the requisition that compensation should be made in respect of the deterioration of the value of the advowson by reason of the charge on the benefice, and insisting upon their right to rescind the contract according to the terms of the condition of sale, the purchaser filed his bill for specific performance of the contract with compensation. One of the Vice Chancellors made a decree for specific performance, but without compensation, and ordered the plaintiff to pay the costs of the suit; and, on appeal, the Lords Justices affirmed the decision in all respects, and the appeal was dismissed, with costs.*

Under a power contained in the will of Sir Edward Antrobus, Bart., deceased, the devisees in trust named in such will, with the consent and by the direction of Sir Edmund Antrobus, the tenant for life of the estates devised, signed an agreement, dated the 29th of May 1857, for the sale to William Edwards-Wood of the advowson of the rectory and parish church of Hasleley, in Warwickshire, being part of the property devised by the will. The contract expressed that the sale was to be at the price of 2,800*l.*, and subject to the stipulations following:—

1. That the sum of 2,800*l.*, the said purchase-money, should be paid on the 24th of June then next, at the office of Messrs. Farrer & Co., of Lincoln's Inn Fields, the vendors' solicitors, at which time and place the purchase was to be completed; but if from any cause whatever the said purchase should not be then completed, the purchaser should pay interest on the purchase-money, at the rate of 5*l.* per cent. per annum, from that day until completion; but this provision was to be without prejudice to the right reserved to the vendors by the last (the seventh) of the said stipulations.

2. That the vendors would, within fourteen days from the date of the contract, at their own expense, deliver an abstract of title to the said advowson to the purchaser,

subject, nevertheless, to the stipulations thereafter contained, and within twenty-one days after the actual delivery of such abstract, all objections and requisitions should be delivered; * * * and if any objections and requisitions should be made which the vendors were unable or unwilling to comply with, the vendors might, notwithstanding any treaty or discussion in reference thereto, or any attempt to remove or comply with the same, annul the said contract without payment of costs.

7. If the purchaser should fail to comply with the above stipulations, or any of them, the vendors should be at full liberty to resell the said advowson, either by public auction or private contract; and any deficiency in price in such second sale, together with all expenses attending the same, should, immediately after such sale, be made good to the vendors by the present purchaser; and in case of non-payment should be recoverable by the vendors as and for liquidated damages.

The purchaser having accepted the title of the vendors as disclosed in an abstract delivered to him by them, his solicitor sent to their solicitor a draft conveyance to him of the advowson.

In this stage of the proceedings under the contract, a search was made by the purchaser's solicitors, at the office of Queen Anne's Bounty, which resulted in the discovery that the advowson or rectory was subject to a mortgage or charge payable to Queen Anne's Bounty for the sum of 696*l.*, of which there then remained upwards of 600*l.* undischarged.

Thereupon the following correspondence ensued between the respective solicitors of the vendors and purchaser:—

“Daventry, Dec. 30, 1857.

“Dear Sir,—On inquiry at the Bounty Office to ascertain whether there was any mortgage upon this rectory, I find there is one existing for 696*l.*, in which Sir Edmund Antrobus joined, four instalments only of which have at present been repaid, leaving a balance of upwards of 600*l.* still due upon it. You will agree with me, I believe, that the purchaser is entitled to some compensation for this, as the income of the incumbent will be seriously affected for many years; and the next presentation Mr. Edwards-Wood intends to dispose of

consequently decreased in value. Will you consider what compensation should be made under the circumstances, as speedily as it is convenient to you? and if it approaches at all what is fair and equitable, I shall advise my client to accept it. Yours faithfully,
E. S. Burton.”

“Messrs. Farrer & Co.”

“66, Lincoln's Inn Fields, Jan. 1, 1858.

“Haseley.

“Dear Sirs,—We should agree with you if we had made any representation of value or income, but the fact is, Mr. Edwards-Wood made his own inquiries, and founded his opinion upon them. We have no doubt you will find, on inquiry of Mr. Edwards-Wood, that he was aware of the mortgage in question. We did not know of it. Yours truly,
Farrer, Ouvry & Farrer.”

“Messrs. Burton & Son.”

“Daventry, Jan. 7, 1858.

“Haseley Advowson.

“Dear Sirs,—I have this morning heard from Mr. Edwards-Wood, who states that his knowledge of the rectory was solely derived from the sale particulars of 1852, and that he never knew of the mortgage, or had any suspicion of it, until after the contract was made, Sir Edmund having told him that he had given Mr. Hadow 100*l.* for the improvement of the rectory; and Sir Edmund had probably altogether forgotten that this was in aid of the mortgage in which Sir Edmund seemed to have joined, and which ought to have been, as you will agree with me, in the abstract. Mr. Hadow has now informed me of the particulars of it, and, except as to four instalments, it appears still to be unpaid. I think it quite clear that the purchaser is entitled to an abatement, and I do not think Sir Edmund will, under the circumstances, object to make one. The mode of calculation will be, the value of the life of the incumbent, deducting it from the mortgage, and abating the balance, whatever it may be, from the purchase-money. This, of course, must be done by an actuary; at least I am not myself capable of making a valuation. Perhaps the better plan will be to state a case between us of the facts, and then submit them to a competent person. Yours faithfully,
E. S. Burton.”

“Messrs. Farrer & Co.”

"66, Lincoln's Inn Fields, Jan. 8, 1858.

"Haseley.

"Dear Sir,—We feel a difficulty in advising the trustees to accept your suggestion as to an actuary's valuation, because we feel that an advowson is not substantially affected in value by the fact of the mortgage, though it may to some extent depreciate the sale of the next presentation. Under the circumstances, perhaps the better way will be to cancel the contract. Yours truly,

"Farrer, Ouvry & Farrer."

"E. S. Burton, Esq."

The plaintiff having declined to cancel the contract, the defendants' solicitors wrote as follows:—

"66, Lincoln's Inn Fields, Jan. 15, 1858.

"Sir E. Antrobus's Trustees to Mr.

"Edwards-Wood.

"Dear Sir,—We cannot advise Sir E. Antrobus's trustees to make compensation. We have no power to compel the incumbent to pay off the mortgage, and it therefore becomes our duty to say that we are unable to comply with the objection you have made; and in accordance with the second clause in the contract, we hereby, on behalf of the vendors, annul the sale. We are, dear Sir, yours truly,

"Farrer, Ouvry & Farrer."

"E. S. Burton, Esq."

The purchaser then filed the bill in this suit against the vendors, insisting that the circumstance of the advowson or rectory being subject to the mortgage or charge was not a question of title, but either a matter of compensation by abatement from the purchase-money, or that the existing amount of the mortgage or charge should be paid off by the defendants; and that the defendants were not at liberty to recede from the contract.

The bill prayed for the specific performance of the contract, and, inasmuch as the plaintiff was satisfied with the title of the vendors, that they might be ordered either to pay off the mortgage or charge, or that a pecuniary compensation might be made to the plaintiff, either by abatement from the purchase-money or otherwise, as the Court should think fit.

Mr. Malins and *Mr. Schomberg*, for the plaintiff, submitted that, as the existence of

the charge upon the benefice diminished in a considerable proportion the value of the advowson, the plaintiff had not got by his contract all that the vendors had contracted to sell to him, and that he was therefore entitled to a decree in the terms of the prayer of the bill. They referred to—

Burnell v. Brown, 1 Jac. & W. 168.

Milligan v. Cooke, 16 Ves. 1.

Dale v. Lister, Ibid. 7.

Nelthorpe v. Holgate, 1 Coll. 203.

Mr. Bacon and *Mr. Hobhouse* were for the defendants, but were not called upon.

STUART, V.C. said, the incumbrance, though not upon the advowson itself, must be regarded as in some degree affecting the value of such advowson; but he doubted whether it did so to any material extent. Assuming, however, the value to be deteriorated by it, still, as it did not appear that there had been any warranty, or any misrepresentation or studied concealment on the part of the vendors, the rule *caveat emptor* applied. The case was a novel one, and its circumstances peculiar, but he could not satisfy his mind that there was any right in the plaintiff to compensation; and his opinion was, that there should be a decree declaring the plaintiff entitled to the specific performance of the contract, but without compensation. The plaintiff to pay the costs of the suit.

From the foregoing decision the plaintiff appealed, the same counsel appearing for the parties as in the court below.

Dec. 17. and 18. — For the appellant, besides the cases cited below, that of *Edwards v. M'Leay* (1) was relied on; and for the defendants it was submitted, that all the plaintiff was entitled to was, to have the contract cancelled, which the defendants had offered to agree to. It was as well in the power of the plaintiff to ascertain the fact of the incumbrance before as after the contract. They referred to *Sugd. Vend. and Pur.* (last ed.) 279.

Mr. Malins was heard in reply.

(1) 2 Swanst. 287; s. c. Coop. Cas. in Chanc. 303.

LORD JUSTICE KNIGHT BRUCE.—In a suit for the specific performance of a contract, instituted by the purchaser — for specific performance, that is, with an abatement from the purchase-money—he has obtained a decree, but for specific performance without abatement, and he has been ordered to pay the costs of the suit. Not pleased with this catastrophe, he has brought the matter hither, and we have to say whether he was entitled to compensation, and whether it was fit to order him to pay the costs. The matter, as it appears to me, stands substantially thus:—The owner in fee of an advowson, held by a good title and free from incumbrance, contracts to sell. After the contract the purchaser comes to the vendor and says, “I think I have agreed to give too much money for this advowson. I thought the income of the living more than it proves to be. I considered the income to be of such and such an amount. I desire, therefore, that you will abate to me from the purchase-money an amount corresponding to the difference between the income as I supposed it to be and the income as it is.” Answers the vendor: “I must be excused from agreeing to your suggestion. I was and am unwilling to sell the advowson at a less price than that which you agreed to give and I to take. I proceeded upon my notions of value; you probably proceeded upon yours. You asked me no question about the income, and must be taken to have formed your own judgment upon such grounds as appeared to you sufficient. I had rather not sell the advowson for less than the agreed price, but I am willing to relinquish the purchase if you wish it, and therefore, if you desire the contract to be cancelled, let it be.”—“No,” replies the purchaser, “I would rather have the advowson, even if obliged to pay for it what I agreed to give, even if compelled to adhere to my agreement. What I will have is the advowson and an abatement out of the purchase-money founded on the calculation that I have mentioned; and if not, I will put you into Chancery.”—“Be it so,” rejoins the vendor, and into Chancery they go. That substantially, according to my view of the matter, is the dispute that has been so ably and zealously argued by the learned counsel for the plaintiff—a

view, however, which renders the plaintiff's claim so almost incredibly absurd, that it is due to him probably to state the matter somewhat more in detail. It seems that, some years before the contract, the incumbent had become desirous of rebuilding the parsonage-house; and, for the purpose of raising the money to that end, had resorted to the very usual and familiar course, known almost to all mankind, of obtaining money from Queen Anne's Bounty-office on the usual terms; namely, that out of the fruits of the living there should be paid interest at a certain rate, and a certain proportion of the principal annually, so as to secure its gradual liquidation by sums to be paid by the incumbent for the time being extending over a certain number of years. The patron at this time was the vendor, and he therefore must have known, and did know it. Whether he remembered it or not, is, in my view of the matter, entirely immaterial. At the time of the treaty and contract the subject is not mentioned; the purchaser offers a certain sum, not informing the vendor upon what, if any, calculations, or upon what basis, the offer is made, and the vendor accepts it. The question is, whether there has been any the least degree of impropriety of conduct, any the least degree of breach of duty, in the fact of the vendor not having mentioned this circumstance affecting the value of the living of the incumbent to the purchaser. Now, if the vendor had been asked any question upon the subject, if he had been told what were the elements of the calculations, if any, made by the purchaser, what had been the inducement of the purchaser to make the offer for the property; or if the vendor had had any reason to believe the purchaser misled or ignorant upon the subject, the vendor possibly might have been bound either to make some compensation or to relinquish the contract; but not one of these circumstances exists. For anything that the vendor knew, for anything that the vendor had any reason to believe, the purchaser was aware of every fact and every circumstance connected with the value of the living. And if he was not, why was he not? He had but to go to the incumbent of the parish; he had probably but to go to the parish-clerk, the churchwardens, the

vestrymen, or any person connected with the business of the parish; he had but to go to Queen Anne's Bounty-office to ask the question, and he would have received every information. To Queen Anne's Bounty-office he does go, apparently of his own accord and from his own knowledge, after the contract has been made. Why did he not go before the contract, if the matter was of any interest to him? A man of business, as he once was, a person of education and good fortune as he seems to be, he wilfully and deliberately shuts his eyes to a fact which he might have ascertained by opening them—by making any inquiry upon the subject. This is not a case of concealment; this is not a case of latent vice; this is the case of a circumstance affecting the value of the living in point of income, to which the purchaser must have known that every living in England was, by the general law of the country, liable. He must have known that there was not a single living from Cumberland to Cornwall in which this might not be the case; he must have known upon any inquiry, without the slightest difficulty he might have ascertained, the truth: he does not; he does not even ask a question of the vendor upon the subject, and he says there has been an improper concealment with respect to it. It is such a proposition as I have never heard advanced in a court of justice. I repeat, that the case might have stood very differently if the vendor had had any reason to believe that the purchaser was mistaken or ignorant, or he had been asked by the purchaser for information upon it. That is not the case before the Court. It is not every circumstance connected with the property in treaty that a vendor is obliged to mention to the purchaser. He must act uprightly; he must act honestly; he must conceal nothing; but, as we all know from a book with which boys and men are alike familiar, though the latter, I believe, are fonder of it than the former: "*aliud est celare, aliud tacere*" (2); and again, "*neque enim id est celare, quidquid reticeas; sed cum quod tu scias id ignorare emolumenti tui causâ velis eos quorum intersit id scire*" (3). There is nothing

(2) Cic. De Off. lib. 3. s. 12.

(3) Ibid. s. 13.

of the kind here. Is it fraud? Fraud has been expressly disclaimed. It must be either fraud or nothing, and nothing it is. I repeat, therefore, that according to my view of the case, the description which at the outset of the few words that I have said I gave to this case, I still believe to be the accurate description, though I have gone somewhat more into detail. Such cases as *Edwards v. M'Leay*, and such cases as *Nelthorpe v. Holgate*, have nothing in common with this case. I think the bill and the appeal are equally unreasonable; both unreasonable in the highest degree; and as the bill was dismissed with costs, so must be the appeal.

LORD JUSTICE TURNER.—I agree, and for the same reasons. We are not here to consider the question of whether this contract can be set aside, as the purchaser desires to abide by the contract, even if he cannot have the compensation which he claims. With reference to the question of compensation, my learned Brother has gone very fully into it. Let me put another case in which this purchaser might have claimed compensation. Supposing the bishop had required an additional curate to be employed in this parish, could the purchaser have said that, because the bishop in the exercise of his discretion has required an additional curate to be appointed to this parish, and the effect of that requisition has been to bring a charge upon the living by the appointment of the curate, therefore I, the purchaser, am entitled to compensation in respect of the diminution in the value of the living by reason of there being the salary of the curate to be paid out of it? Now, I do not mean to give any concluded opinion upon the question which I mooted in the course of the argument, whether the principle of compensation at all applies to a case of this description. It is obvious that if you apply the principle of compensation, if this purchaser does not go to a sale, he gets both the advowson and the compensation without any loss which can be estimated, because he loses only the difference between the right to present to a living of a given amount, and the right to present to a living which for some years must be less productive; and I doubt whether the principle of compensation has ever been

applied to cases where there is no estimable loss to the purchaser, unless he shall happen to go to a sale of the estate. I do not mean, however, to conclude that question, but it certainly seems to me to be a matter of very considerable difficulty. Upon the whole, I agree with my learned Brother that this appeal must be dismissed, and dismissed with costs.

L.C. }
Jan. 24, 25, } MONYPENNY v. MONY-
26, 31. } PENNY.

Settlement—Rent-Charge—Covenant—Recital.

By the settlement made on the marriage of R. J. M. with S. D., it was recited that upon the treaty for the said marriage P. M. proposed and agreed to secure, in manner and subject as thereafter expressed, to S. D., after the decease of the survivor of them the said P. M. and R. J. M., an annual sum or yearly rent-charge for her jointure, to be issuing and payable out of the manors and other hereditaments thereafter charged therewith, and of or to which the said P. M. was seised or entitled in fee simple. By the operative part of the deed P. M., in consideration of the intended marriage, gave, granted, bargained, sold and confirmed unto S. D. and her assigns, in case the marriage should take effect, and she should survive P. M. and R. J. M., an annual sum or yearly rent-charge of 300*l.*, to be charged and chargeable upon and yearly issuing and payable out of all and singular the manors, or reputed manors, of M, N. and R, and also all that mansion-house called M. in the same county, and also all and singular the messuages, &c. in the several parishes of R, &c., in the county of K, of or to which he the said P. M., or any person in trust for him, was or were seised or entitled for an estate of inheritance at law or in equity; and by the same deed P. M. covenanted, granted and agreed with S. D. that so often as the annuity should be unpaid for twenty-one days she should have power to enter and distrain upon the manors, &c. charged therewith; and for further securing the annuity P. M. granted, bargained, sold, demised and confirmed to trustees the manors, &c. thereby charged there-

with for a term of 100 years. P. M. and R. J. M. died, leaving S. D. surviving. It was subsequently determined that P. M. had only a life interest in the estates charged. In a suit to administer the estate of R. J. M. a small portion of the estates charged which belonged to R. J. M. in fee was sold, and S. D. received the purchase-money in part discharge of the arrears of her annuity. Upon her claim against the general estate of P. M. in respect of the annuity, it was considered, by Bramwell, B. and Watson, B., that there was no covenant in the settlement on which S. D. or the trustees could maintain an action; and accordingly Wood, V.C. held, that there being no covenant, S. D. could have no special or separate equity against the estate of P. M.; but the Lord Chancellor, considering that the deed contained a covenant, reversed the decision, and allowed the claim.

This was an appeal from a decision of Wood, V.C., assisted by Bramwell, B. and Watson, B., which is reported 27 *Law J. Rep.* (N.S.) *Chanc.* 369. The facts are fully stated in the former report, and are recapitulated in the Lord Chancellor's judgment.

Mr. Daniel, Mr. Unthank and Mr. C. C. Berkeley appeared for Mrs. Monypenny, the appellant.

Mr. Rolt, Mr. Baggallay and Mr. Honyman, for the executor.

Mr. Willcock and Mr. Wickens, for the residuary legatees.

Mr. Daniel was heard in reply.

The following authorities were cited:—

Randall v. Lynch, 12 *East*, 179.

Parker v. Hannay, 4 *Bro. P.C.* 604.

Glegg v. Glegg, *Ibid.* 614.

Grey v. Pearson, 6 *H.L. Cas.* 106; s. c. 26 *Law J. Rep.* (N.S.) *Chanc.* 473.

Nokes's case, 4 *Co. Rep.* 80, b.

Ognell's case, *Ibid.* 48, b.

Webb v. Jiggs, 4 *M. & S.* 113.

Kelly v. Clubbe, 3 *Bro. & B.* 130.

Randall v. Rigby, 4 *Mee. & W.* 130; s. c. 7 *Law J. Rep.* (N.S.) *Exch.* 240.

Varley v. Leigh, 2 *Exch. Rep.* 446; s. c. 17 *Law J. Rep.* (N.S.) *Exch.* 289.

Ellison v. Bignold, 2 Jac. & W. 503, 510.

Right d. Jefferys v. Bucknell, 2 B. & Ad. 278; s. c. 8 Law J. Rep. K.B. 304.

Line v. Stephenson, 4 Bing. N.C. 678; s. c. 5 Bing. N.C. 183; 7 Law J. Rep. (N.S.) C.P. 263.

Mathew v. Blackmore, 1 Hurl. & N. 762; s. c. 26 Law J. Rep. (N.S.) Exch. 150.

Adams v. Gibney, 6 Bing. 656; s. c. 8 Law J. Rep. C.P. 242.

Smith d. Dormer v. Parkhurst, Willes, 327, 332.

Cholmondeley v. Clinton, 2 Jac & W. 1.

Adey v. Arnold, 2 De Gex, M. & G. 432.

Alexander v. Brame, 7 Ibid. 525.

Co. Litt. 145, a.

Com. Dig., Vol. 3, pp. 285, 383.

Jan. 31.—The LORD CHANCELLOR.—This case arose out of a suit instituted by the executors of Phillips Monypenny, for the administration of his estate. A decree having been made, a claim was brought in on behalf of Susannah Monypenny, widow, on account of an annuity of 300*l.*, created by her marriage settlement, dated the 10th of June 1835. The Vice Chancellor Wood, on the matter being brought before him, thought it was a purely legal question, and that if he were to hear the case, he ought to have the assistance of a common-law Judge. The case having been accordingly postponed, it came on again before his Honour, assisted by Bramwell, B. and Watson, B. After argument, and time taken to consider, Bramwell, B. delivered the judgment of himself and Watson, B., that the claimant had no right at law under the deed, on the ground that it contained no covenant binding the executors of Phillips Monypenny. The Vice Chancellor, after hearing the opinion of the learned Judges, stated, that it being purely a question of law, he concurred with them; but it having been contended that the claimant had an equity beyond her legal rights, his Honour considered that in the absence of all legal right there was no equitable right arising out of the deed, and, therefore, disallowed the claim. The matter has been brought before me by way

of appeal, and has been very fully and ably argued, the counsel apparently acquiescing in the view taken by the Vice Chancellor, in which I entirely concur, that the question is a legal one, and that if the claimant fails in establishing the legal construction of the deed which she contends for, she has no equitable right or remedy. The whole question is on the deed, which must, therefore, be carefully examined. It was made on the marriage of Robert Joseph Monypenny with Susannah Dearden, and Phillips Monypenny, who was the uncle of Robert Joseph, was a party to it. The deed recited that “upon the treaty for the said intended marriage, the said Phillips Monypenny proposed and agreed to secure, in manner and subject as hereinafter is expressed, to the said Susannah Dearden, after the decease of the survivor of them, the said Phillips Monypenny and Robert Joseph Monypenny, in case she should survive them, an annual sum or yearly rent-charge for her jointure to be issuing and payable out of the manors and other hereditaments hereinafter charged therewith, and of or to which the said Phillips Monypenny is seised or entitled in fee simple”; and then the said Phillips Monypenny, in consideration of the said intended marriage, gave, granted, bargained, sold and confirmed unto the said Susannah Dearden and her assigns, in case the said intended marriage should take effect, and she should survive both of them, the said Phillips Monypenny and Robert Joseph Monypenny, an annual sum or yearly rent-charge of 300*l.*, to be charged and chargeable upon and yearly issuing and payable out of all and singular the manors or reputed manors of Maytham, Nether Forsham and Rensham, in the county of Kent, and also that mansion-house called Maytham Hall, in the same county, and also all and singular the messuages, lands, tenements and hereditaments in the several parishes of Rolvenden, Tenterden, Benenden, Sandhurst, Newenden, St. Mary in Wittersham and Stone, in the Isle of Oxney, in the said county of Kent, of or to which he the said Phillip Monypenny, or any person in trust for him, was or were seised or entitled, for an estate of inheritance at law or in equity. And by the same indenture Phillips Monypenny,

for himself, his heirs and assigns, covenanted, granted and agreed with Susannah Dearden, her executors, administrators and assigns, that in case and so often as the said annual sum or yearly rent-charge of 300*l.*, or any part thereof, should at any time or times be behind and unpaid for twenty-one days after any of the days on which the same ought to be paid, then and so often it should be lawful for the said Susannah Dearden, her executors, administrators and assigns, but subject and without prejudice as aforesaid, to enter into and distrain upon the manors, hereditaments and premises thereby charged with the payment, or any of them, or any part thereof, and to dispose of the distress and distresses then and there found, according to law, as in case of distress for rent reserved on common leases for years, to the intent that thereby the said Susannah Dearden, her executors, administrators and assigns, might be fully paid and satisfied the said annual sum or yearly rent-charge of 300*l.*, and every part thereof, and all costs, charges and expenses attending the recovery of the same; and also, that in case and so often as the same annual sum or yearly rent-charge of 300*l.*, or any part thereof, should at any time or times be behind or unpaid for forty days next after the same should become due and payable as aforesaid, then and so often, although no formal demand should have been made thereof, it should be lawful for the said Susannah Dearden, her executors, administrators and assigns, but subject and without prejudice as aforesaid, to enter into and upon the manors, hereditaments and premises thereby charged with the said annual sum or any of them, or any part thereof, and to have, hold and enjoy the same, and receive the rents, issues and profits thereof, to and for her and their own use and benefit.

Phillips Monypenny created a term of 100 years in trustees, for the better securing the payment of the rent-charge. Phillips Monypenny died in 1841. After his death it was discovered that of the Maytham Hall estate, which was the principal part of the property charged with the annuity, Phillips Monypenny was only tenant for life; and on his death Robert Thomas Monypenny became entitled to

this estate as equitable tenant in tail. The husband, Robert Joseph Monypenny, died in 1842. After his death, a suit for the administration of his estate was instituted, in which a decree was made for the sale of his real estate. Mrs. Monypenny was a party to this suit, and a question arising whether Jobs Cross farm formed part of the estate, the opinion of the Court was taken on that; and the decision being in the affirmative, Mrs. Monypenny presented a petition claiming the whole of the proceeds, and received the amount of 1,100*l.*, part of the arrears of her annuity. It was insisted in argument that by her petitioning and receiving the proceeds of the real estate, the claimant had determined her election to make the rent-charge real, and that she had no power now to treat it as an annuity, and to sue for it as such. According to *Littleton*, s. 219, "if a man grant by his deed a rent-charge to another, and the rent is behind, the grantee may choose whether he will sue a writ of annuity for this against the grantor, or distrain for the rent behind, and the distress detain until he be paid. But he cannot do or have both together, &c. For if he recovers by a writ of annuity, then the land is discharged of the distress," &c. *Lord Coke's* commentary upon the latter words is: "Here it is to be observed that this determination of the election of the grantee must be by action or suit in court of record; for albeit the grantee distrain for the rent, yet he may bring a writ of annuity and discharge the land." It seems to me quite unnecessary in the present case to consider what is the effect of the abolition of the writ of annuity by the 3 & 4 Will. 4. c. 27, upon the right of election at the present day, because it must be conceded that if there is no remedy by covenant then the only right which can exist is that which attaches upon the land, and if there is a covenant as well as a power of distress, it is not a case of election at all, but the grantee has a double remedy, and may have recourse to either as he pleases, as often as the rent-charge is in arrear. It is, therefore, unnecessary to consider whether the petition of Mrs. Monypenny to have the proceeds of the real estate paid to her, for the arrears of her rent-charge is equivalent or not to

the action or suit in a court of record which Lord Coke says is necessary to the determination of the election of the grantee. If there is a covenant in the deed which binds the executors of the grantor, she may avail herself of the covenant against his personal estate, although she has received a portion of the arrears out of the estate.

The important question, therefore, to be determined is, whether such a covenant is to be found in the deed. The learned Barons who assisted the Vice Chancellor in putting a legal construction on the deed, were clearly of opinion that there were no words in it creating a covenant. They examined the recital, the grant, and the power of distress in succession, and dismissed each of them in its turn, with the remark, that it did not operate as a covenant. Even the strong and appropriate words used in the creation of the power to distrain did not shake their opinion; for as to them they say, "Nor do we think that the words used in the creation of the power to distrain, extensive as they are—'covenants, grants, and agrees that it shall be lawful, when the rent-charge is in arrear, for the grantee to distrain on the premises'—are an express covenant that he shall have power to do so. We think that 'covenants and agrees' mean no more than 'grants.'" Then the learned Judges proceeded to inquire whether there is any implied covenant arising out of the general words used by the grantor, and properly observe, that such a covenant must be a covenant at law, and that there cannot be a covenant implied from such words; that the covenantor had an equitable estate; and they conclude that the deed contains neither an express nor an implied covenant, of which the claimant can avail herself to enforce the payment of her jointure. After the most careful consideration of every part of the deed, I cannot bring my mind to a similar conclusion. In the course of the argument of the counsel against the claim, I have been earnestly requested to examine the whole scheme of the deed, in order to be enabled to put a satisfactory construction upon those parts of it which involve the question to be decided. Undoubtedly, as Sheppard says (*Touchstone*, 87.) in

the construction of all parts of all kinds of deeds, amongst the rules to be universally observed is one, "that the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect, and none be rejected." Where words are ambiguous, or the intention is not manifest and plain, it is useful and necessary to recur to other parts of the deed for an interpretation; but this mode of construction is frequently invoked for the purpose of giving a different meaning to words from that which they ordinarily bear; and on the present occasion, the assistance of the whole scheme of the deed seems to be used, not that every word may take effect, but for the purpose of weakening the appropriate words. It is unnecessary, in my opinion, to resort to any more of the deed, except to observe that the marriage consideration runs through every part of it. It was clearly to Phillips Monypenny's interest that Mrs. Monypenny should have a rent-charge out of his estate, and he believed himself to be the absolute owner of the Maytham Hall estate. The deed therefore contains a recital that, "upon the treaty for the marriage he had agreed to secure to her an annual sum or rent-charge, to be issuing and payable out of the manors and other hereditaments hereinafter charged therewith, and of or to which he, the said Phillips Monypenny, is entitled or seised in fee-simple"; and in the granting part, "he gives and grants the annual sum, or rent-charge to be issuing out of certain manors and lands, and generally out of messuages, lands, tenements and hereditaments in the several parishes in the county of Kent, of or to which he, or any person or persons in trust for him, is or are seised or entitled for an estate of inheritance at law or in equity." It is said that the alternative words in the recital and in the grant express an uncertainty as to the nature of the title of Phillips Monypenny to the estates charged; and that according to the case of *Right d. Jefferys v. Bucknell*, they created no estoppel against Phillips Monypenny. But in that case the question related to two houses only, which were mortgaged, and the deed reciting that the mortgagor was legally or equitably en-

titled to the premises, and he covenanting that he was legally or equitably seised in his own demesne as of fee, it was clear that there was no certain or precise averment of any seisin in him. There the charge was intended to apply to various lands of the grantor; and as it is an undoubted canon of construction, that if possible you should give effect to every part of a deed, I find no difficulty in considering the words both in the recital and in the grant, not as expressive of any uncertainty, but as applying to lands held by different titles, and therefore, *reddendo singula singulis*, to all the lands mentioned, whether Phillips Monypenny was legally or equitably entitled to them. The effect of this mode of reading the recital and the grant will be, that the annuity will be a charge upon all the land, whether Phillips Monypenny's title to them was legal or equitable, although the power to distrain would be limited to those only of which he had the legal estate. The converse of this is put by Lord Coke, in p. 147. in his *Commentary*, where he says, "If a man seised of lands in fee, and possessed of a term for many years, grant a rent out of both for life in tail or in fee, with clause of distress out of both, this rent, being a freehold, doth issue only out of the freehold, and the lands in lease are only charged with the distress." It will be said that the words "give, grant, bargain and sell," cannot operate as a covenant, because they merely assert a power to give or create an annuity; at the same time, the plain and ordinary effect of the word "covenant" has been denied, and it has been treated as synonymous with the word "grant." But in construing this deed, I should be much more disposed to give the word "grant" the operation of a covenant, than to transform the word "covenant" into a grant. It is undoubtedly law, that a deed that is intended and made to one purpose, may accrue to another; for if it would not take effect in the way that it is intended, it may take effect another way—*Shepherd's Touchstone*, 82. There is an admirable judgment of Lord Chief Justice Willes on this subject, in *Roe d. Wilkinson v. Trumien* (1), which has a considerable

bearing on the point in question. There Thomas Kirkley, in consideration of natural love to his brother Christopher, and for 100*l.*, granted, released and confirmed to Christopher the premises in question after his (Thomas's) death, and covenanted and granted that the premises should, after his death, be held by Christopher and the heirs of his body, and after their decease to John Wilkinson and his heirs; and it was held, that the deed would not operate as a release, because it attempted to convey a freehold in future, but that it was good as a covenant to stand seised: and the Chief Justice said, there is likewise one thing in the present case much stronger than in any of the cases which have been cited on the one side or the other, for here is not only the word "grant," which has often been construed as a word of covenant, but likewise the grantor expressly covenants, in two places in the deed, that the estate shall go to John Wilkinson in such a manner as he granted it. In the present case, if the words creating the annual sum or yearly rent-charge are to be construed strictly as a grant and nothing more, then it was absolutely void from the first, and never could have any inception, because it was not to begin until after the death of Phillips Monypenny, and, on his death, the estate on which it is charged came to an end. Why, under these circumstances, it being the clear intention of these parties that the deed should operate, if it could not take effect as a charge, should it not be construed to be a covenant to pay the annual sum of 300*l.*, which would be binding upon the executors of Phillips Monypenny, though not named? It is unnecessary to multiply authorities to shew that, according to what Lord Mansfield says, in *Lant v. Morris* (2), "no particular technical words are requisite towards making a covenant," for in this deed there is a clause in which this peculiar and appropriate word is to be found in giving the grantor a power to distrain for the rent-charge—"Phillips Monypenny, for himself, his heirs and assigns, covenants, grants and agrees." I asked more than once in the course of the argument, what would have been the effect

(1) Willes, 682.

(2) 1 Burr. 290.

of the deed if it had simply contained this clause of distress? I was not aware my question almost received an answer from Littleton himself; for he says, in the course of section 221, "Also, if one make a deed in this manner, that if A, of B, be not yearly paid at the feast of Christmas for term of his life 20 shillings of lawful money, that then it shall be lawful for the said A, of B, to distrain for this in the manor of F, &c.: this is a good rent-charge, because the manor is charged with the rent by way of distress." But he adds—"And yet the person of him who makes such deed is discharged in this case of an action of annuity, because he doth not grant by his deed any annuity to the said A, of B, but granteth only that he may distrain for such annuity." Now, upon this, put the case that a person "covenants, grants and agrees," for a power of distress for an annual sum or rent-charge upon land in which he has nothing. If it is a rule that every word in a deed must have effect given to it if possible, and none ought to be rejected, and there is another rule that if a deed cannot take effect in the way intended, it shall take effect in another way,—why should not these words have each its due effect, and after the creation of the rent-charge by the grant of the power of distress, why should not the covenant, applied to the words "annual sum," create a personal liability in the grantor and his executors? I am aware that the grantor in this clause of distress binds only his heirs and assigns, and not his executors; and it was insisted, though not very strongly, in argument, that this shewed an intention that his executors should not be bound. I inquired whether there was any authority to be found that executors in such a case would not be liable, and I was told that none had been discovered; and I should have been surprised to have learnt that, the rule being that heirs are in general only bound if named, and that executors are bound although not named, the naming the heirs for the purpose of binding them should be considered to amount to an exclusion of the executors, whom it was unnecessary to name. But had there been any such authority, I should have thought it inapplicable to the present case, in which there being no heirs

to be bound, as there was nothing to descend, the naming them could have no greater effect than if they had been altogether omitted from the covenant.

It is not necessary for me to consider the question as to whether a covenant could have been implied from the words of the deed if there had been no express covenant. I proceed on the covenant, which I consider to be expressly created by the language of the parties. I am happy to think that in thus arriving at a conclusion opposed to the judgment of the learned Judges who have decided this question, I am able to support myself by very high authorities, founded upon reasons which recommend themselves strongly to my mind, and that in the decision which I feel bound to pronounce, I shall not determine anything which will be found inconsistent with justice, or contrary to the obvious intention of the parties to the deed. I think the appeal must be allowed, and the claim allowed also.

KINDERSLEY, V.C. } ESPIN v. PEMBERTON. (1)
Dec. 8. }

Equitable Mortgage—Priority—Notice—Solicitor and Client.

A solicitor borrowed money from the plaintiff, and deposited with him the title-deeds of a leasehold house by way of security, at the same time agreeing by writing to execute an assignment of the premises when called on to do so. The solicitor, who had acted for himself in the first transaction, subsequently assigned the same property to another person, his articulated clerk, but the assignee neglected to obtain the title-deeds, although he made several applications for them to the mortgagor. The plaintiff claimed priority in respect of his equitable security:—Held, that the assignee could not be considered to have had constructive notice, through the mortgagor, as his solicitor, of the plaintiff's security, and that the omission on the part of the assignee to obtain the deeds did not prevent him from having the benefit of his assignment.

The bill stated that in the month of January 1855 the defendant W. A. S.

(1) See this case on appeal, *post*, 311.

Pemberton was carrying on business as a solicitor, at No. 8, Southampton Street, Bloomsbury, and that he applied to the plaintiff, John Espin, to lend him the sum of 300*l.*, which the plaintiff agreed to do upon having the said sum secured upon a mortgage of the house then occupied by the defendant Pemberton. In the said month of January 1855 the defendant delivered to the plaintiff the following memorandum:—"I, William Augustus Sadler Pemberton, of No. 8, Southampton Street, Bloomsbury, in the county of Middlesex, solicitor, do hereby acknowledge and declare that as a consideration and inducement to Mr. John Espin, of No. 50, Bedford Row, in the county of Middlesex, solicitor, to advance me the sum of 300*l.*, and previously to his advancing the same, I did agree to charge, and in pursuance of that agreement, I do hereby charge, and for myself, my heirs, executors and administrators, do agree to do and execute any act and deed that shall by the said John Espin, his executors, administrators or assigns, or his or their counsel, be reasonably required or deemed necessary for the better and more effectually charging by assignment or otherwise the lease of certain premises situate and being No. 8, Southampton Street aforesaid, from his Grace the Duke of Bedford to J. Mallock, Esq., dated the 27th of March 1843, and the assignments of such leases dated respectively the 21st of December 1846 and the 2nd of January 1854, on being required by the said J. Espin, his executors, administrators or assigns, to give such further security; as witness my hand, this 11th of January 1855, W. A. S. Pemberton.—Witness, J. Sanson." The money was, thereupon advanced by the plaintiff, and the defendant at the same time gave the plaintiff his promissory note for 300*l.* at three months' date, and handed over to him the deeds relating to the property. The promissory note was renewed from time to time until the 9th of August 1857, when it was dishonoured.

On the 6th of November following the plaintiff called at No. 8, Southampton Street and saw Mr. Frederick Moojen, who had been a partner with Mr. Pemberton, but their partnership had been dissolved. On that occasion the plaintiff informed him

of his security upon the premises for 300*l.*, and Mr. Moojen then stated that Pemberton had assigned the lease to another party for 500*l.* The plaintiff called again on Mr. Moojen, who then told him that the assignment was, in fact, made to the defendant W. E. Browne, who was the step-son of Mr. Pemberton and his articled clerk, and that Browne's assignment had been registered on the 12th of November. He also agreed to accept service of the notice of the plaintiff's security on behalf of Browne and as his solicitor. On the 23rd of November the plaintiff received a letter from Mr. Pemberton, in which he stated that the assignment to Browne was subject to the plaintiff's claim; that the lease was valuable, and that the plaintiff should not be a loser, but that he had been subject to pecuniary embarrassments, which compelled him to absent himself from London.

The bill was then filed against Pemberton and Browne, alleging that inasmuch as Pemberton had acted as solicitor in the mortgage transaction with Browne, and as he knew of the plaintiff's security, that must be considered as constructive notice to Browne of the prior mortgage, and that Browne had been guilty of negligence in not obtaining the deeds relating to his mortgage, which were held by the plaintiff, and that no consideration had, in fact, passed from Browne to Pemberton, who was insolvent at the time of the transaction. The bill, therefore, prayed that the plaintiff might be declared entitled to his equitable security in priority to the assignment to Browne.

The defendant Browne, by his answer, stated that he attained the age of twenty-one in January 1857; that in the following month of April he lent to Mr. Pemberton the sum of 1,500*l.*, which he had borrowed from the North British Insurance Company for the purpose of the loan. That on the 8th of September the lease of the house in Southampton Street was assigned to him by Pemberton as security for the sum of 500*l.*, part of the said sum of 1,500*l.* That at the time the assignment was executed he had requested Pemberton to hand over to him the title-deeds, and that subsequently he had repeatedly asked for the deeds, but was informed by Pemberton that they were mislaid, and that he should have

them as soon as he could obtain them. He also denied that Moojen had acted as his solicitor.

Mr. Glasse and *Mr. T. H. Terrell* appeared for the plaintiff, and contended that there had been constructive notice to Browne of the plaintiff's security by reason of the defendant Pemberton having acted as solicitor in both transactions; that Browne had been guilty of negligence in not obtaining the deeds affecting his security, and that, therefore, the plaintiff was entitled to priority over Browne in respect of his equitable security. They cited—

Hewitt v. Loosemore, 9 Hare, 449;
s. c. 21 Law J. Rep. (N.S.) Chanc. 69.
Kennedy v. Green, 3 Myl. & K. 699;
s. c. 6 Sim. 6.

Mr. Baily, *Mr. Beales* and *Mr. H. Browne* appeared for the defendants, but were not called upon by the Court.

KINDERSLEY, V.C.—Although at first sight there are no doubt circumstances attending this case which might well induce the plaintiff to entertain a strong suspicion of the honesty of the transaction, yet those circumstances, when you examine them, seem to bear a reasonable explanation. No doubt Pemberton did promise to give Browne the security of this property, which, unknown to him, was equitably secured to the plaintiff, and that security was afterwards given in the shape of an absolute assignment, in consideration of 500*l.* out of the 1,500*l.* lent by Browne. It seems that the assignment was not stamped until the 7th of November, but that was natural, because if they had gone on for two days more they would have exceeded the period of two months. I do not think there was anything suspicious in that. Then, as to the deed not being registered, I do not see that there was anything wrong in the omission to register. This is the case of a young man whose step-father wanted to obtain money, and he was induced to raise the money for him, upon the understanding that he was to have a security, which was afterwards executed. So far as regards fraud in this transaction, I think that the relationship between the parties, and the fact that the

money was actually borrowed, shews that there was no ground for that. The grounds on which the plaintiff asks relief are, first, that Mr. Pemberton must be considered to have acted as solicitor in the transaction for Browne, and that, inasmuch as he knew of the previous equitable mortgage to the plaintiff, that made it constructive notice to Browne through Pemberton; and, secondly, that there was negligence on the part of the defendant Browne in not asking for his title-deeds, which were in the possession of the plaintiff, and that, therefore, his security ought not to prevail as against the prior equitable incumbrance of the plaintiff. Now, in the case of *Hewitt v. Loosemore*, it appears that Lord Justice Turner, then Vice Chancellor, came to the conclusion, in a similar case to the present, where a mortgagor was himself a solicitor, and no solicitor was acting for the mortgagee, that there the mortgagor *quà* solicitor was to be considered as solicitor of the mortgagee. I confess I think I am bound to state that if it were not for the opinion expressed in that case, I doubt whether I should arrive at a similar conclusion, but the long experience and ability of that learned Judge are such that, although I should consider it probable that his opinion is right and mine wrong, yet I should hesitate to apply the principle in every case. It might be, for instance, that the intended mortgagor was a retired solicitor, and thought fit to act for himself. How could I say, in such a case, that, because the mortgagor happened to be a solicitor, he was to be considered as solicitor for the mortgagee? Or suppose the mortgagor were a barrister who was not in practice; he might say he could take care of himself, and could act for himself. It would be very hard in such a case to say that he was therefore to be taken to have acted professionally for the mortgagee. I should also feel great difficulty in a case like the present, where the gentleman is being educated as a solicitor, and is, in fact, an articled clerk. He has got, at least, some knowledge of what should be done. I do not see the reasonableness of saying that because Mr. Pemberton was a solicitor, consequently he is to be treated as solicitor for his articled clerk. Therefore, if it were not for the

expression of opinion found in the case of *Hewitt v. Loosemore*, I should not have come to the same conclusion; but as it is I dare say the Lord Justice is right and I am wrong; but suppose Pemberton were to be treated as solicitor for Brown in the transaction, it would be a monstrous perversion of the doctrine of constructive notice to say that, because Pemberton knew of a prior mortgage to the plaintiff, that is constructive notice to the subsequent mortgagee of the prior mortgage. It appears, however, that, in the same case I have mentioned, the same Judge refused to add to the constructive solicitorship the additional ingredient of constructive notice, and I entirely concur in the justice of that conclusion. Then, as to the alleged negligence in not procuring the title-deeds, no doubt the rule is, that where there is a subsequent mortgagee, though he has no notice of the prior mortgage, if he does not get in the title-deeds, then the Court will consider that tantamount to a fraud, and that he had constructive notice of the prior mortgage; but is there not sufficient reason shewn here for his not having obtained the title-deeds? It appears that he did ask for them; in fact, they say he asked for them too much, and therefore they say he is charged with negligence in not making his requisitions more effectual; but he is a young man, the articulated clerk of the mortgagor who married his mother, and the step-father says 'you shall have the deeds as soon as I can get them,' and he further says you have got the assignment. There is nothing in this to make the young man guilty of fraud, or to shew that he was assisting Pemberton to commit a fraud.

I cannot in this case come to the conclusion, that there is any such negligence or omission with regard to not procuring the title-deeds as to lead me to say that the defendant is not entitled to his security.

I cannot help adverting to this, that if a person will take an equitable mortgage only when he may have a legal mortgage, particularly when he is entitled to come for a legal mortgage, it must be considered that he has less reason to complain. The plaintiff took an agreement from Pemberton that he would, by assignment or

otherwise, give him a charge upon the property. He agreed that he would make it effectual, then why did not the plaintiff call for such a charge? If he had done so there would have been no such second mortgage. His omission to do this has occasioned all the trouble. He is not, therefore, entitled to so much sympathy, although it is true that equitable mortgages are quite common. The question, however, is, whether the plaintiff has made out such a case of suspicion or of fraud as to entitle him to the decree he asks. I think there is neither one nor the other; on the contrary, the circumstances which appear suspicious are removed, and I must, therefore, dismiss the bill with costs.

L.C. }
Jan. 27, 28. } ESPIN v. PEMBERTON.

Equitable Mortgage—Priority—Notice—Solicitor and Client.

Where an assignee of a lease, upon the occasion of the assignment, made bond fide inquiries for the deeds, and a reasonable excuse was given for their not being produced, he was held to be entitled to the benefit of the assignment, free from a previous equitable charge which had been made by the assignor by deposit of the deeds.

Where a mortgagor is a solicitor and prepares the mortgage deed, no other solicitor being employed in the transaction, the mortgagor will not be considered as the solicitor for the mortgagee, so as to affect the mortgagee with notice of facts within the mortgagor's knowledge, unless there be some consent on the part of the mortgagee to constitute the relation.

Hewitt v. Loosemore (1) observed upon.

This was an appeal from Kindersley, V.C., who had dismissed the plaintiff's bill, with costs (*ante*, 308). The suit was instituted under the following circumstances:—In January 1855, the plaintiff lent to the defendant, W. A. S. Pemberton, a solicitor, the sum of 300*l.*, on the security of Pemberton's promissory note, and the deposit of the deeds relating to his house of business, No. 8, Southampton Street, Blooms-

(1) 9 Hare, 449; s. c. 21 Law J. Rep. (N.S.) Chanc. 69.

bury. The lease of the house and the assignments were accordingly deposited with the plaintiff, accompanied by a memorandum, dated the 11th of January 1855, and signed by Pemberton, whereby he charged the lease with the payment of the 300*l.* and interest, and agreed to execute when required any deed for more effectually charging by assignment or otherwise the lease and the assignments. The promissory note was made payable three months after date, and was several times renewed, but in August 1857 was dishonoured. In November 1857, the plaintiff gave notice to Moojen, who had been a clerk to Pemberton, and afterwards his partner, of the charge of January 1855, and subsequently Moojen informed him that an assignment of the lease had been made to the defendant Browne, a stepson of Pemberton's, and also his artied clerk, to secure 500*l.* Moojen stated that he acted as Browne's solicitor, and accepted service of notice of the charge for him. Browne's assignment was dated the 8th of September, and was registered in Middlesex, on the 12th of November 1857. The plaintiff, under these circumstances, claimed priority to Browne's assignment. Browne, by his answer, denied that Moojen was his solicitor, and stated that when the assignment was executed, Pemberton accounted for the original lease not being given to him by alleging that it was mislaid. Browne had attained his age of twenty-one in January 1857, and he borrowed 1,500*l.* of the North British Assurance Company to lend to Pemberton, which he did in April 1857, 1,000*l.*, part of the loan, being secured to him by a bill of sale of the furniture in the house in Southampton Street, and in which Browne was then living. Kindersley, V.C., dismissed the bill, with costs.

Mr. Glasse and *Mr. T. H. Terrell*, for the plaintiff, the appellant, contended that he was entitled to the relief prayed, as Browne had been guilty of gross negligence in not requiring the delivery of the deeds to him; and further, that he must be considered as having had constructive notice of the plaintiff's charge. If a person purchased an estate without requiring the production of the title-deeds, that was

such gross negligence that the Court would presume that he wilfully abstained from inquiry. But if there had been an inquiry, and a sufficient answer to that inquiry had been given, the proposition must be modified to that extent.—

Le Neve v. Le Neve, 3 Mer. 646.

Hiern v. Neill, 13 Ves. 119.

Worthington v. Morgan, 16 Sim. 547;
s. c. 18 Law J. Rep. (N.S.) Chanc. 233.

Hiern v. Loosemore, 9 Hare, 449;
s. c. 21 Law J. Rep. (N.S.) Chanc. 69.

It was clearly established that if a purchaser employed the same solicitor as the vendor, he would have constructive notice of what the vendor's solicitor knew. If he abstained from employing a separate solicitor, that was not material, but in itself was an act of wilful negligence.—

Kennedy v. Green, 3 Myl. & K. 699.

Dryden v. Frost, 3 Myl. & Cr. 670;
s. c. 8 Law J. Rep. (N.S.) Chanc. 233.

Tylee v. Webb, 6 Beav. 552.

Mr. Baily and *Mr. Beales*, for the defendants, referred to—

Plumb v. Fluit, 2 Anst. 432; and

Martinez v. Cooper, 2 Russ. 198.

Mr. Terrell, in reply.

THE LORD CHANCELLOR.—The question in this case is, whether the plaintiff, who is an equitable mortgagee by deposit of a lease, is entitled to priority over the defendant Browne, who subsequently acquired the legal estate by assignment of the lease. The question depends upon whether the defendant is a *bond fide* purchaser for value, without notice, either actual or constructive, of the plaintiff's prior incumbrance. The plaintiff contends that Browne is not a *bond fide* purchaser for value, and that the assignment of the lease to him was merely colourable. It appears that Browne, who was a young man of about twenty-one years of age, and who had been the artied clerk of his step-father, the defendant Pemberton, was applied to by Pemberton, in the beginning of the year 1857, to advance him a sum of 1,500*l.*, and that Browne was induced to obtain that amount from the North British Assurance Company, and to make the advance upon an understanding, as it is said, that he

should have, as a security for that advance, a bill of sale of the furniture in the house, and an assignment of the lease. In August 1857, in pursuance of that arrangement, a bill of sale of the furniture was executed by Pemberton. It was certainly an instrument of rather an extraordinary character, and was evidently intended to permit the step-father and mother of Browne to have the advantage of the furniture for an indefinite period, leaving to Browne the opportunity, when he pleased, of putting an end to that enjoyment by taking possession; and there can be no doubt that such a bill of sale would have been invalid against Pemberton's creditors. The bill of sale, however, disclosed on the face of it the real transaction between the parties, and it was duly registered. It was to secure 1,000*l.*, part of the advance of 1,500*l.*, and 500*l.* remained uncovered. The assignment in question, which was executed on the 8th of September 1857, was intended as a security for that 500*l.*; and it is alleged, on the part of the plaintiff, that it was the original intention of Browne not to have taken an absolute assignment, but to have had merely a security upon the lease, and that he abandoned that intention in consequence of the knowledge which he acquired of the embarrassed circumstances of his step-father. That circumstance, however, appears to me very strong in favour of the defendant, because if the transaction was intended to be merely colourable, and to protect the property and interest of Pemberton, there could be no reason why, upon any knowledge which had been acquired by Browne of the circumstances of his step-father, the original intention which he is said to have had should have been abandoned, and that he should have taken an assignment instead of a security. Upon that assignment various observations have been made on the part of the plaintiff. In the first place, the form of the assignment has been strongly commented upon. It was said, that the transaction, as it appears upon the face of the deed, was an advance of money made at the time of the execution of the assignment, whereas it was intended as value for an antecedent debt. It was also said that there is a receipt for the consideration-money indorsed upon the deed, as

if money had actually been advanced at that time; and observations are made arising out of the delay in stamping the deed and of registering it within some short time of its execution. Observations are also made on the part of the plaintiff as to the absence of the attesting witnesses; and all the circumstances together are considered by him to be so suspicious as to induce the Court to come to the conclusion, that the transaction itself was colourable. Now, it is admitted, that the 1,500*l.* was actually advanced by Browne to his step-father. There was an arrangement made as to the nature of the securities which he was to receive, and these were carried into effect to a certain extent by this bill of sale, which certainly was given in pursuance of the original undertaking. As to the form of the deed, I believe it is the most ordinary form where the deed is executed in consequence of the existence of an antecedent debt, and the receipt for the consideration-money is nothing more than an acknowledgment by the assignor that he has received the money.

With respect to the absence of immediate registration and of stamping the deed, those are in themselves very slight circumstances. If there were anything that rendered the deed suspicious in any other respect, they might certainly be thrown in as weights in the scale against it, but in themselves they are really perfectly insignificant, and, at all events, as Pemberton, the step-father, had the management of the whole transaction, it would be very hard to affect Browne by any circumstance of that kind. With regard to the absence of the attesting witnesses, that is really matter of observation only. It raises no suspicion; it does not in the slightest degree impeach the deed, and it may be observed that, although attesting witnesses are most important when the question of the execution of a deed is brought into dispute, yet they are probably the persons who know the very least of the contents of the deed. Therefore I think that, all these circumstances considered, there is nothing whatever to induce me to come to the conclusion that Browne was not a *bond fide* purchaser for value of this lease. Then, the next question, which is a very important one, is, whether the defendant had notice of a

prior incumbrance. This will, in the first place, depend upon whether Pemberton was the solicitor of the defendant Browne in the transaction, and whether, as he, of course, knew of this incumbrance, his knowledge can be imputed to the defendant. The notice which a principal is supposed to receive through a solicitor is generally treated as constructive notice, but I cannot help thinking it would be better if it were classed under the head of actual notice. The notice which affects the principal through a solicitor does not depend upon whether it is communicated to him or not. If a person employs a solicitor who either knows or has intimated to him in the course of his employment, a fact that is hostile to his interest, he is bound by it, whether the fact is communicated to or is concealed from him. Constructive notice is properly the knowledge which the Court imputes to a person, the contrary presumption being so strong it cannot be allowed to be rebutted; and the knowledge must exist either from his knowing something which ought to have put him on further inquiry, or from his wilfully abstaining from inquiry to avoid notice. I should, therefore, prefer calling the knowledge which a person has either by himself or his agent actual knowledge; or, if it is necessary to make a distinction between that which a person knows himself and that which is known to his agent, the latter might, I think, be called imputed knowledge. Was Pemberton, then, who came to the transaction with a perfect knowledge of the plaintiff's incumbrance, the solicitor of the defendant? I find it very difficult to accede to the proposition, however high the authority from which it proceeds, that when a mortgagor is himself a solicitor and preparing the mortgage-deed, the mortgagee employing no other solicitor, the mortgagor must be considered to be the agent or solicitor of the mortgagee in the transaction. I think there must be some consent on the part of the mortgagee to constitute this relation. If he is imprudent enough to entrust his interest to the mortgagor, who is himself a solicitor, he may do so and take the consequences; but he may not desire to have any solicitor, he considering himself equal to the protection of his own interest, and then his mere

omission to communicate the circumstance to the mortgagor, who is preparing the deed, cannot constitute him the solicitor. If the mortgagor, under these circumstances, becomes the solicitor of the mortgagee, it is impossible to stop short in applying all the consequences of the relation, and then the knowledge which the mortgagor possesses becomes the knowledge of his client, the mortgagee. It is difficult to escape from this conclusion unless you apply the principle of *Kennedy v. Green* and exclude this particular knowledge, because the mortgagor was committing a fraud in the transaction which he could not be presumed to communicate, or rather, perhaps, because the very commission of the fraud broke off the relation of principal and agent, and therefore prevented the possibility of imputing his knowledge to his client. I think Pemberton was not the solicitor of Browne in the assignment, and there is not only no proof of consent that he should act in that capacity, but something approaching to a proof of the contrary. This brings me to the remaining question, whether Browne must be presumed to have had constructive notice of the plaintiff's incumbrance in consequence of his not having made proper inquiries respecting the deeds? There, it appears to me, the case of *Hewitt v. Loosemore* is a clear and distinct authority. It is said that Sir G. Turner, then Vice Chancellor, in that case laid down a new doctrine when he held, that where a *bond fide* inquiry is made for the deeds, and a reasonable excuse is given for their not being forthcoming, there is no ground for imputing knowledge which a further and fuller inquiry might have imported; and this decision was said not to have given satisfaction to the profession. But it would appear that Sir G. Turner founded himself on a long course of prior authorities, examined them all with his usual care, and arrived at his conclusion only after the most full and careful examination. I think that judgment is consonant with the prior decisions, which will govern me in this case. It appears to me that the inquiry made by Browne precludes the possibility of supposing that he abstained from all inquiry for fear of hearing something adverse to the title, and the answer which he

received was a sufficient excuse to induce him not to prosecute his inquiries further. The case, indeed, bears a singular resemblance in all respects to the case of *Plumb v. Flutt*, which has been followed in the various cases cited in *Hewitt v. Loosemore*. It is said that this case is of great importance to the commercial world, and that the doctrine which it asserts will alarm bankers and others who have advanced their money upon the deposit of deeds, and that they will be rendered liable to have their securities affected by secret assignments; but the only effect of such a doctrine, if it were new, would be to prevent persons obtaining advances of money with such facility upon the deposit of their deeds, and whether any great mischief would arise from a check being put upon equitable mortgages of this description may be extremely questionable. The law, however, has been settled for a great number of years, at least from the time of *Plumb v. Flutt*, which is now sixty years ago, and it has not been found that it has rendered persons unwilling to advance money upon such securities. But considerations such as these can have no effect, unless to prevent any new rule of law being laid down; and, whatever the consequences may be, I am bound by the prior decisions, and I am only following the uniform course of them when I arrive at the conclusion, that there is no such gross neglect on the part of Browne in not pursuing the inquiry he had made as would induce the presumption of notice of the plaintiff's incumbrance. Agreeing, therefore, with the judgment of the Vice Chancellor, I am of opinion that this appeal ought to be dismissed, with costs.

INDERSLEY, V.C. }
Dec. 22, 26. } WARDE v. DIXON.

Vendor and Purchaser—Conditions of Sale—Time for raising Objections—Power to rescind Contract.

A vendor put up for sale "the absolute reversion to the sum of 2,000l. consols," with conditions that any objections to title should be made within ten days after delivery of the abstract, and that the vendor, in case he should be either unable or un-

willing to meet any objection that should be raised, might rescind the contract upon return of the deposit without interest or costs. The vendor filed a bill for specific performance, and the case came on upon motion for a decree:—Held, that notwithstanding the expiration of the time allowed for making objections to title, the purchaser was entitled to raise objections in respect of matters not disclosed upon the face of the abstract, which he had subsequently discovered, and which would render the title bad or doubtful.

Held, also, that the vendor could not rescind the contract under the condition without first dismissing his bill, with costs.

The Court refused the motion for a decree, with costs.

The bill in this case was filed, against the directors and trustees of the National Reversionary Investment Company, for the specific performance of a contract entered into by their agent, on behalf of the company, for the purchase of the reversionary interest in a sum of 2,000l. consols.

The case now came on upon motion for a decree.

It appeared that by a settlement made in the year 1832, upon the marriage of the Rev. W. Lloyd and Miss Jeffries, a sum of 7,000l. consols and a policy of assurance for 4,000l. were vested in trustees for the benefit of the husband for life, remainder to the wife for life, and then in trust for the children of the marriage, as the husband and wife jointly or as the survivor should appoint, and in default of appointment, to be divided among the children equally. There were four children of the marriage, one of whom was Frances Ann Lloyd, who attained the age of twenty-one in the month of August 1854.

Mrs. Lloyd died in February 1843. On the 1st of January 1855 Mr. Lloyd, who had just then obtained the chaplaincy at Port Natal, exercised the power of appointment given him by the settlement, and appointed the sum of 2,000l. in favour of his daughter F. A. Lloyd.

On the 3rd of January 1855 Miss Lloyd mortgaged the reversionary interest in the 2,000l. so appointed to her, to Mr. Gay for 300l., and on the next day she further

charged the property to Mr. Gay for 100*l.*, making together a sum of 400*l.*, which was to be repaid on the 3rd of February, that is, one month after the execution of the mortgage, and in default of payment there was a power of sale contained in the mortgage.

Mr. Lloyd and his family embarked from Gravesend for Port Natal on the 7th of January, and on the following day, while the ship was lying off Deal, Mr. Lloyd came up to London with a clerk of Mr. Dodd, his solicitor, for the purpose of making a statutory declaration with respect to the circumstances under which the power of appointment had been executed, but was unable to fulfil his intention on account of the office being closed. He promised, however, to send home such a declaration from Port Natal, but this was never done.

On the 11th of January Mr. Dodd and his clerk made two statutory declarations on the same subject. Subsequently, an attempt was made to sell the property to the Law Reversionary Interest Society under the power contained in the mortgage in consequence of the non-payment of the mortgage money at the time specified. This society, however, refused to become the purchasers, considering that a doubt was thrown upon the title by the circumstances of the case. On the 31st of May another attempt was made by Mr. Gay to sell the reversionary property by auction, but in this he was also unsuccessful. On the 12th of February 1856 the property was again put up for sale with a reserved bidding of 490*l.*, but no sale then took place. Subsequently to this attempt to sell, certain communications took place between the plaintiff's solicitor and the auctioneer, which resulted in the purchase of the reversion by the plaintiff, Mr. Warde, for the sum of 510*l.* On the 7th of January 1858 the plaintiff put up the property for sale by auction, describing it in the following terms:—"The absolute reversion to the sum of 2,000*l.* consols, part of a larger sum standing in the name of the Accountant General of the Court of Chancery, and transferable on the death of a gentleman holding a public appointment abroad, now in his fifty-sixth year. A stop order has been lodged on the fund

by the vendor. Succession duty of 1*l.* per cent. to be borne by the purchaser." The conditions at the time of the sale comprised the following, viz., "All requisitions upon or objections to the title shall be made and sent to the vendor's solicitors within ten days after the delivery of the abstract, and in default thereof they shall be considered to have been waived;" and also a condition "entitling the vendor, in case he is either unable or unwilling to meet any objection that may be raised, to rescind the contract at his pleasure upon a return of the deposit without interest or costs;" and a further condition that "the vendor, who had purchased from a mortgagee, with full power of sale, should not be bound to enter into any covenant for the production of the settlement under which the reversion was derived, nor should the concurrence of any other person be required." No sale was effected upon the day of the auction; but on the 13th of January following an application was made to the auctioneer, by the defendant, as representing the National Reversionary Interest Society, who agreed to become the purchasers of the reversionary property for the sum of 770*l.*

The abstract was then delivered, which stated only the fact that Miss Lloyd attained twenty-one in August 1854; the appointment to her by her father on the 1st of January 1855 of the 2,000*l.* in reversion; and that on the 3rd and 4th of the same month Miss Lloyd had mortgaged this reversion for 400*l.* to Mr. Gay, who had sold it to Mr. Warde, the vendor. After the expiration of the ten days allowed by the conditions for making objections to the title, the defendants discovered the previous transactions as to the circumstances under which the appointment was made, the failure in the attempt to sell to the Law Reversionary Society, and the fact that certain statutory declarations had been made to avoid the objections to the appointment; and they thereupon declined to complete the purchase on the ground, that these material facts had not been disclosed, and that they were calculated to throw a doubt upon the validity of the title. A correspondence then took place, in the course of which the defendants' solicitor wrote a letter to the plaintiff's

solicitor, stating, that the difficulty might be, perhaps, removed, if Miss Lloyd would join in the conveyance; but no result having been arrived at, this suit was instituted for specific performance of the contract.

The defendants, by their answer, stated their willingness to complete the purchase, provided a good title could be shewn. Evidence on both sides had been produced, and the case now came on upon motion for a decree.

Mr. Amphlett and *Mr. C. T. Simpson* appeared for the plaintiff, and contended that the appointment was *bond fide*, and the father had full power to make it; that there was no evidence to shew that Miss Lloyd had not benefited by it, and it was clear that her outfit and passage-money had been paid out of the proceeds of the mortgage. They also contended, that the plaintiff had power to rescind the contract by the conditions of sale, without payment of costs, and this he claimed to do, unless the Court decreed specific performance. They cited *M'Queen v. Farquhar* (1).

Mr. Baily and *Mr. G. Lake Russell*, for the defendants, submitted that the plaintiff ought to have stated upon the abstract of title the facts which had subsequently been discovered, and therefore the defendants were justified in raising objections upon those facts, although the time for making objections had expired; that from the subsequent evidence it appeared the appointment had been made in fraud of the power according to the rules of the Court, for that the money obtained under it had never been applied to the benefit of the appointee, who was living at the time of the appointment under the controul and influence of her father; and that the circumstances which had now come to light were sufficient to prove, either that the title was bad, or that it was so doubtful that a purchaser could not be compelled to complete.

Mr. Amphlett was heard in reply.

KINDERSLEY, V.C.—This case comes on upon motion for a decree, and when a case is brought on in that form, it is com-

petent for the Court to, and it is expressly directed that it shall, deal with the question and with the case as justice requires. The Court may either simply refuse the motion, leaving the case *in statu quo*, or it may make a decree, either with or without costs, or may direct the motion to stand over, in order that further evidence may be adduced. In short, the Court may take such course as it thinks fit, with a view to work out the justice of the case between the parties. What it appears to me that I ought to do now is, to adopt the first course, and dismiss the motion, with costs, leaving the suit as it stands. I will first consider the case supposing it were entirely unencumbered by any question arising out of the correspondence between the solicitors and anything special appearing in the answers or in the bill. Here is a case in which certain property is put up for sale, which is thus described:—"The absolute reversion to the sum of 2,000*l.* consols, part of a larger sum standing in the name of the Accountant-General of the Court of Chancery, and transferable on the death of a gentleman holding a public appointment abroad, now in his fifty-sixth year. A stop order has been lodged on the fund by the vendor. Succession duty of 1*l.* per cent. to be borne by the purchaser." From this description one may, of course, infer that the property was an absolute reversion, and that the vendor was not the original reversioner, but one who had purchased. I allude to the statement that there is a stop order, and that that stop order had been lodged on the fund by the vendor, from which the inference may be drawn that the person selling was not, as in fact he was not, the original reversioner, but one who had bought from the reversioner. When the abstract of title was delivered, it appeared from it that the reversioner was Miss F. A. Lloyd, who had attained the age of twenty-one in the month of August 1854. It also appeared that she was not simply and originally a reversioner, but that she became entitled to this 2,000*l.* by virtue of the exercise of a power of appointment. That fact was for the first time disclosed on the abstract, and it appeared that the power of appointment was one which might be executed by the father

(1) 11 Ves. 467.

among his children, by virtue of a marriage settlement. The father exercised that power on the 1st of January 1855, appointing to his daughter, who had attained twenty-one some four or five months previously, the sum of 2,000*l.*, out of a larger sum of 11,000*l.* That is to say, there was 7,000*l.* consols or stock, and a sum of 4,000*l.* besides, which was secured by a policy of assurance, kept up by means of the dividends on the stock, and was a perfectly secure fund. The father exercised his power in favour of this daughter to the extent of only 2,000*l.*, which was considerably less than would have been her equal share of the property. It further appeared by the abstract that, on the 3rd of January 1855, Miss Lloyd, having had the appointment made in her favour on the 1st of the month, mortgaged that reversionary interest to Mr Gay to secure 300*l.*, which was to be repaid on the 3rd of February following, that is, a month afterwards; and, in default of payment, there was a power of sale. Then, on the following day, there was a further charge in favour of Mr. Gay of an additional sum of 100*l.*, making the whole of the sum secured to Mr. Gay 400*l.* It further appeared that, on the 3rd of March 1856, Mr. Warde, the present plaintiff, and the vendor in the sale which is now sought to be enforced, had purchased this reversionary interest from Mr. Gay, the mortgagee, who sold under his power, for 510*l.* That was the whole of what appeared upon the face of the abstract, or the whole of what it is necessary to refer to now. Before I revert to what subsequently turned out to be the facts, I will state my view of what actually appeared upon the abstract. Here was an appointment made in favour of a young lady, one of several children, and immediately afterwards she raised 400*l.* upon it by mortgage. That appointment was made about five months after she attained twenty-one. What suspicion then arises there? No doubt it would cross the mind of any one that this was probably not for the benefit of the daughter, considering that she was then young, and that she had immediately mortgaged it, and had evidently contracted to mortgage it before the appointment was made in her favour. There would be a certain degree of sus-

picion, though not, perhaps, a very strong suspicion, arising out of these circumstances, but a thousand suggestions might be made of the most probable kind as reasons why that was a most proper transaction. A young lady having just attained twenty-one might want the money. She might have been about to marry, or she might be going out to some colony or into some business, or she might require it for any other advancement in life, and by means of this appointment in her favour, she would be acquiring the power of raising a sum of money by mortgage. Therefore, although I think a certain degree of suspicion might arise from what appeared upon the abstract, yet it would not be such a suspicion as would necessarily lead a person to further investigation. I think a very careful person would have investigated further, and I am rather surprised that no further investigation was made as to why this transaction took place; but when the matter comes to be looked into with care, the purchaser discovers these facts:—that at the time when the appointment was made, this young lady was living and continued to live under the controul, that is, in the domestic circle, and, therefore, under the controul of her father; and, also, that when the appointment was made, her father was a person in a good station of life in point of birth and connexion, but in somewhat reduced and straitened circumstances, and was glad to accept an appointment in South Africa as a colonial chaplain, and that he was about to proceed to Port Natal with this very daughter and two other daughters, three out of his four children. They embarked on the 7th of January 1855, but they did not actually sail till three days afterwards. The ship, in fact, lay off Deal, but did not sail until the 10th or 11th. That is a fact which is discovered, and, moreover, it is said that the gentleman who was acting as the solicitor for Miss Lloyd in the matter was, as might be expected, the solicitor of her father, and was also the solicitor of Mr. Gay, the mortgagee. It is further discovered that the 165*l.* which was paid, or agreed to be paid as the passage-money of the family to South Africa was paid in this way:—The father, Mr. Lloyd, gave an order upon Mr. Dodd, his solicitor, for

150*l.*, and the remaining 15*l.* was to be paid subsequently. For the 400*l.* advanced by Mr. Gay, the mortgagee, a cheque was given for an odd sum of 336*l.* That cheque was paid at the private banker's partly by a bank-note for 300*l.*, and that note was exchanged at the Bank of England for so many 5*l.* notes, and of these 5*l.* notes twenty-seven are traced as paying not for the mere passage-money or outfit of Miss Lloyd, but for the passage-money of the whole family.

Now, these facts appear, and consistently with them it is possible that the whole thing was perfectly right and *bona fide*, and neither a fraud upon the power, nor a fraud nor an imposition upon Miss Lloyd herself. That is perfectly possible, but nobody can doubt for one moment that when these additional facts are ascertained, they do raise the gravest question whether the transaction was fair in many points of view; whether it was fair and right as regards the other children; whether it was not what this Court calls a fraud upon the power, not a moral fraud, but a fraud which might be set aside by the other children; and whether, having regard to the position of this young lady, under the control of her father, going abroad with him, and having recently attained twenty-one, she might not also complain of the transaction as a matter in which the father, exercising undue influence over her, had induced her to mortgage her property in order to raise money for his benefit. No one can question for a moment that these additional facts, as they appear, raise the very gravest doubts. Supposing the case rested simply on that state of circumstances, and that I were asked by the vendor to decree specific performance of this contract, is it possible I could do so? I should be obliged, if it stood there simply, to dismiss the vendor's bill, and I should certainly be under the necessity of dismissing it with costs. But I must now consider what is the effect of the condition upon which, very naturally, great reliance is placed by the counsel for the plaintiff. I must take this into consideration. At the time when Mr. Warde put this property up for sale, what did he know? He, of course, knew the circumstances under which he had bought, and it appears that

they were these: that he bought immediately after—that is, somewhat less than a month after—an attempt by Mr. Gay, the mortgagee, to sell the property by auction, and Mr. Warde knew that his purchase was made upon the conditions of sale at that auction. I think he also knew of the prior attempt in May 1855, but that is not material, because the conditions on both sales are very much the same. I believe he knew that, when Mr. Gay put up the property for sale, it was put up with a condition referring to certain statutory declarations which had been made, and that the statements in those statutory declarations were to be assumed to be true, whether they were true or not. Whatever was stated in those statutory declarations, they were conclusive as to the facts therein stated. He knew also the circumstances which I have mentioned, except that the 150*l.* or any portion of the money was actually applied in paying the passage-money. He did not know that fact, but he knew that the daughter was under the dominion of her father, and that they were going to Port Natal, and sailing at the time that I have mentioned. He knew also this very remarkable circumstance—though it was not conclusive that the transaction with the father and the daughter was a fraud either on the power of the father or on the daughter—that the purpose for which this appointment was made to the daughter was to enable the money to be raised, in order that the father and the family might go out to Port Natal. It might be a very useful thing for the family, the very best thing that could happen to any one of them, and I dare say it was; but he knew this, because it appeared from some of the letters produced from the custody of Mr. Warde, that before the 1st of January, which was the date of the appointment by the father, negotiations were on foot for the sale of the reversionary sum, proposed to be appointed, to a reversionary interest society, called “The Law Reversionary Interest Society;” they were actually in negotiation for the sale to that society before the appointment had even been made. Now, all these circumstances were circumstances known to Mr. Warde; and Mr. Warde knew this, that those statutory declarations had been made with a

view—I do not say what their effect is at this moment, but certainly with a view—to remove the suspicion, and not merely the suspicion, but a grave doubt, whether the matter was not such as this Court would have set aside as fraudulent, either in one view or the other. He knew what the statutory declarations contained. He knew that a statutory statement of Mr. Dodd represented this circumstance that, while the ship was at Deal, Mr. Lloyd went up to London, for the purpose of making a statutory declaration to the same effect as those made by Mr. Brady and Mr. Dodd, with a view to satisfy any person to whom these facts should become known, that this money was raised exclusively for the benefit of the daughter; and that the father had derived no benefit from it at all. The reason why the statutory declaration was not on that occasion made by the father was, that when they got to town it was late in the day; they went to some notary public, whose office was closed; they did not find him; they were afraid the ship would sail, and they were obliged to hurry back. They went back; the thing was never done, but Mr. Lloyd promised that, as soon as he got out to Port Natal he would send home a statutory declaration to the required effect. Mr. Warde swears that no such statutory declaration, as far as he had any reason to suppose, had ever been sent home.

Mr. Warde considers then, when he is putting up the property for sale by auction on the 7th of January, what is his best course. He says, “I know the natural suspicion—not only natural suspicion, but doubt—which must present itself to the mind of any one if these facts once become known. I am quite aware of that, and I am quite aware that, when the property was put up before, I only gave, by private contract, 510*l.*, being about 20*l.* more than the reserve bidding on that occasion. But I will get as much as I can.” I do not mean to find fault with him for trying to get as much as he could, but he considers how he should put it up for sale in such a manner as should realize the utmost without enabling the purchaser to say “your title is a bad one.” Therefore these conditions of sale are prepared: “All requisitions upon or objections to the

title shall be made and sent to the vendor's solicitors within ten days after the delivery of the abstract, and in default thereof they shall be considered to have been waived.” Then comes another condition, entitling the vendor, in case he is either unable or unwilling to meet any objection that may be raised, to rescind the contract at his pleasure upon a mere return of the deposit, without interest or costs. And then comes this condition: “The vendor who purchased from a mortgagee with full power of sale shall not be bound to enter into any covenant for the production of the settlement under which the reversion is derived, nor shall the concurrence of any other party be required.” Then, with these conditions of sale he puts upon the abstract nothing but what I have already stated, namely, the fact that Miss Lloyd attained twenty-one in August 1854, the fact of the appointment to her by her father on the 1st of January 1855 of 2,000*l.* in reversion, and the fact that on the 3rd and 4th of January Miss Lloyd mortgaged that for 400*l.*; and then that Mr. Gay sold it to Mr. Warde, and that Mr. Warde is now the vendor. Only see the position. I am not at all supposing that Mr. Warde knew, or had any reason to suppose, that the fact actually was, that part of the very money which Mr. Gay paid to Miss Lloyd went to pay the passage-money of the whole family. I am not supposing that; but he knew facts enough to lead him to suppose that without this condition, and without making the abstract represent what it did, he would expose himself to great objection as to title. I do not like, as I am only dismissing the motion, and not deciding the case, to say a word more than is necessary in order to explain the view I now take, which induces me to dismiss the motion with costs. But I cannot help observing, that there is not absent from my mind the consideration, whether these are fit and proper conditions for a vendor, under such circumstances, and with such knowledge as he had, on which to put up property for sale in that manner, and with such an abstract of title. I do not think it right to express any opinion whether it was absolutely necessary that there should have been a statement of the statutory declaration on the

face of the abstract; but I confess that the manner in which this property was put up for sale is not without its operation on my mind. Considering the nature of the property, and the facts known to him, he ought not to have put it up with such conditions, or to have delivered such an abstract as he has delivered, without communicating more than he did to the purchaser; because the purchaser is in this position: the abstract being delivered, he must deliver his objections and requisitions within ten days; but he knows nothing of the facts of the case, except what may appear on the face of the abstract; and, according to this condition, he is barred from all objection, unless made within ten days. Suppose he discovered this: that, in point of fact, not only were there facts raising a great doubt as to the title, but facts shewing there was no title at all; the same argument would be equally valid, to say the purchaser is precluded from raising the objection because he did not do so by his requisitions within ten days. I know there are very peculiar conditions which are becoming customary in these times which in former times we never heard of, and I do not mean to say that a vendor has not a right to fence himself with all sorts of conditions—but if there be these conditions, whether such conditions are proper or not, and facts are subsequently discovered either to shew that the vendor has no title, or what is called a bad title; or that the vendor has a title which is open to the greatest possible doubt; I, for one, will never say that the purchaser is subsequently bound and precluded from raising those objections if the facts were not known to him on which the objection is raised at the time he delivered his requisitions. Therefore, it appears to me I ought not to preclude the defendant now from raising the objection. It is not necessary that he should be able to say, “I prove your title is bad”; but that he should be able to say, “I prove facts which shew that your title is at least doubtful”; not merely raising a case of suspicion, as in *M'Queen v. Farquhar*, but one of grave doubt. I must say in this case, unless the matter be explained, the facts in evidence are presumptive proof

that some of the money did go into the pocket of the father. But still, I admit, it is left open to shew that, though some of the money went for the benefit of the father, it was for the benefit of the daughter and of the other children, who were entitled to share. That is one of my reasons for not now dismissing the bill. The plaintiff has thought fit to bring forward this matter by way of motion for decree. He is bound to shew me that he is entitled to a decree; he does not do so, and therefore I dismiss his motion, but I will not preclude him from the opportunity, if he thinks he can avail himself of it, of shewing that there is a good title.

Now, what I have said very much disposes of the motion, but there are some minor considerations of this kind: there are suggestions as to what the defendant, by the letter of his solicitors on the 26th of March 1858 (which was, of course, after the delivery of the conditions and requisitions), and what he by his answer considered he was entitled to. It appears to me, as I have stated, that, at the time the letter of the 26th of March was written, the writer of that letter in fact had not present to his mind any objection as to the appointment being a fraud on the power; otherwise he would not have written that letter. That letter amounts to this only: “let Miss Lloyd join, and I am content, and will complete.” Well, Miss Lloyd's joining could not remove the objection, if it was an objection, as to the appointment being a fraud on the power. When the answer is put in, it appears to me that the learned counsel who drew it had not present to his mind so distinctly as now, the question as to the invalidity of the execution of the power in the way I have mentioned; but I cannot hold that the answer being put in precluded the defendant from raising that objection, as well as all the other objections, which depend very much on the same state of facts. The same state of facts raises the two chief objections: one, of its being a fraud on the power; and the other, of its being an imposition or undue influence exercised on Miss Lloyd. The same fact goes very much to the same point, and it appears to me that the defendant is not precluded from setting up that point by his answer.

The only other point to which I think it necessary to advert is this. It is suggested by the plaintiff's counsel, that the condition as to the right to rescind, is a condition of which he is entitled to avail himself; and that if the Court would make an order to the effect that there is to be first of all a decree for specific performance, and then a reference as to title in the usual way—having regard to the conditions of sale—he is content not to rescind. But if the Court will not give him that, then that he ought to be entitled to rescind the contract—nay, more, that if he so rescinds, the Court ought to give him the costs of the suit. I confess I am unable to understand how he can claim the latter, even if he could claim the former. I conceive the very purpose of the condition is, to save the vendor the obligation of going into litigation. The vendor says, "I reserve to myself the power of rescinding, because there may be a great deal of difficulty caused by the requisitions. I may find it very inconvenient, or very expensive, and, perhaps, almost impossible, to answer them, or to meet the objections; and, therefore, I reserve to myself the power. If I do not, the purchaser may file a bill against me; I may be dragged into equity, or I may have an action brought against me for non-performance of the contract; and therefore I reserve to myself the power of rescinding the contract, that I may not be exposed to such a result. The plaintiff, however, says, "I know I may rescind the contract if I like, but I will not rescind the contract; and so far from objecting to being dragged into equity at all, I will myself drag the purchaser in. I will file my bill, and bring the cause to a hearing." I think I may say this, that if the cause comes to a hearing, the vendor will find it very difficult to satisfy me that he is entitled to ask to rescind the contract. He cannot ask to rescind the contract, and put aside the other proposition as to his being entitled to the costs of the suit. The question is, what he may do in the present state of things? The cause does not come to a hearing except so far as under the new practice a motion for a decree may be said in one sense to bring the cause to a hearing. I think that, under such a condition as this, if a vendor files a bill and after-

wards dismisses his bill, he may be—I do not say he is—then entitled to say, "I will still resort to my condition, and rescind the contract;" but if he is so entitled, he must first dismiss his bill; and how he is to dismiss his bill, except by dismissing it with costs, I really do not know. I think, therefore, he would have to dismiss his bill with costs before he could say he is entitled to rescind the contract. Well, in this state of things, I refuse this motion with costs: but I do not mean to express any opinion that when that is done it is not competent to the plaintiff to dismiss his bill with costs, and then rescind the contract. This will leave the cause exactly in the same position in which it was at the time when the notice of motion was given.

M.R. { NOBLE v. BRETT.
Nov. 24. { NOBLE v. HODGES.

*Administration of Estate — Costs —
Executor, Action against.*

If an executor administers the estate of his testator and pays over the residue so that no part can be recovered to answer a subsequent debt of the testator, he will not as against appropriated legacies be entitled to the costs of an action brought against him by the creditor, or of a proceeding necessary to establish the debt, or of any suit by him to make the appropriated legacies available for the payment of the debt (1).

Samuel Hodges, by his will, dated the 3rd of May 1843, directed his executors to invest 4,000*l.* in their names and in the names of his two sons, Samuel and William, to remain until his two sons should severally attain twenty-five, at which time the sum of 2,000*l.* was to be paid to each. The residue of his estate he gave to Sarah Brett.

William Noble and Sarah Brett, the executor and executrix, paid the testator's debts, and invested the two sums of 2,000*l.* as directed by the will, in the purchase of two sums of 1,872*l.* 11*s.* 3*d.* consols. The residue of the testator's estate, amounting to 308*l.* 8*s.* 11*d.*, was received by Sarah Brett, as residuary legatee.

(1) *Morris v. Livie*, 1 You. & C. C.C. 380; *a. c.* 11 Law J. Rep. (N.S.) Chanc. 172.

On the 26th of October 1855, Samuel Hodges sold and assigned his interest in his legacy to Thomas Hayley, for 1,500*l.*

On the 6th of May 1856, W. Dyson, who was seised in fee of certain premises which had been let on lease to the testator Samuel Hodges, but which had been sold by him in his lifetime, brought an action against William Noble and Sarah Brett, for damages consequent on breaches of the covenants contained in the lease.

William Noble then filed a claim against Sarah Brett, for the administration of the testator's estate, and upon notice of this a Judge's order was obtained, staying the action, and giving W. Dyson leave to prove his demand in the suit of *Noble v. Brett*.

The suit of *Noble v. Hodges* was afterwards instituted by William Noble, in order that the two sums of 1,872*l.* 11*s.* 3*d.* might be secured for the benefit of the parties entitled thereto; the only order made in this suit was, that the two sums of stock should be transferred to contingent accounts, the one of S. Hodges and T. Hayley, and the other of W. Hodges, but no order was made as to the costs.

An order was then made in *Noble v. Brett*, that Mrs. Brett should pay the amount of the testator's residuary estate into court; and after payment of costs, that W. Dyson's demand, which had been ascertained to amount to 188*l.* 19*s.* 3*d.*, should be satisfied. Mrs. Brett was, however, insolvent, and unable to pay anything; and, finally, she took the benefit of the Insolvent Debtors Act.

The decree made in *Noble v. Hodges* was drawn up by T. Hayley, as W. Noble declined to proceed further with the suit.

By an order, dated the 13th of January 1858, and made in both causes upon the petition of W. Dyson, after directing the costs and subsequent interest upon the debt to be ascertained, it was declared that he was entitled to be paid his debt (which, with interest and costs thereon, amounted to 207*l.* 19*s.* 7*d.*), and also the subsequent interest and costs, in equal moieties out of the two sums of 1,872*l.* 11*s.* 3*d.* consols, and leave was given to W. Dyson to prosecute the order made in *Noble v. Hodges*; and after directing a sale and payment of the debt and costs out of the two sums

of 1,872*l.* 11*s.* 3*d.*, when brought into court, it ordered that the costs of W. Noble and of T. Hayley should be costs in the cause; but such order was made without prejudice to any question between the executors and S. and W. Hodges and T. Hayley.

W. Dyson took no proceedings under the order of the 13th of January 1858 to obtain payment of his claim; and as the two sums of 1,872*l.* 11*s.* 3*d.* had not been transferred into court in pursuance of the order made in *Noble v. Hodges*, T. Hayley presented this petition, praying that W. Noble and Sarah Brett alone might, upon his satisfying one moiety of the debt, interest and costs due to W. Dyson, be directed to transfer to him the sum of 1,872*l.* 11*s.* 3*d.* consols, standing in the names of W. Noble, S. Brett, J. Davies and S. Hodges, in the books of the Bank of England.

On the 31st of July 1858, the petition came on, but the Court only ordered that the stock should be transferred into court, as directed by the decree made in the suit of *Noble v. Hodges*, and the rest of the petition was directed to stand over.

On the 27th of August 1858, W. Noble and S. Brett transferred the two sums of 1,872*l.* 11*s.* 3*d.* into court.

The petition was, therefore, again brought on to determine the right of the parties to costs.

Mr. Hardy, for T. Hayley.—The fund purchased by T. Hayley had been rendered liable to a debt through the negligence of the executor; he ought, therefore, to be responsible for the costs; no part ought to be paid out of the fund purchased by Mr. Hayley.

Mr. R. Palmer and *Mr. G. L. Russell*, for Mr. Noble.—There is no ground for dealing with Mr. Noble as an executor misconducting himself: he had not misapplied any of the testator's estate. W. Noble, after bringing back the fund into the general assets, was entitled to all the subsequent costs.

Knatchbull v. Fearnhead, 3 Myl. & Cr. 122.

Gillespie v. Alexander, 3 Russ. 130; s. c. 3 Law J. Rep. Chanc. 52; 2 Sim. & S. 145.

Mr. Hardy, in reply.

THE MASTER OF THE ROLLS.—An executor, when distributing the estate of his testator, must run some risk, unless he acts under the direction of this Court. In this case the executor administered the estate; he set apart sufficient sums to answer two legacies of 2,000*l.*, and allowed his co-executrix, who was the residuary legatee, to appropriate the residue. After a lapse of some time a claim was made against the estate of the testator; it arose in consequence of a breach of covenant contained in a lease of premises, which had been granted to the testator, but which in his lifetime he had disposed of. The executor refused to pay the demand, and the lessor brought an action to recover the amount claimed; and one question now to be decided was, who was liable to pay the costs incurred? It was clear that the executor should not have resisted the action: he had no defence at law, and he had no pretence for asking to throw the costs upon the legatees. He then filed a claim for the administration of the estate of the testator; but it was not practically for that purpose, its real object was to make the sums set apart to pay the legacies answerable for the liabilities incurred by the testator upon the covenants in the lease, as well as to secure a fund for the payment of his own costs. The debts and liabilities of the testator must be discharged, and I thought that Mr. Dyson's demand ought to be satisfied out of the funds set apart to answer the legacies—*Noble v. Brett* (2). It was impossible to consider those funds as money which had not gone out of the hands of the executor, or as if they were funds in a course of administration: the residue which S. Brett had received and retained ought to have been applied towards the discharge of the debt of Mr. Dyson: it was, however, dissipated, and the amount of the demand could not be realized from her. If W. Noble had applied to the legatee or his assignee before he had filed his bill, and had asked them to pay the debt, I should, if they had refused, have held him entitled to his costs. In this case, however, a suit was instituted, asking that the legacies might make good a deficiency, which had been occasioned, by his allow-

ing the residuary legatee to retain the fund liable to pay the testator's debts. It had been argued that the Court would not have permitted the executor to retain any assets in his hands to indemnify him against the breach of any covenant the testator might have entered into; but in those cases the fund was administered by the Court, and the executor was protected from any further liability; here, however, it could not be contended that the fund in court was to indemnify the executor from the costs incurred in consequence of the action brought by W. Dyson, or of the proceedings which had been rendered necessary to establish his debt: they could not be separated, and could not be considered as costs in the cause; they, therefore, must be treated the same, and the costs of the claim and the costs of the suit must also follow the costs of the action. As for T. Hayley's applications to obtain a transfer of the fund, he must, as he failed, pay the costs of them, but those costs were wholly distinct from the suit, the object of which was to determine whether the fund was liable to the demand of W. Dyson. It certainly could not be considered as an administration suit, or as a suit instituted by a trustee on behalf of T. Hayley. It was impossible, therefore, to give to W. Noble the costs asked for out of the funds, which had been brought into court.

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Extract from the Order.

It was ordered, that the Taxing Master do tax W. Noble his costs, charges and expenses properly incurred in consequence of the claim of T. Hayley to a transfer of the fund before the institution of the suit of *Noble v. Hodges*; and his costs as between solicitor and client of and relating to this petition; and the defendant Sarah Brett her costs of and relating to this petition as between solicitor and client, and certify the amount thereof. And W. Dyson, by his counsel admitting that he has received the amount of his claim due and payable out of the fund, pursuant to the order, dated the 13th of January 1858, it was ordered, that so much of the 1,872*l.* 11*s.* 3*d.* consols standing "To the contingent account of the defendant, Samuel Hodges and his assignee, T. Hayley," as will be sufficient to raise the costs, charges and expenses, and costs when so taxed, be sold, and the amount placed to the credit of the cause, the like account: and out of the money to arise by the said sale it is ordered, that the costs, charges and expenses and costs of the plaintiff be paid to ———, his solicitor, and the costs of Sarah Brett to ———, her solicitor. And it was ordered, that the residue of the said consols, after the payments aforesaid,

and any interest to accrue on the said consols previous to the transfer, be paid to T. Hayley; and such order was declared to be without prejudice to the petitioner T. Hayley's rights under the order of the 13th of January 1858.

WOOD, V.C. { *In the matter of* THE ATHENÆUM LIFE ASSURANCE SOCIETY.
Jan. 11, 28. { SHEFFIELD'S CASE.

Joint-Stock Companies Winding-up Acts, 1848 and 1849—Contributory—Misrepresentation.

S. took shares in a joint-stock company, and signed the deed, upon the representation made by one of the officers of the company that such deed contained a clause limiting the liability of the shareholders to the amount of their shares. This clause had been fraudulently inserted in the deed after complete registration, and was not contained in the registered deed. S. attended meetings of the company and received dividends for three years, when the company was ordered to be wound up:—Held, that S. was liable as a contributory.

This was an application to review the chief clerk's decision in putting Mr. Sheffield's name on the list of contributories of the Athenæum Life Assurance Society.

Mr. Sheffield was appointed an agent of the company, in May 1851, and in October of the same year, upon the representation made by the managing clerk and cashier of the company, that the paid-up capital of 1*l.* per share was all that could possibly be demanded of the shareholders, he consented to take five shares in the society, which were paid for by the deduction of 5*l.* from his commission, and he signed the deed for five shares, but without reading it.

In February 1852 he was again applied to to take more shares, and he then agreed to take fifteen more shares, being again assured that the deed of the company fully protected him from all risk beyond the amount for which he signed the deed, and on the 28th of February he signed the deed for these fifteen shares, the money being deducted from commission as before.

On four several occasions Sheffield received dividends on the twenty shares, viz., the 30th of December 1852, the 1st

of June 1854, the 30th of December 1854, and the 30th of June 1855. He also attended three general meetings of the shareholders, held respectively in August 1852, in August 1853 and August 1854, and two extraordinary general meetings in December 1855 and July 1856.

The deed of settlement was dated the 2nd of May 1851, and it appeared by the evidence that, between the 27th of July 1851 and the 5th of October 1852, it contained a clause by which it was expressly declared that the funds and property of the company remaining unapplied and inapplicable to prior claims should be alone liable to make good all liabilities of the company, and that no officer or shareholder of the company should be in any other way individually or personally liable to any such claims, or in any manner whatsoever, if his shares were fully paid up, nor beyond the amount due on his shares or interest if not fully paid up, nor for any longer period than he should retain the same. This clause was fraudulently inserted in the deed by the interpolation of a skin of parchment, after the complete registration of the company, and was removed some time in October 1852, without affecting the appearance of the deed.

Several persons executed the deed whilst it contained the interpolated clause, and in the case of three gentlemen who had executed the deed in this condition, it had been determined by the Vice Chancellor in chambers that they were not liable as contributories—see 4 *Kay & J.* 308.

The account of the transaction given by Mr. Sheffield was as follows:—

“I was appointed agent for the society in May 1851, or thereabouts. I was frequently applied to by Messrs. Whitehead and Sutton (the managing clerk and cashier of the society) to take shares. I agreed to take shares as soon as I had done some business for the society. In October 1851 I did some business for the society, by issuing a policy, and I then determined to take shares in the society, and I went to Mr. Whitehead and told him I was willing to take five shares. The board was sitting, and he went into the board-room and brought out with him the deed of settlement, which I then signed. No scrip or document

was then given me, as I did not then pay any money. * * * On the 27th of December 1851, I think, I settled an account with the society, and from the commission due to me as agent to the society, the society deducted, with my assent, 5*l.* as the full amount of my subscription for the five shares. * * In February 1852 I was applied to by Mr. Whitehead and by Mr. Sutton to take some more shares in the company. I ultimately, on the 28th of February 1852, agreed to take fifteen more shares, on the assurance of Mr. Sutton and Mr. Whitehead that I should not run any risk beyond the paid-up capital. Mr. Sutton, I think, then fetched the deed of settlement, and I again executed it, for fifteen shares. My name appearing on the eighth page of the deed is in my handwriting. The 15*l.*, the full amount of my subscription for the last-mentioned shares, were allowed by me to be deducted by the society in my account with the society."

Being cross-examined on his own behalf, he said, in addition to what he had already stated—"On the 17th of October 1851, I was at the office and took five shares. Mr. Whitehead then shewed me several signatures of parties to the deed, and assured me that all the directors were shareholders. Before signing the deed I said, 'Is there any risk or liability beyond the paid-up capital of 1*l.* per share?'—and he assured me that there was not; and I remarked that if there were any other risk or liability it would be like signing my death-warrant, as I was not in a position to meet any further calls. He again assured me it was a good investment, and that I had no occasion to fear any further liability, the deed providing against the liability of any additional calls beyond the amount of 1*l.* per share. I did not read the deed; Mr. Whitehead told me it was very voluminous, and that I should never read it through, and that it was wanted in the board-room."

Mr. Daniel and *Mr. Roxburgh*, in support of the application, contended that Mr. Sheffield could not be held to have executed the deed of settlement of the company. He executed a deed containing a clause which limited the liability of share-

holders, and when that clause was taken away it became a different deed from the one which he had executed. They cited

Cox's case, referred to 4 Kay & J. 308.

Lord Mansfield's case, 2 Mac. & G.

57; s.c. 19 Law J. Rep. (n.s.)

Chanc. 258; 1 Hall & Tw. 593.

Sutton's case, 3 De Gex & Sm. 262.

Mr. Rolt and *Mr. W. D. Lewis*, for the official manager.—The true deed of the society was registered, and Mr. Sheffield might at any time have inspected it. The misrepresentation of the servants of the society did not bind the society. At all events, it is too late to complain now, after attending meetings of the society and receiving dividends on his shares.

Ex parte The Prince of Wales Life

Assurance Company, 4 Kay & J. 517;

s.c. 27 Law J. Rep. (n.s.) Chanc.

798.

Blackburn's case, 4 Week. Rep. 420.

Ex parte Cookney, ante, p. 12.

Brockwell's case, 4 Drew. 205; s.c.

26 Law J. Rep. (n.s.) Chanc. 855.

Mr. Daniel, in reply.

Jan. 28.—Wood, V.C.—This is one of those numerous cases which have arisen in consequence of the gross frauds committed by some of the directors of the Athenæum Society. Mr. Sheffield having signed the company's deed of settlement at a time when it contained a clause which formed no part of the original registered deed of the company, but was surreptitiously inserted in it by the directors, and having not only taken shares but having received dividends for three or four years after so taking them, the question now is, whether he is or is not a contributory within the meaning of the act of parliament. With regard to any fraud in misrepresenting what the deed itself was, I apprehend nothing can be made of that. Of course, the representations made by the secretary could have no effect at all, if the deed were different from what it was represented to be; for though companies have been held to be bound in some cases by the act of all the directors acting in the due execution of their powers, it has never yet been held, that an officer of a company misre-

presenting the effect of a deed, it being no part of his functions to explain or expound that deed, could release a shareholder. In fact, if you look at it strictly, the evidence, when analyzed, would not amount to actual misrepresentation. The representation appears to have been to the effect that he would not be liable to any other calls. To a certain extent that is quite true, for although he might be liable in contribution with respect to the debts of the company, he is not liable to any calls which the directors may make. The directors are only authorized to make calls to the amount of the shares. Mr. Sheffield's case was therefore to be put thus:—that he cannot be fixed as a member of the company, the only company that he bound himself to being an association of persons met together for a different purpose and under a different deed, and the deed he put his name to not being the deed of the company now in course of winding up, but a different deed altogether. After considering the case for some time, it occurred to me that it would be singular if he could escape on this ground, having accepted dividends for three or four years. I do not say that taking those dividends is any ratification of the deed, no difference in the deed as executed having been pointed out to him, and no alteration having been called to his attention since the time he executed it. But the real state of things is this: the Courts have held, and the House of Lords has always held, that third persons dealing with companies must be supposed to know the contents of the deed. The deed is registered for every one's inspection, and those who deal with the directors of these companies must be taken to know what the powers of those directors are, and must be bound to know the contents of the deed. Now, if that is so, it would be singular if a shareholder should be allowed to go on for five years and then say he did not know what the contents of the deed were. Even assuming that he had been led to execute this deed upon having the clause shewn to him, as was the case in some other instances which I have had, it would be difficult to say that persons continuing to receive dividends and income from the society could be held to be excused

from any contribution in respect of that society. The other case I have had to deal with was that of a person who executed the deed having had that clause pointed out to him; and he did not receive any dividends. In this case I have this fact, that a man signs a deed which happens to be not the deed of the company, but a deed of a very different description. I hold, on the evidence, that he does not sign on the faith of there being anything in the deed, except that he is told that it is a deed that would not subject him to calls (and he is truly so told, taking it one way,) beyond the amount of 1*l.* per share. He is content with this. But he must be taken to know that the deed is registered, yet he never looks to ascertain what the purport of it is; he has continued to receive the dividends of the company, which in this case, as in the case of some other companies, I am afraid have been paid out of the capital subscribed by the shareholders, and not out of the profits. He has been receiving, therefore, the monies of his contributories in the shape of dividends, and yet he now claims to be exempted from liability, with his co-contributories, when a loss has occurred, after he has remained four or five years without saying anything about the matter. I am afraid that in every case which arises out of this Athenæum Company, I shall have some special class of circumstances to deal with, every case differing from the others; but in this case, where I do not find the clause in question pointed out, or anything more than a mere exposition of the contents of the deed, and where I do not find this gentleman making any inquiry at the office where the deed is registered, to see what the true state of the matter was, but where I find him taking the profits for several years out of the concern, I think that under these circumstances he must be held to be a contributory.

M.R. }
Jan. 13, 14. } COURSE v. HUMPHREY.

Trustees—Suit against—Separate Defences—Costs.

If trustees, defendants to a bill filed against them for the execution of the trusts

of a will, appear separately and sever in their defence, one set of costs alone will be allowed, and in the absence of evidence shewing misconduct, the Court will not order the costs to be paid to one trustee only.

John Course, by his will, dated the 6th of March 1854, appointed Martin Humphrey and Alfred Hayward his executors and trustees. The testator died on the 8th of May 1854, and in November 1856 this suit was instituted by his widow, Susannah Course, on behalf of herself and her only child, against the trustees. The bill charged that the defendants had sold part of the real estate of the testator, and had not invested or applied the proceeds according to the trusts of the will; that the plaintiffs were unable to obtain any accounts from the defendants, and that they believed that the defendants had considerable sums of money in their hands belonging to the testator's estate; that these were likely to be lost or misapplied, as A. Hayward was in insolvent circumstances; and that the plaintiffs had no other property, and had not for sometime received anything from the defendants. The bill then prayed for an administration of the estate, and also that the defendants might be charged with interest on any sums in their hands, and that they might be removed from the trust, and that new trustees might be appointed in their place. The trustees put in separate answers, and severed in their defence. On the 20th of January 1857 Mr. Humphrey put in his answer, stating that he had received the money arising from the sale of the personal effects of the testator, and that after paying several debts he had handed the balance to Mr. Hayward, his co-executor, that he might pay other debts of the testator. He admitted that he had in his hands a balance arising from the rents of the real estate, and stated that the proceeds of such part of the real estate as had been sold had been paid to Mr. Hayward, his co-trustee, and that he had thereout paid several incumbrances on the estate, but that he did not know what balance remained in his hands; that he had frequently requested him to make up the executorship accounts; that he had not done so, and that he had absconded in June 1856, and that all access to the trust

papers had been refused to him, and that he believed his co-executor was in insolvent circumstances.

On the 12th of August 1857 Mr. Hayward, who was a solicitor, put in his answer. He stated that he had paid more than he had received on account of the trust estate, and denied that the plaintiffs had any reason to believe that the money received by him would be lost to the testator's estate.

A decree was made for the administration of the estate, and upon taking the accounts, the chief clerk found that on account of the receipts of the personal estate and the rents of the real estate there was due from Mr. Humphrey a balance of 73*l.* 11*s.*, and that there was due to A. Hayward a balance of 24*l.* 18*s.* 11*d.*: but that there was due from A. Hayward 40*l.* 16*s.* 3*d.*, a balance of monies which arose from real estates sold; and that after deducting the 24*l.* 18*s.* 11*d.* it left due 15*l.* 17*s.* 4*d.*, and that this being further increased by 13*l.* 17*s.* 9*d.*, charged for interest on balances in his hands, made a sum of 29*l.* 15*s.* 1*d.* due from A. Hayward.

The suit was then brought on for further consideration, and after disposing of the case on the merits, the Court considered that the defendants had no right to sever in their defence, and directed that they should receive one set of costs only. Mr. Humphrey claimed the whole, but this was objected to by A. Hayward.

Mr. Waller, for the plaintiffs.

Mr. Smale, for Mr. Humphrey.—Mr. Humphrey had no course left open but to put in a separate answer: his co-trustee had become insolvent, and had absconded. Inquiries had been made for him, but without success; the plaintiffs, in the mean time, had pressed Mr. Humphrey for his answer, and he was ultimately compelled to answer separately to avoid an attachment. All charges of fraud and misconduct had been abandoned. Mr. Humphrey, therefore, was entitled to the full costs of the suit, and to his costs, charges and expenses, and as the necessity of putting in a separate answer had been caused by Mr. Hayward, if one set of costs only was to be allowed, Mr. Hayward was not entitled to receive any part of them.

Mr. Tripp, for *Mr. Hayward*, insisted that he had not, by any act, deprived himself of his right to a share of the costs awarded to the trustees.

Mr. Smale, in reply.

Jan. 14.—The MASTER OF THE ROLLS.—There is no reason why the plaintiffs should be required to pay more than one set of costs. The defendants were not justified in severing in their defence; the accounts were to be rendered by both. There may have been some misconduct on the part of *Mr. Hayward* which compelled his co-trustee to put in a separate answer, and sever in his defence, and as between them there may be grounds to justify the payment of the whole of the costs to *Mr. Humphrey*, but I cannot enter into that question. As the evidence at present stands between the defendants it would be contrary to the practice of the Court, and further inquiry and further evidence could only lead to increased expense; it must, therefore, be left to the Taxing Master. I cannot order the whole costs to be paid to one trustee only (1).

STUART, V.C. }

March 17, 18. }

LORDS JUSTICES. }

Dec. 16. }

MORRIS v. MORRIS.

Breach of Trust—Account—Lapse of Time—Waste—Pulling down Mansion House—Account of Materials—Tenant for Life.

The bill alleged a breach of trust by a

(1) Extract from decree:—"After ordering the defendants to pay the balances of 73*l.* 11*s.* and 29*l.* 15*s.* 1*d.*, severally found due from them, into court to the credit of the cause, it was referred to the Taxing Master to tax the plaintiffs and the defendants their costs of the suit, as between solicitor and client, including in the costs of the defendants, the trustees, any costs, charges and expenses properly incurred as such trustees; but in such taxation the Taxing Master was to allow only one bill of costs for the defendants, and he was to certify how much of such bill of costs was due to the defendant *Mr. Humphrey*, and how much was due to the defendant *A. Hayward*, and out of the 73*l.* 11*s.* and 29*l.* 15*s.* 1*d.*, when paid, it was ordered that what should be certified to be the amount of the costs of the defendants, when taxed, should be paid to their respective solicitors," &c.

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*deceased tenant for life under a settlement, in the application to the liquidation of a charge on the settled estates, of the proceeds of part of such settled estates, while there was in his hands, as personal representative of the settlor, personal estate of such settlor primarily applicable to the liquidation of the charge. The answer of the personal representative of the deceased tenant for life asserted the trust to have been duly and regularly performed by such tenant for life, and as evidence thereof set forth references to the accounts rendered of the settlor's personal estate by his representative, the deceased tenant for life, to the Stamp Office. The plaintiffs did not amend their bill to meet the *prima facie* case thus set up by the defendant:—Held, the alleged breach of trust having taken place (if at all) at least thirty years back, that the plaintiffs were not, under the circumstances, entitled to an account of the settlor's personal estate.*

A tenant for life, without impeachment of waste, pulled down the family mansion-house, and built a better mansion in another part of the settled estate, using the old materials. It appeared that for years prior to 1819, the date of the settlement, the settlor had contemplated the abandonment of the mansion and the building of another, and that the settlement contained powers of sale and exchange, and also a power to grant building leases of the settled premises, including the site of the old mansion-house:—Held, that the tenant for life was not liable to an account and inquiry as to the application of the materials of the old mansion-house.—On appeal from the latter part of the decree, the Lords Justices affirmed the decision, as the tenant for life had neither sold nor applied to his own use any part of the old materials, but had merely enjoyed them in an altered form.

By indenture of settlement, dated the 8th of June 1819, certain freehold, copyhold and leasehold estates, including the mansion-house and property at Clasemont, in Glamorganshire, and barony or lordship of Sketley, in Glamorganshire, and all other the manors or lordships, messuages, lands, tenements and hereditaments in Glamorganshire, belonging to Sir J. Morris, since deceased, were conveyed and assured by the said Sir J. Morris to trustees, their heirs,

and assigns, for ever, to the use of the said Sir J. Morris for life, and after his decease to the use of the trustees for the term of 1,000 years, upon the trusts thereafter expressed concerning the same, and upon the expiration or sooner determination of the said term, and in the mean time subject thereto, to the use of the trustees, their executors, administrators and assigns, for and during the life of Sir John Morris, the son of the said Sir J. Morris, the settlor, without impeachment of waste, provided the same be committed or suffered with the privity and assent of the said Sir J. Morris, the son, upon trust to preserve the contingent uses and estates thereafter limited from being defeated or destroyed, and upon further trust that the trustees should permit and suffer the said Sir J. Morris, the son, during the term of his life, to receive the rents, issues and profits of the said manors and other hereditaments for his own use and benefit, and from and after the decease of the said Sir J. Morris, the son, to the use of Sir J. A. Morris, his eldest son, during his life, without impeachment of waste, and after the determination of that estate, by forfeiture or otherwise, during the lifetime of the said Sir J. A. Morris, to the use of the trustees during his life, in trust to preserve the contingent uses thereafter limited, but nevertheless to permit and suffer the said Sir J. A. Morris and his assigns during his life to receive the rents, issues and profits of the said manor and other hereditaments to and for his and their own use and benefit, and immediately after his decease to the use of the first and every other son of him the said Sir J. A. Morris, successively in tail male, with divers remainders over, and with the ultimate remainder to the use of the said Sir J. Morris, the settlor, his heirs and assigns for ever. And in the said indenture was contained a proviso that it should be lawful for the trustees, by the desire and at the direction of the tenant for life for the time being, to demise or lease any of the lands and hereditaments contained in the said indenture of settlement upon building leases, and also to sell or exchange the same in manner therein mentioned.

The trusts declared by the said inden-

ture of the term of 1,000 years therein limited were, by demise, sale or mortgage, or otherwise, to raise such sums of money in aid of the personal estate of Sir J. Morris, the settlor, as should be sufficient to pay off a mortgage debt of 12,000*l.* charged upon the said hereditaments and premises comprised in the said indenture of settlement, and any other sums or sum of money which then were or was, or which should at the time of the death of the said Sir J. Morris, the settlor, be charged or chargeable upon or payable out of the said premises under or by virtue of any other mortgage or charge then already made by the said Sir J. Morris, the settlor.

Sir J. Morris, the settlor, died in 1819, having by his will directed that his debts should be paid, and bequeathed his personal estate to the said Sir J. Morris, his son, whom he appointed his executor.

Upon the death of Sir J. Morris, the settlor, Sir J. Morris, his son, entered into possession of the estates comprised in the said indenture of settlement, and shortly afterwards pulled down the mansion-house called Clasemont. Having subsequently caused to be felled a number of trees which had been planted for the ornament or shelter of the said mansion-house, he was, at the suit of his son, Sir J. A. Morris, restrained by injunction from cutting down any of the trees planted for shelter and ornament, and growing upon the lands conveyed by the said settlement (1). The defendant in that suit, Sir J. Morris, the son, afterwards moved, before the Lord Chancellor, that the order for an injunction might be discharged, but the motion was refused, with costs.

Sir J. Morris, the son, died in 1855, having by his will appointed Lady Morris his sole executrix.

The bill in this suit was then filed, by Sir J. A. Morris and his infant son, J. A. Morris, against Lady Morris, alleging that the trustees of the settlement had sold part of the settled estates, and applied the proceeds in payment of a part of the above-mentioned mortgage debt, in exoneration of the personal estate of Sir J. Morris, the settlor, possessed by the late Sir J. Morris, the son, as his representative, and

(1) *Morris v. Morris*, 15 Sim. 505; s. c. 16 Law J. Rep. (N.S.) Chanc. 201.

alleging that Sir J. Morris, the son, when he pulled down the said mansion-house at Clasemont, sold part of the materials, and applied the rest to his own use, and praying that it might be declared that the personal estate of Sir J. Morris, the settlor, ought to have been applied by Sir J. Morris, the son, in payment of the said mortgage debt of 12,000*l.*; and that the amount which ought to have been so applied might be ascertained and ordered to be paid into court out of the personal estate of Sir J. Morris, the settlor, received by Sir J. Morris, the son, and out of the personal estate of Sir J. Morris, the son, received by the defendant. The bill also prayed a declaration that the pulling down of the mansion-house at Clasemont was an act of equitable waste, and that an account might be taken of the application of the materials of the said mansion-house, and of the profits received by the said Sir J. Morris, the son, from the same, and the amount of compensation to which the plaintiffs might be entitled in respect thereof, paid into court.

The answer of the defendant Sir J. A. Morris stated that the personal estate of Sir J. Morris, the settlor, received by Sir J. Morris, the son, had been found insufficient to meet the debts of the settlor, other than the said mortgage debt of 12,000*l.*; and as evidence of the truth of such statement, it set forth the amount of the personal estate of the settlor which had been rendered to the Stamp Office.

The plaintiffs brought their case to a hearing without amending their bill, in order to meet the case set up by the answer.

There was no evidence that any part of the materials of the old mansion were sold or used otherwise than in the construction of the new house.

Mr. Malins and *Mr. A. Smith*, for the plaintiffs.

Mr. Bacon and *Mr. Speed*, for the defendant.

Mr. A. Smith replied.

The following cases were cited:—

Lansdowne v. Lansdowne, 1 Madd. 116;
s. c. 1 J. & W. 522.

The Duke of Leeds v. Lord Amherst,
16 Law J. Rep. (N.S.) Chanc. 5;

s. c. 2 Ph. 117: affirming 15 Law J. Rep. (N.S.) Chanc. 351; 14 Sim. 357.

Morris v. Morris, 15 Sim. 505; s. c. 16 Law J. Rep. (N.S.) Chanc. 201.

Wilkinson v. Parry, 4 Russ. 272.

Raffety v. King, 1 Keen, 601; s. c. 6 Law J. Rep. (N.S.) Chanc. 87.

Davies v. Quarterman, 4 You. & C. 257; s. c. 10 Law J. Rep. (N.S.) Exch. Eq. 17.

Pearce v. Watkins, 5 De Gex & Sm. 315.

Heron v. Heron, 2 Atk. 160; s. c. Prec. Chanc. 163.

Micklethwait v. Micklethwait, 1 De Gex & Jo. 504; s. c. 26 Law J. Rep. (N.S.) Chanc. 721.

STUART, V.C. said that, as to the alleged misapplication of the proceeds of the sale of part of the settled estates in payment of the mortgage debt in exoneration of the testator's personal estate, that had been met by a *prima facie* case set up in the answer of the defendant, to the effect that the sale had been properly conducted and regularly proceeded with in execution of the trust, it having been found necessary to resort to the land by reason of the personal estate of the settlor having been found insufficient to meet his debts other than the mortgage debt. And in support of that case the answer had referred to the account of the settlor's personal estate rendered to the Stamp Office. The case thus set up by the answer had been left uncontradicted by the plaintiffs. That being so, and the transaction sought to be impeached having occurred in the execution of a trust discharged and wound up more than thirty years ago, the right of the plaintiffs to relief on this part of their case must entirely fail. Then, as to the second part of the case, viz. the right of the plaintiffs to an account and inquiry as to the profit derived by the son from the materials of the mansion-house at Clasemont, there could be no doubt that the pulling down of the mansion-house and the sale of the materials was, *prima facie*, an act of equitable waste which a Court of equity would restrain, if applied to before its completion, and for the profits derived from which the assets of the tenant for life would be held

liable in this Court. The settlement of 1819 included this mansion-house, but, though included, it had been then for some time condemned as a place of residence by the settlor. The settlor had in fact, years before, contemplated the abandonment of it as a place of residence, and had prepared the plans of another residence to be built at Sketley in a different part of the estate. This the son afterwards did with the materials of the old mansion-house and at his own expense. The case of *The Duke of Leeds v. Lord Amherst* had been referred to. There could be no doubt that, in that case, the Court went to a most extraordinary and unprecedented length. In the present case the settlement contained powers of sale and exchange of the estates comprised in it, including the mansion-house, as well as a power to grant building leases, with liberty to pull down and rebuild. Under either of these powers the mansion-house might have been pulled down and a new one erected on the same or another site upon the premises. These circumstances were amply sufficient to render *The Duke of Leeds v. Lord Amherst* inapplicable as an authority upon the present case. It had been argued, however, that an injunction had been obtained by the present plaintiff Sir J. A. Morris in 1847, restraining his father from felling the ornamental timber. As to that, it was to be observed that, although the owner thought that the smoke of the copper-smelting houses erected in the neighbourhood was a reason for removing the family mansion, there still remained a power to grant building leases, with reference to which alone the ornamental timber might well have been considered of sufficient value to justify the order for an injunction granted by Lord Cottenham. No doubt in the shorthand-writer's notes of the judgment in that case Lord Cottenham was represented as saying that Sir J. Morris, the tenant for life, had no more right to pull down the mansion-house than the house of any other person; but as that question was not then actually before him for decision, the observation could only be regarded as a dictum, and it would be going too far to treat it as *res judicata*. No doubt that expression had given some pretext for the present suit, and there had besides been some misapprehension as to

the effect of the decision of *The Duke of Leeds v. Lord Amherst*. The proper order to make would, therefore, be simply to dismiss the bill, and to say nothing about costs unless costs were pressed for.

Dec. 16.—From the above decision the plaintiffs appealed, so far as it dismissed the bill with respect to compensation, to which the plaintiffs alleged themselves to be entitled as against the estate of the former tenant for life, who had pulled down the old mansion-house and erected the new one.

The same counsel appeared as upon the original hearing. In addition to the cases then cited, *Wellesley v. Wellesley* (2) was referred to.

LORD JUSTICE KNIGHT BRUCE.—This is not a question of injunction, for the act of which complaint is made was done more than thirty years ago. It is a mere question of equitable damage, and in considering that, we must look at the peculiar circumstances of the case. That it was a reasonable, a judicious and a beneficial thing to pull down the house at Clasemont, and to use the materials, so far as they could be used, for building at Sketley, is perfectly clear; but I agree with Mr. Malins that an act may be reasonable, may be judicious, may be beneficial to all persons interested in a settled property, and yet it may be an act prohibited to a tenant for life, if a person interested in the remainder chooses to interfere. I do not put the case, therefore, merely on the reasonableness, on the judiciousness and on the beneficial nature of what was done; but those considerations are ingredients in the case. The property has been benefited by what has been done, and the plaintiffs and others interested in the remainder are receiving the benefit of it. Still, if it had been shewn, or were in any degree probable, that any part of the materials of the old house had been sold, it is very possible, notwithstanding the much larger expenditure upon the construction of the new mansion-house, that the estate of the second baronet would be held liable to account.

(2) 6 Sim. 497; s. c. 9 Law J. Rep. (N.S.) Chanc. 21; 10 Sim. 256.

Here, however, there is no evidence that any part of the materials was sold; the probability is that no part was sold. There is this evidence: that the bulk of the materials—probably all that was of any value—was applied in building the present mansion-house; actually and substantially applied in building the mansion-house in a proper position on the estate, and adapted in its condition and circumstances to the purpose. In my opinion, therefore, it would be unjust, and would be straining a rule far beyond its reason, to make the tenant for life account for the materials belonging to a mansion upon the estate wisely pulled down, when the materials had been so applied. I am of opinion, therefore, that in the peculiar circumstances of the present case there is no equitable waste, and the bill ought to remain dismissed, so far as it relates to the materials of the Clasmont house; with regard to the other matter, that is understood.

LORD JUSTICE TURNER.—I do not rest my opinion in this case upon the estate having been improved by the building of the new mansion-house and the pulling down of the old one. I am not at all satisfied that the question of improvement is one that the Court ought to proceed upon. I apprehend that the principle that the Court does proceed upon is this: that the tenant for life of an estate is liable for profit that has been received by him from an improper user of his powers in committing equitable waste; and if, therefore, the material of this house had been sold, and the money derived from the sale had come into the pocket of the deceased tenant for life, in my opinion this would have been a case for an account. But all that can be said in the present case as to any benefit that has been derived by the deceased tenant for life is this, that he enjoyed the materials during his life in a different state from that in which they originally existed upon the estate. They remained upon the estate, but they remained as materials attached to a new house, and not to the original house to which they had been formerly attached; and I do not find any evidence in the case that there has been any sale of the materials, or any other profit derived by the tenant for life, than by an enjoyment of the materials in an

altered state. I think there is another subject for consideration, when you come to calculate any profit derived from the enjoyment of the materials in an account of profit against the tenant for life. I think it is applicable to a case where the tenant for life has actually received monies arising from the sale of the materials, but not by the mere user of the materials in another and a different shape. My opinion, therefore, is, that this part of the bill has been properly dismissed.

KINDERSLEY, V.C. } OLDALE v. WHITE-
Jan. 11. } HEAD.

Costs, Security for—Misdescription of Residence.

A plaintiff described himself of a particular place, and stated that his wife and family resided at this address; that he was a commission agent, and travelled about the country, but had been at his residence within the last few months. Upon an affidavit that he could not be found at his address, and that his place of abode could not be discovered, he was ordered to give security for costs.

This was a motion, on behalf of the defendant, that the plaintiff might be ordered to give security for costs, on the ground that he could not be found at the address given as his place of residence. The plaintiff had brought an action of ejectment against the defendant, in which he had failed, and a writ of *ca. sa.* was issued for the costs, but the sheriff was unable to find the plaintiff, who was alleged to be keeping out of the way to avoid service of the writ. The plaintiff then instituted this suit, which was in the nature of a bill for an equitable ejectment, and the plaintiff was described as of No. 26, Egerton Street, Sheffield, silversmith. The defendant, in his affidavit, stated that he had been endeavouring to find the plaintiff for the last eight months; that he had applied at his address in Sheffield, and was told that his wife resided there, but that he was absent, and his address was not known. The plaintiff had filed an affidavit, in which he stated that he

rented and occupied apartments at No. 26, Egerton Street, and his wife and family resided there ; that he had himself been at this residence within the last few months, but that he travelled about the country as a commission agent.

Mr. Rasch, in support of the motion, contended that the plaintiff was not rightly described, and that as he could not be met with at the address he thought fit to give, he must be ordered to find security for costs. He cited—

Bailey v. Gundry, 1 Keen, 53 ; s. c. 5 Law J. Rep. (N.S.) Chanc. 199.

Manby v. Bewicke, 24 Law J. Rep. (N.S.) Chanc. 664.

Ainslie v. Sims, 17 Beav. 57 ; s. c. 22 Law J. Rep. (N.S.) Chanc. 834.

Busk v. Beetham, 2 Beav. 537 ; s. c. 9 Law J. Rep. (N.S.) Chanc. 54.

Mr. Ward appeared for the plaintiff, and submitted that there was no misdescription of residence, and that if due diligence had been used the plaintiff might have been found. Being a commission agent, he was necessarily away from home very frequently, but his place of residence when at home was rightly described.

KINDERSLEY, V.C.—It is a sound principle, and not a technicality, that a plaintiff, although he may not actually have absconded or misdescribed himself, ought to be forthcoming, and if the defendant has no means of getting at him, he must be ordered to give security for costs. The plaintiff, in this case, instituted proceedings in another court, and upon judgment being given against him, a writ was issued for payment of the costs. The sheriff had been unable to find him, and it is alleged that he is keeping out of the way to avoid service of the writ. When his wife was applied to, she seems to have refused to divulge his whereabouts. The plaintiff, in his affidavit, does not venture to state that he has himself resided at his place of address even for a single day since the institution of the suit ; he only states that he rents and occupies apartments at No. 26, Egerton Street, and that his wife and family reside there. This is, in fact, a negative pregnant, and an admission that he

does not reside there himself. Under these circumstances my opinion is, that the plaintiff must give security for costs.

**KINDERSLEY, V.C. } In re BAINSDON'S
Jan. 21. } TRUST.**

Baron and Feme—Matrimonial Causes Act — Protection Order — Payment of Legacy.

A married woman entitled to a legacy in reversion was deserted by her husband in the year 1845. The legacy fell into possession and was paid into court under the Trustees' Relief Act. The married woman then obtained a protection order under the Divorce and Matrimonial Causes Act, and upon her petition the Court ordered the money to be paid out to her.

This was a petition that a sum of 142*l.* 12*s.* 10*d.*, which had been paid into court under the Trustees' Relief Act, might be paid to the petitioner, Mary Crew, under the following circumstances. It appeared that in the year 1845 the petitioner, who was then the wife of Vincent Crew, was deserted by her husband. At this time she was entitled to a pecuniary legacy under the will of her uncle, payable on the death of a tenant for life. Vincent Crew not having been heard of for a period of seven years, the petitioner married John Bent. The legacy fell into possession, and the trustees paid the money into court under the Trustees' Relief Act, and a petition was presented in the names of John Bent and Mary Bent that the amount might be paid to them. The Court, upon that petition, being of opinion that the presumption as to the death of Vincent Crew was not established, refused to make an order for the payment of the money to the petitioners, but ordered that the dividends should be paid to Mary Crew. That order was never drawn up, in consequence of the expense attending so small a sum. John Bent afterwards died, and Mary Crew obtained a protection order from a magistrate, under the 21st section of the statute 20 & 21 Vict. c. 85. and the 8th section of 21 & 22 Vict. c. 108, and now presented this petition in her name of Mary Crew, and without a next friend.

Mr. James Hopwood, in support of the petition, submitted that the protection order under the Divorce and Matrimonial Causes Acts applied as well to property to which a married woman was entitled in remainder as to the property in possession at the time of the desertion. *Bathe v. the Bank of England* (1) and *In re Kingsley* (2) were cited.

Mr. Hetherington appeared for the trustees.

KINDERSLEY, V.C.—I think that under all the circumstances, and considering the time which has now elapsed since any tidings of Vincent Crew have been obtained, I may make the order prayed under the two sections of the acts referred to.

WOOD, V.C.
Dec. 8, 9.
LORDS JUSTICES.
Jan. 26, 27, 29;
Feb. 19.

Ex parte THE PRINCE
OF WALES LIFE AND
EDUCATIONAL ASSUR-
ANCE COMPANY, *in re*
THE ATHENÆUM AS-
SURANCE SOCIETY.

*Joint-Stock Company — Winding-up —
Liability—Contract—Policy of Assurance
—Proviso.*

The P. of W. Company effected a cross-insurance with the A. Society on the life of J, and the latter society was ordered to be wound up. The life dropped, and the P. of W. Company having paid the amount assured claimed to prove the amount as a debt against the A. Society, and moved that the official manager might be directed to make a call upon the contributories for payment of the same. The policy of the A. Society contained a proviso that the capital and other property of the company remaining at the time of any demand unapplied and inapplicable to any prior claim or demand should alone be liable to answer and make good the claims and demands against the company by virtue of the policy, and that no director or shareholder should be in anywise individually or personally liable or subject

to any claim or demand beyond the amount unpaid of his shares in the capital stock of the company. One of the Vice Chancellors refused the motion, and the P. of W. Company appealed:—Held, affirming the decision, that the liability of the shareholders was expressly limited by the contract in the policy, to which the P. of W. Company were parties, to the amount unpaid on their shares, and that no call could be made for satisfying a claim on the policy on a shareholder who had already paid up the full nominal value of his shares, or upon any other shareholder to an amount exceeding the sum due from him upon the shares held by him.

This was an application, on the part of the Prince of Wales Assurance Company, in the matter of the Athenæum Assurance Company, now in course of winding up, that the Prince of Wales Company might be permitted to prove a debt of 11,695*l.* 5*s.*, for which judgment had been entered up in the Court of Queen's Bench against the Athenæum Company, and that the official manager might be directed to make a call upon the several persons settled on the list of contributories for payment thereof, or that he might be directed to include the Prince of Wales Company as one of the creditors of the company entitled to share in any dividend which might be declared.

The facts will be found stated in the report of *Durham's case* (1), in which His Honour refused an application for liberty to issue execution against a shareholder. The important clause, viz. the 28th, of the deed of settlement of the Prince of Wales Company, and the policy of assurance, with its proviso, and also the 4th clause of the deed of settlement, are fully set out in the judgment of Lord Justice Knight Bruce in the appeal from this case, the 28th clause and the proviso in the policy being also stated in 27 *Law J. Rep.* (N.S.) Chanc. 798.

The Solicitor General, Mr. Daniel and Mr. Graham Hastings, in support of the application.—It is conclusively established by the verdict in the action that at the time of Mr. Joddrell's death there were

(1) 4 Kay & J. 564; a. c. 27 *Law J. Rep.* (N.S.) Chanc. 630.

(2) 4 Jur. N.S. 1010; a. c. ante, 80.

(1) 27 *Law J. Rep.* (N.S.) Chanc. 798.

assets sufficient to pay this claim, and the contract was that if there were assets it should be paid ; therefore, the proviso in the policy is inapplicable.

Mr. Rolé and Mr. W. D. Lewis, for the official manager of the Athenæum Company.—This is like the case of a mortgage, and the applicants have nothing more than a right to payment out of particular assets. If the assets have been misapplied there is an equity against those persons who have misapplied them, but there is no other right. The question is concluded by the decision in *Durham's case*, and the present application is an attempt to review the decision in that case.

The cases cited were :—

Hallett v. Dowdall, 18 Q.B. Rep. (N.S.) 2 ; s.c. 21 Law J. Rep. (N.S.) Q.B. 98.

Halket v. the Merchant Traders' Association, 13 Ibid. (N.S.) 960 ; s.c. 19 Law J. Rep. (N.S.) Q.B. 59.

Evans v. Coventry, 25 Law J. Rep. (N.S.) Chanc. 489.

Law v. the London Indisputable Life Policy Company, 1 Kay & J. 223 ; s.c. 24 Law J. Rep. (N.S.) Chanc. 196 ; 10 Hare, App. xx.

Robson v. M'Creight, 27 Law J. Rep. (N.S.) Chanc. 471.

The Solicitor General replied.

WOOD, V.C.—This, in truth, is in some sense the argument used in *Durham's case*, and if the point now urged is successful, the decision in that case was wrong, and undoubtedly a *scire facias* ought to have issued, and the claimant ought to have been allowed to proceed. It is said that, although under a contract to pay out of the goods of the company, and only out of those goods, when you recover judgment in an action in which you have either not made any particular averment with reference to the goods of the company, or have averred,—for it does not very distinctly appear what the pleadings were in *Halket v. the Merchant Traders' Association*,—that the assets were insufficient, you are not allowed to proceed against any individual shareholder, for the reason assigned in that judgment, viz., that there is a clause

in the contract itself by which you are prevented from proceeding against individual shareholders, and no special case has been made beyond the actual contract for payment out of the goods of the company, no case made or proved of there being sufficient assets for the purpose. Yet, it is said, it has been established and proved in this case by the verdict of the jury that at the time this demand was made, and down to the time of bringing the action (for that is the form of the pleading), there were assets of the company. That has now been established, and we must look to see what effect the establishing of that fact has upon the contract entered into on behalf of the company. It is said that the company have contracted in the first place that payment shall be made ; they have then contracted that it shall be made out of the assets of the company alone, it is true, but that it shall be made out of the assets of the company, and it is proved that there are such assets. Therefore, you have a distinct contract on the part of the company that they will pay out of a given fund ; you find they have that fund ; having that fund they ought to have observed their contract ; not having observed it, judgment has gone against them, and consequently every individual member of the company is now liable upon that judgment. That is an ingenious way of putting the case. The real difference between it and the case which I put in the argument, of a contract in an ordinary partnership to pay out of a given fund, on which you obtain judgment against the partnership, and on which, I apprehend, the partners would be liable, is this—This is a case of contract by the company in which you recover against the company, and there is no right of proceeding against individual members, except such right as may be given by the act of parliament 7 & 8 Vict. c. 110. (2). The effect of that act, as stated by Lord Denman, is not to do away with the effect of any special contract entered into with companies, but only to enable parties who had recovered on a general contract with the company, not restricted in its terms as to the remedy upon it, to enforce a judgment against the

company by execution against the individual members of it, after due diligence used to obtain satisfaction from the funds of the company. That single observation does away with a very large portion of the Solicitor General's argument, which was this: Having got judgment, I throw the contract aside; I have got judgment against the company; I do not want to look at the contract, we have got beyond that; we have established our right by judgment, and we do not take the contract into consideration. Now, as far as that portion of the argument is concerned, the case of *Halket v. the Merchant Traders' Association* is a positive answer. There was a judgment obtained against the company, and the nobleman who was proceeded against was a shareholder of the company, yet the contest did not succeed, and a *scire facias* was not allowed, because the Court looked at the contract solely. Therefore, I am bound to look at the contract. I find that contract to be, not merely that the capital stock of the company of 100,000*l.* and other stock and effects of the company remaining at the time of any claim or demand being made, and not subject to prior claims, shall be applicable to this payment, but it is to be alone applicable. And then follows this proviso: "That no director or shareholder of the society, his heirs, executors or administrators, shall, by reason of this policy, be in any way individually or personally liable or subject to any such claims or demands, or be in anywise charged by reason thereof beyond the amount unpaid on his shares in the capital stock, nor longer than he shall remain a shareholder." Therefore, that gets rid of another large portion, indeed the remaining portion of the Solicitor General's argument, which was this:—You, the company, have contracted that if you have assets you will pay; and I having established against you the fact that you have assets, you have become liable, and therefore I may sue individual shareholders. But that omits to consider this clause, which has said that, under this policy or contract, whatever it be, no individual shareholder shall be affected. That, really, is the whole case. It is exactly the case of *Halket v. the Merchant Traders' Association*. In *Durham's case* you wished

to proceed by *scire facias* against an individual shareholder. Lord Denman said, you must look at the contract, and you find that individual members have taken themselves out of the contract for every purpose. It does not signify to them whether the company contracted one thing or another. The company may do what it pleases. You, the assured, have taken a contract by which you can have recourse to the company alone. You will have any right which may ensue from your being able to sue the company corporately. You will have recourse to all their property, but you shall not under this policy have any recourse to individual shareholders. If I look at the policy to see whether they have made themselves liable under it, I find that they have put themselves out of any such liability. Therefore, it is really brought back to that simple case which I decided on a former occasion. There were other authorities then mentioned, which, notwithstanding this additional view, presenting and embracing also that view of the case, compel me to say that there is no liability whatever on the part of any individual shareholders upon *scire facias*. The only contract here is that the individual will be liable to the extent of his shares, the full calls on his shares, but beyond that he is not liable to anybody. It is said that the consequences will be grievous, but it does not seem to me that that is really so. If it were so, the answer, of course, is, You took the contract with your eyes open, and you must take the consequences. Again, if I was right in my decision in the case of *Law v. the London Indisputable Life Policy Company*, a decision to which the Master of the Rolls has also come (3), that you have a right against these particular assets, it follows, of course, whenever you suspect any malfeasance is likely to take place, you may file your bill and obtain a receiver. Of course, if your rights are disputed you will have some difficulty. All will depend upon the circumstances. If you shew reasonable ground for expecting that the property will be destroyed in the interval, and that your case, though disputed, is one in which there is a serious question to

(3) *Robson v. M'Creight*.

try, the Court will or will not grant a receiver according to the exigencies of the case. That is your remedy in cases of malfeasance, such as those suggested by the Solicitor General, the possibility of the property being misapplied during the interval. The only point that occurred to me was, whether any person who had received a dividend with a knowledge of the contract would not be obliged to refund. That does not seem to arise here, because I am told none were paid. But it appears to me that persons having a knowledge of the policy would not be able to draw money out of the funds to prejudice the creditors. However, all that it is necessary now to do is to decline making any call upon any persons in respect of their debt beyond the extent of unpaid calls. Then comes the question of marshalling. As to that part of the case, it is not a question whether the claimant puts himself in possession or not, but it is this question: he has got a charge, and whatever assets can be got which he can avail himself of for payment of his security ought to be as between him and other creditors, who have another fund which they can have recourse to, first applied in payment of his debt,—or rather the converse way of putting it is the right one,—that other creditors ought to be first paid their debts out of funds, which this gentleman cannot apply to, and then they will come in *pari passu* with him in regard to any other amount. That will be a matter of account in chambers.

The Prince of Wales Company appealed from this decision, so far as it directed that “no call shall be made in respect of the sum claimed by them upon any of the contributories of the Athenæum Society who have paid up the full amount of their shares in the capital stock of the said society, nor upon any of the said contributories beyond the amount unpaid of their shares.” During the argument it was agreed, by the counsel on both sides, that the appeal should be considered as having been presented against the whole order of the Vice Chancellor.

The Solicitor General, for the appellants.
—The argument for the appellants is, that if the Athenæum Society had not been

in course of winding up, the Prince of Wales Company could have had execution against any proprietor for the whole amount; and the question for decision on this appeal is, what is the true construction of the proviso in the policy coupled with the witnessing part of that instrument? The true construction of the policy, the appellants contend, is, first, that there is an undertaking by the company to pay if the funds shall be sufficient; and, secondly, if that is not the construction, then the appellants contend, that the proviso is repugnant and void. But this is only raised if the first should fail. Thirdly, there is a representation that the capital stock is 100,000*l.*; and, fourthly, inasmuch as both parts of the policy refer to the deed of settlement, the appellants have a right to incorporate the 28th section of that deed, by which, after requiring all contracts to be executed in a particular manner, it directs that a reference shall be made to that deed, and a proviso limiting the scope and effect of the contract, so that the same shall “take effect and be satisfied only out of such funds and property of the society as under the provisions after contained shall at the time at which the liability shall accrue, be at the disposal of the directors in that behalf,” and negating an unconditional liability. Then followed a proviso, that nothing therein or in such contract contained should limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any such shareholder, under or by virtue of the aforesaid statute: the aforesaid statute being the act 7 & 8 Vict. c. 110, the title to which is set forth in the recitals of the deed of settlement. On the first point, the cases of *Andrews v. Ellison* (4) and *Dawson v. Wrench* (5) are conclusive, for they establish this, that a contract is contained in the policy that the funds shall be sufficient, that if sufficient, each shareholder is liable, but that if insufficient, no shareholder shall be liable beyond the amount unpaid on his shares. The decision in *Andrews v. Ellison* was

(4) 6 J. B. Moore, 199.

(5) 3 Exch. Rep. 359; s.c. 18 Law J. Rep. (n.s.) Exch. 229.

the case of a fire policy, by which it was agreed that the money assured should be paid out of the funds of the company; and it was stipulated that neither the directors who signed the policy, nor the plaintiff, nor the holder of the policy, should as members be liable, except under the articles establishing the society. There was an averment that the funds were not sufficient, and a verdict on that issue for the plaintiff. The Court refused to arrest the judgment. And in *Dawson v. Wrench* it was stipulated, in the deed of a company, that the capital stock, &c. alone should be liable, and that no proprietor should be subject or liable beyond the amount of his shares. Then there was an averment that the funds were insufficient; but it was held, that the defendants were permanently liable.

[**LORD JUSTICE KNIGHT BRUCE.**—The judgment obtained in this case seems to smooth the difficulties, if not to entirely remove them. On what ground does this differ from an ordinary judgment, for stationery or other goods sold and delivered?]

Secondly, the appellants say that the proviso is repugnant and void, and for that proposition they rely upon *Furnival v. Coombes* (6), which was the case of a covenant entered into by A, B. and C, churchwardens, to pay a certain sum by instalments, with a proviso, that nothing in the instrument of covenant should be construed to make it a personal covenant, or should in any way personally affect them in their goods, and the Court held the proviso to be repugnant, from which it is plain that such a proviso cannot be maintained. There is also, thirdly, a representation that the capital stock of 100,000*l.* shall be found, possibly not that it was actually paid up, but that it would be forthcoming. That the appellants are correct when, fourthly, they say they have a right to incorporate the deed of settlement with the policy, is made sufficiently plain by referring to the 25th section of the Joint-Stock Act of 1844, (7 & 8 Vict. c. 110), which, in effect, enacts, that the parties conducting the business are to ascertain that there are funds, and if there be, then the contract

is, that these funds shall be forthcoming. Neither of the cases relied upon in the Court below, against the appellants, namely, *Halket v. the Merchant Traders' Ship Loan and Insurance Association* (7) and *Hallett v. Dowdall* (8), are really detrimental to them. The effect of the former case is, that if the just construction of the contract be that there is no personal liability, there can be no *scire facias* on the judgment; and as to the latter case, the meaning of Mr. Justice Cresswell and Mr. Justice Williams is favourable to the appellants.

Mr. Daniel, on the same side, insisted on the first ground of argument, and contended that the limited liability clause would have had no effect unless the shareholders could shew that the funds were insufficient. He cited *Greenwood's case* (9), and remarked on *Lord Talbot's case* (10).

Mr. Graham Hastings, on the same side, argued that the words in the policy in the present case were equivalent to those used in *Gurney v. Rawlins* (11), where the contract was, that the capital stock of the company should stand charged and be liable, which was, therefore, a mere charge and no contract; and Mr. Baron Parke said, it was the case of a covenant which was a specialty; and he observed, that the defendants undertook by the instrument which was under seal, that the sum assured should be paid if the funds were adequate. This, said his Lordship, was equivalent to a covenant to pay, "if J. S. goes to Rome." In the present case, if the words of the policy did not amount to a covenant to pay, how could the action be maintainable? and if there was a personal liability, the proviso is repugnant. Besides this, the act of parliament declared that they (the shareholders) shall be liable; and, therefore, assuming that the proviso was not *ultra vires*, it was of no effect unless clearly expressed,

(7) *Ubi supra*.

(8) *Ibid*.

(9) 3 De Gex, M. & G. 459; s. c. 23 Law J. Rep. (N.S.) Chanc. 966, reversing 2 Sm. & G. 95.

(10) 5 De Gex & Sm. 386; s. c. 21 Law J. Rep. (N.S.) Chanc. 846.

(11) 2 Mee. & W. 87; s. c. 6 Law J. Rep. (N.S.) Exch. 7.

(6) 5 Man. & G. 786; s. c. 12 Law J. Rep. (N.S.) C.P. 265; 6 Sc. N.S. 522.

which here it was not. Again, in *Reid v. Allan* (12), which was a case of a policy in the usual form, with a proviso similar to the one in this case, and an averment that the funds were sufficient, and that the defendant was a shareholder, it was held that there was a good cause of action. That case shews that there may be a personal liability notwithstanding a proviso of this character. To proceed then to the limiting clause in the policy, these companies have no right to exceed those powers which are given by the act (7 & 8 Vict. c. 110.) under which they are constituted, and those powers are given by clause 66, which enacts, that if companies have not limited liability by act or patent, execution may be enforced, not only against the property and effects of the company, but by execution against the person, property and effects of any individual shareholder of the same; and *Greenwood's case* decided that a proviso limiting liability has no effect in the deed, even if notice of such proviso be given to the creditor. What, then, is the difference between this and the case now before the Court? Under what authority were the policies of the Athenæum Society issued? No answer can be given, but that they were issued under the Joint-Stock Act (7 & 8 Vict. c. 110.), and the 27th and 28th clauses of the deed of settlement, which say, that nothing shall prejudice the rights of the parties under that statute, namely, the Joint-Stock Act, section 66, which gives this very power. The result upon the whole case seems to be either that there is no difference between the proviso as contained in the deed, with notice, and as contained in the particular instrument which takes effect under the deed, or that there being a repugnance in the deed, it must be construed most favourably for the policy holder.

Mr. W. D. Lewis (with *Mr. Rolfe*), for the official manager of the Athenæum Society, in support of the order of the Vice Chancellor.—The present appeared, and indeed was the same as an application for leave to issue a *scire facias*. The contract runs through the judgment—*Hassell v.*

(12) 4 Exch. Rep. 326; s. c. 19 Law J. Rep. (N.S.) Exch. 39.

the Merchant Traders' Ship Loan and Insurance Association (13); and the judgment strikes out the first of the two provisos in the policy, as against the corporation. As to the liability of the corporate funds, it was worked out by the case of *Law v. the Indisputable Life Assurance Society* (14), and *Robson v. M'Creight* (15); and *Greenwood's case* proves that a man who has paid up the full amount of his shares may be called upon for more. *Halket v. the Merchant Traders' Association* and *Ex parte Durham* (16) were then cited by the learned counsel. In this case the policy is the contract of the company, and not that of the individual shareholders (*Andrews v. Ellison* and *Dawson v. Wrench*), and as regards the individual shareholders the proviso must both in law and on authority be good—*Ernest v. Nicholls* (17). The question of what is "capital" and "capital stock" was entered into in the case of *The Northumberland Bank* (18) and *Evans v. Coventry* (19). Referring then to the deed of settlement, it appears, by clause 4, that the business is to go on without the whole capital being paid up; and the affidavit of Mr. Hornby, the manager of the Prince of Wales Company, states that he examined the deed, and, according to the cases of *Ernest v. Nicholls* and *The Athenæum Society, ex parte the Eagle Company* (20), he was bound, if he relied upon it, to see that the 100,000*l.* was the capital as stated in the deed. The term "capital" means neither paid-up nor subscribed capital, but subscribable capital according to the terms of the deed. Then the appellants say, they are entitled to look at the deed of settlement of the company, and to incorporate it with the policy. The answer to that is, that the deed is not incorporated in the policy, and that if it is,

(13) 4 Exch. Rep. 525; s. c. 19 Law J. Rep. (N.S.) Exch. 183.

(14) *Ubi supra*.

(15) *Ubi supra*.

(16) 4 Kay & J. 517; s. c. 27 Law J. Rep. (N.S.) Chanc. 798.

(17) 6 H.L. Cas. 401, 419.

(18) 27 Law J. Rep. (N.S.) Chanc. 356.

(19) 25 Law J. Rep. (N.S.) Chanc. 489, 500.

(20) 4 Kay & J. 549; s. c. 27 Law J. Rep. (N.S.) Chanc. 829.

it does not bear the construction contended for.

Mr. Rolt, on the same side, argued, that the question was as to the true construction of the policy, and the case was the same as that of an equitable mortgage with a proviso that the mortgagor shall not be liable personally for the sum lent: there was no obligation by the shareholders that the sum assured should be forthcoming, though there was such obligation on the part of the company, and the creditors had no right except under the policy. There were three classes of cases applicable to the present: the first, where there was simply a clause in the deed that a shareholder shall not be liable beyond the amount of his shares, and *Greenwood's case* decided that such a clause cannot protect the shareholder; the second, such as the case of *Ernest v. Nicholls*, and the present case at law, where there is a provision in the deed that the company shall have such and such powers, with a certain limit on those powers. If that limit is one of substance, the contract goes beyond the powers, and the shareholders shall not be liable.

[LORD JUSTICE TURNER.—The state of the authorities, such as *Ernest v. Nicholls*, shews that you are bound to look at the deed and to see whether the provisions of it are complied with.]

Yes; and the case of *The Royal British Bank v. Turquand* (21) shews, that parties dealing with companies are bound to read the deed and the act. The third class of cases is, where the policy is identical with the clause in the deed of settlement. There the policy is at least as favourable to the respondents as the clause in the deed. The contract here expresses the terms of liability, and those cases do not shew that there had been an issue on the question of the funds being sufficient. It was unnecessary to distinguish *Andrews v. Ellison* and *Dawson v. Wrench*, for those who signed the contracts there were liable on them, and against them the action was brought. It is not objected, by the respondents, that the deed should be incorporated in the policy as to the 28th clause.

[LORD JUSTICE KNIGHT BRUCE.—You

cannot understand the policy without the deed.]

The proviso is expended in the policy, and the construction of the appellants will not be adopted if any other can be arrived at. What is the true construction? What is the conditional liability? The liability to pay the call. The shareholder is only bound to that under the statute (7 & 8 Vict. c. 110), and nothing in the contract is to prejudice that. The true construction of the proviso is, that the shareholders shall only be liable for their share of the assets of the company. There has been no averment and there is no pretence for saying that the policy amounts to a representation that the capital is 100,000*l*.

Mr. Daniel, in reply.—The action in this case was brought against the official manager, not against the company. The winding-up order was made in July 1856, which effected a dissolution of the company, and the act of 1848 clearly defines the powers and liabilities of official managers, and among the latter an action by creditors.

[LORD JUSTICE TURNER.—The creditors' rights after proof are not affected by the statute of 1844.]

True. But the company after the order for winding up is a mere shadow; the contributories are the substantial defendants. Under the statute 20 & 21 Vict. c. 78. a creditors' representative thereby authorized to be elected is alone enabled to sue and do certain acts, and that restraint upon the creditors is given for the protection of the shareholders.

[LORD JUSTICE TURNER.—No, it is not for the protection of the shareholders. The official manager represents a substance and not a shadow,—the contributories, not the company. The company referred to in the 58th section of the Winding-up Amendment Act, 1848 (11 & 12 Vict. c. 45), is not the corporation constituted by the Joint-Stock Act of 1844, but the company as consisting of a number of persons. The corporation is gone by the 36th section of the act of 1848.]

The appellants submit that the rights of creditors are not taken away by the act 20 & 21 Vict. c. 78. It is a mere matter of mistake to suppose that the judgment obtained in this case is one against the

(21) 6 E. & B. 327; a.c. 25 Law J. Rep. (N.S.) Q.B. 317.

company. The rights of the creditors against the shareholders are not identical with the liabilities of mere contributories. The question here is, as to the proper construction of the contract and the deed of settlement. The Joint-Stock Act of 1844 negatives the notion of limited liability; and if the assets do not exist, still they must be forthcoming, and for that the shareholders are liable. It is to be remarked, that Mr. Hornby could not have looked at anything but the deed of settlement, and therefore he could not have concluded that it was a fraud to represent that the subscribed capital was 100,000*l*.

Feb. 19. — LORD JUSTICE KNIGHT BRUCE.—By the Athenæum Life Assurance Society, now under the process of winding up, were issued before its stoppage various life policies. To some of these, in which the appellants in the appeal petition now before us were the assured, in the name of their secretary, Mr. Hornby, the petition relates. One of these policies may be taken as a sample of all: what is true of it is true of each. It is in these terms: "Whereas John Hornby, as secretary of, for and on behalf of the Prince of Wales Life and Educational Assurance Company, No. 105, Regent Street, London (hereinafter called the assured), has proposed to effect an assurance with the Athenæum Life Assurance Society in the sum of 2,000*l*., upon and for the whole continuance of the life of Richard Paul Hase Joddrell, of Childwick Hall, St. Albans, Herts, Esq.; And whereas the said assured has paid to the said society the sum of 95*l*. as a premium or consideration for the said assurance for one year, until the 2nd of September 1855: Now this policy witnesseth, that if the said R. P. H. Joddrell shall die before or upon the said 2nd of September 1855, or shall live beyond that day, and the said assured or his assigns, or the holder of this policy, who shall be registered as such in the book hereinafter mentioned of the said society, shall on or before that day, and on or before the 2nd of September in each and every succeeding year, during the continuance of this assurance, pay to the said society the said premium of 95*l*., then the funds and other property of the said society

shall, according to the provisions of the settlement of the said society, be subject and liable to pay to the said assured or his assigns, or to the holder of this policy, who shall be so registered as aforesaid, immediately after satisfactory proof of the death of the said R. P. H. Joddrell, the sum of 2,000*l*. of lawful money of Great Britain. Provided always, that the secretary of the said society shall, upon the request of the holder of this policy, and with the consent of the said assured, register such holder in a book to be called "The Register of the Holders of Policies." Provided also, that the payment as above mentioned of the said sum of 2,000*l*. to the holder of this policy who shall be registered as aforesaid, shall be a good and sufficient discharge to the said society from and against any claims or demands upon or in respect of this policy." And it then provides in case certain events shall happen that the assurance shall be void. Then it provides also: "That the capital stock of 100,000*l*. sterling and other the stocks, securities, funds and property of the said society remaining, at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the provisions of the said deed of settlement, shall alone be liable to answer and make good all claims and demands upon the said society or otherwise, under or by virtue of this policy, and that no director, officer or shareholder of the said society, his heirs, executors or administrators, shall, by reason of this policy, be in anywise individually or personally liable or subject to any such claims or demands, or be in anywise charged by reason thereof beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares. Given under the hands of three of the directors, and sealed with the common seal of this society, this 2nd of September in the year of Our Lord 1854." And then there are the three signatures and the common seal of the company. Mr. Joddrell died, I believe, before the stoppage, and the appellants became entitled to the benefit of their assurance. The present question is, in substance, if not in form also, whether those shareholders in the Athenæum Society, upon whose shares

is the capital stock mentioned in the policy no amount remains unpaid, are liable personally to pay the amount secured by the policies. Of course what they have paid must be considered as irrevocably gone and lost in the ruin of the scheme that has failed—perhaps it may be said of course failed. The question is as to their personal liability to pay more. I have borrowed the language of the policies, the expressions used in them being “amount unpaid of their shares in the said capital stock.” The terms of the deed of settlement mentioned in the policies do not vary, nor are they inconsistent with the meaning which, without reading the deed, would be ascribed to their language. The fourth clause in particular seems worthy of attention. It runs thus: “That the capital stock of the said society shall in the first instance, and subject to the power of increasing the same hereinafter contained, consist of 100,000*l.* of 100,000 transferable shares of 1*l.* each, to be paid as herein provided. Provided nevertheless, that in case the whole of the said 100,000 shares shall not be subscribed for or disposed of, the shareholders of the society for the time being shall continue associated and bound under and by these presents, and the powers and provisions herein contained shall continue and be in force and be valid in respect of the shares for the time being subscribed for or taken, in like manner as if the number had been the whole number of shares agreed or intended to be issued.” Whether we look at the policies and deed together, or at the policies alone, I think it is very plain that the shareholders who have by actual payments contributed the full amount of their nominal shares of the capital—for instance, a shareholder holding 2,000 shares of 1*l.* each, who has paid his 2,000*l.* to the capital fund—are not subject to any liability, or any further liability, upon the policies. The express provisions of the contract appear to me to exclude such notion. The liability of the assets of the company is a measure beyond our present consideration, and it is not touched by the present dispute; and the same may, I conceive, be stated of the questions, whether those assets are sufficient or insufficient to answer the demands upon them,

and whether the company's funds have been wasted, embezzled or misapplied. What I have said is on the assumption that the judgment at law obtained by the appellants against the official manager of the Athenæum Society does not make any difference. I think that it does not. It fixes the fourteen pleas in the action with the character of untruth; and, as between the appellants and the shareholders in the Athenæum Society, precludes the latter, I assume, from asserting any fact or alleged fact asserted by any one of the pleas. It must for every present purpose be taken, therefore, that there are or ought to be funds of the company sufficient to pay the amount due upon the policies, and available for that purpose. By this, however, whatever the waste, embezzlement and misapplication (if any) which have, to whatever extent, taken place,—is, I apprehend, left undisturbed, and left untouched the right of the shareholders who have paid and must lose the whole nominal amount of their shares, to say that not one of them is personally liable for the debt established by the judgment in the action, more than he would have been if the judgment had not been obtained. The order of Vice Chancellor Wood seems to me to have done justice, and to be right.

LORD JUSTICE TURNER.—This is a motion to discharge so much of an order of Wood, V.C. as orders that no call be made, in respect of the sum claimed by the appellants on the judgment against the official manager, upon any of the contributories in the Athenæum Life Assurance Society, who have paid up the full amount of their shares in the capital stock of the said society, nor upon any of the contributories beyond the amount unpaid of their shares. Upon the motion being opened, it was agreed that the whole order should be considered as under appeal, but the substantial question arises upon the part of the order which I have stated. The appellants, the Prince of Wales Life Assurance Company, having insured the life of Richard Paul Hase Joddrell, re-insured his life in the Athenæum Life Assurance Society by policies, by the terms of which it is witnessed, that upon the assured paying the premiums in the usual form, the funds and other property

of the society shall, according to the provision of the deed of settlement of this society, be subject and liable to pay to the assured or to the holder of the policy, immediately after satisfactory proof of the death of the assured, the sum which is mentioned in the policy, and there are these provisions in the policy which follow.—[His Lordship here read the proviso which is set forth in the judgment of Lord Justice Knight Bruce.]—The life of the assured Richard Paul Hase Joddrell having dropped, the appellants went in under the winding-up order against the Athenæum Society, and claimed the amount assured by the policy, but the debt was not admitted, and the appellants were left to their action; and they accordingly brought an action against the official manager of the Athenæum Society, in which they alleged that at the time of their claim accruing there were assets of the company sufficient for payment of the claim, and they recovered judgment in that action. It is to this judgment that the order under appeal refers. There being upon the face of these policies an express provision that no shareholder shall be liable beyond the amount unpaid of his shares in the capital stock of the company, the burden of proof that the shareholders are liable beyond that amount of course rests upon the appellants. In order to satisfy this burden, they first relied upon their judgment, contending that the judgment having established that there were assets of the company to answer the claim, and there being a contract that the funds of the company should be subject and liable to pay, the shareholders of the company must be answerable for the breach of that contract. But the contract contained in these policies is either a contract of the directors who signed the policies, or the contract of the company; it is the contract not of the individual shareholders, but of persons who are responsible to them and acting on their behalf; and by the terms of the policies the appellants have agreed that they, the individual shareholders, shall not be liable beyond the specified amount. This argument, therefore, seems to me to be untenable. It is met by the cases which have been decided at law upon that point, and which were cited in the course of the

argument. Then it was argued on the part of the appellants, that there is a representation upon the face of these policies, that there was capital stock of the company to the amount of 100,000*l.*, and that there never was in fact any such capital stock, only 49,000*l.* having been subscribed; and it was insisted that the shareholders of the company were liable to make good the representation upon the face of the policies. But I do not see my way to hold that the shareholders can be made liable upon this misrepresentation, in the face of the express contract that they shall not be liable beyond the amount of their shares; unless, indeed, they can be reached on the ground of fraud. I do not think, upon the facts before us, any such case of fraud can be maintained. It was also attempted to support the appellants' case on the ground that the company's deed of settlement was incorporated in the contract, and that by the 28th section of the deed there was unlimited liability on the part of the shareholders. But, in my opinion, this construction of the 28th section of the deed cannot be supported. To put that construction upon the deed would be to construe it as first negating unconditional liability, and then immediately afterwards creating it. It was much argued in reply, that the official manager must be considered to have represented the shareholders in the action in which the judgment was obtained; but this argument, even if it is well founded, does not seem to me to advance the appellants' case; it is still met by special contract against the unlimited liability of the shareholders. In the course of the argument before us some doubts had crossed my mind as to whether the inquiries directed by this order would sufficiently work out the rights of the parties; but, upon further consideration, I am not satisfied that they are insufficient for the purpose; and, as the Vice Chancellor has the power to extend them, if they should be found to require extension, I think it better to leave them as they are. This motion must be refused, and refused with costs.

STUART, V.C.	}	COOK v. STURGIS.
1858.		
June 9, 10, 12, 14.		
LORDS JUSTICES.		
1859.		
Jan. 11.		

Insolvent—1 & 2 Vict. c. 110. s. 92.—
Title to Surplus Estate—*Jurisdiction to determine.*

The surplus of an insolvent's estate left in the Insolvent Debtors Court, after payment of all the debts under the insolvency, was claimed adversely by various persons, as assignees by deed from the insolvent, and also by the provisional assignee of the Insolvent Debtors Court, representing the creditors under a second insolvency of the same insolvent:—Held, by one of the Vice Chancellors, that this Court, and not the Insolvent Debtors Court, was the proper tribunal for adjudicating upon such conflicting claims; and the same was affirmed by the Lords Justices.

Whether there is a concurrent jurisdiction in the Insolvent Debtors Court, quære.

George William Dyson, having petitioned the Court for the Relief of Insolvent Debtors in England, an order was made, on the 1st of December 1849, by that Court, vesting Dyson's estate and effects in two assignees. One of these assignees shortly afterwards died, and the Court subsequently removed the survivor, and appointed in his stead Samuel Sturgis, the provisional assignee of the Court, in whom the estate and effects of the insolvent became consequently vested in 1852.

The case was in the court of William John Law, Esq., the Chief Commissioner.

By an indenture, dated the 8th of July 1850, made between G. W. Dyson, the insolvent, of the first part, Robert Cook of the second part, and James Cook (a trustee to bar dower) of the third part, in consideration of 3,000*l.* expressed to be paid by R. Cook to Dyson, Dyson did bargain, sell, convey, release and assign to R. Cook, his heirs, executors, administrators and assigns, certain interests, limited and absolute, to which Dyson was entitled under the will of his father, in the real estates therein mentioned, but subject to the incumbrances affecting the same, and also all other his

estate and effects, subject to the payment of his debts.

By an indenture, dated the 6th of March 1851, George William Dyson, the insolvent, conveyed and assigned all his real and personal estate unto John Renninson and George Henry Taylor, their heirs, executors and administrators, upon the trusts therein mentioned for the benefit of his creditors.

In June 1851 Renninson and Taylor instituted a suit in this court against Robert Cook and George William Dyson, the insolvent, to have the deed of the 8th of July 1850 set aside, on the alleged ground that the consideration for which it was expressed to be made had not in reality been paid, or, at all events, only in part.

That suit was afterwards compromised, upon terms mentioned in articles of agreement, signed by the parties, and dated in October 1851.

George William Dyson, the insolvent, afterwards assigned to one MacLeoman, for valuable consideration, all his resulting interest in the premises comprised in and conveyed by the indenture of the 6th of March 1851, under and by virtue of such indenture and the compromise mentioned in the articles of agreement of October 1851.

G. W. Dyson having incurred fresh debts, he on the 15th of March 1853 again petitioned the Court for the Relief of Insolvent Debtors, and, on the following day, a vesting order was made in the matter of the second insolvency, vesting all his estate and effects in Samuel Sturgis, the provisional assignee of the Court.

On the 6th of August 1855, the Chief Commissioner made the following order in the matter of the insolvency:—

“Pursuant to the acts,” &c. “Whereas, it is now ascertained that the fund in court exceeds the amount required to pay all debts and costs, and whereas it is not the ordinary case of an insolvent claiming a vesting order, but there are various claimants of the surplus, those known to the Court being Mr. Cook, Messrs. Taylor and Renninson and the assignee of a subsequent insolvency. Let those parties attend me on Monday, the 13th of August, at 12 o'clock, to exhibit the grounds of their claims. I do not purpose to go into

any discussion on that day." "Mr. Cook will exhibit the original instruments and accounts on which he relies, and will produce a specific account in debtor and creditor form, with dates of all transactions between him and G. W. Dyson from the 14th of March 1850 to the 16th of March 1853, verified by affidavit."

There was a large surplus at this time in court, amounting to 4,000*l.* and upwards. Application had been made to Samuel Sturgis by Cook for a particular account thereof, which he had refused to give.

On the 12th of July 1856 the Chief Commissioner made the following order:—"Pursuant to the acts," &c. "After paying the debts under the former insolvency, a considerable sum remains in court. There are three claimants: first, the whole is claimed by Mr. Cook, under a deed made to him; secondly, by Mr. Taylor and Mr. Renninson, under a deed made to them; thirdly, by the assignee for the creditors under the latter insolvency of 1853. All parties interested are at liberty to attend the court in this matter and deliver their claims on Tuesday, the 22nd of July inst., at eleven o'clock."

Accordingly, on the 22nd of July, R. Cook attended the Court, and after shewing that the deed of assignment to him was long anterior to the second insolvency of Dyson, demanded an order vesting the surplus estate in the first insolvency in him, and directing payment of the money into court. This the Commissioner refused, and he also refused to act on the deed of the 8th of July 1850, and insisted upon inquiring into the validity of the said deed and the consideration paid for it, and as to the rights of other persons who made claims subsequent to the said deed. Mr. Cook protested against this being done, and afterwards obtained from the Court of Chancery a writ of prohibition, prohibiting the Insolvent Court from adjudicating on or dealing with the surplus fund in court, except so far as was necessary in order to give effect to the said deed of the 8th of July 1850. Notwithstanding the prohibition, the Commissioner refused to make an order to vest the said fund in Cook, or to make any order at all, at the same time saying that, but for the prohibition, he would have ordered the fund to be vested in the as-

signee under the subsequent insolvency, and intimating that he was still of opinion that the surplus fund ought to revert in S. Sturgis, as assignee under the second insolvency, for the benefit of the insolvent's creditors thereunder.

In November 1856 R. Cook obtained a rule *nisi* in the Court of Queen's Bench, calling upon W. J. Law, Esq., the Chief Commissioner of the Court for the Relief of Insolvent Debtors in England, to shew cause why a writ of mandamus should not issue directed to him, commanding him to make an order for payment of the surplus money in the said Insolvent Court standing to the credit of the estate of G. W. Dyson, an insolvent debtor, to R. Cook, his assignee, and also to vest all the property of any kind or description, estate and effects whatsoever of the said G. W. Dyson in the said R. Cook.

This rule was afterwards discharged with costs, on the ground that the Chief Commissioner had full power under the Insolvent Acts to determine the effect to be given to the deed of the 8th of July 1850, and that he was not precluded from so doing by the writ of prohibition—see *The Queen v. Law* (1).

On the 22nd of May 1857 R. Cook filed his bill in this suit, stating the facts above mentioned, and praying that Samuel Sturgis, as provisional assignee under the first of the above-mentioned insolvencies, might be declared to be a trustee of the surplus estate, standing in the Court for the Relief of Insolvent Debtors in England to the credit of such first insolvency, for the plaintiff, or for the plaintiff and Renninson and Taylor, according to their shares and interests under the deeds of the 8th of July 1850, the 6th of March 1851 and the articles of compromise of October 1851; and that S. Sturgis might be restrained by injunction from proceeding to the distribution of such estate under the said second insolvency.

S. Sturgis, by his answer, claimed the surplus estate under the first insolvency for the benefit of the creditors under the second insolvency, so far as it had not been effectually disposed of prior to such

(1) 7 E. & B. 366; s. c. 26 Law J. Rep. (n.s.)—Q.B. 126.

second insolvency; and submitted that the chief Commissioner had ample jurisdiction given to him by the Insolvent Acts to refuse to act upon the deed of July 1850 in favour of Cook, until payment of the consideration for such deed had been proved; and that under the circumstances, Cook could only be entitled to hold such deed as security for the sum actually paid by him on the footing thereof, with interest.

Mr. Malins and *Mr. W. H. C. Bagshawe*, for the plaintiff, contended that the question of title to the surplus of the insolvent's estate, when it arose between persons not claiming as creditors under the insolvency, and particularly where one of the claimants was the Court for the Relief of Insolvent Debtors itself, claiming in respect of a second insolvency of the party insolvent, could not be properly dealt with by the Insolvent Debtors Court, but fell properly within the jurisdiction of this Court.

Mr. Bacon and *Mr. Osborne*, for the defendant Samuel Sturgis, submitted that, upon the authorities and upon the statutes 1 & 2 Vict. c. 92. and 5 & 6 Vict. c. 116, the Chief Commissioner of the Insolvent Debtors Court had full power to decide in whose favour a revesting order as to the surplus estate should be made, and in so doing to inquire into the circumstances under which any of the claims were made, and to disregard any deed or instrument which should appear to have been obtained from the insolvent without any adequate consideration—*Wearing v. Ellis* (2) and *Tudway v. Jones* (3). Such, they contended, had been also the effect of the decision in *The Queen v. Law*; and upon the application to the Lord Chancellor for the writ of prohibition; also of that of the Lords Justices of Appeal in a suit of *Dyson v. Hornby* (4) as to an application by Cook, the present plaintiff, to intercept the payment to Samuel Sturgis of the surplus of certain funds then in court in that suit, over and above what he alleged

would be necessary to pay all the debts under the insolvency, and which funds had arisen from the sale of part of the estate and interest of G. W. Dyson under his late father's will.

STUART, V.C. said the plaintiff claimed under a deed which had assigned to him the surplus of the insolvent Dyson's estate under his first insolvency. It was the province of the Insolvent Debtors Court to ascertain a surplus, and it was the duty of the Insolvent Debtors Court to reveal that surplus in the insolvent, his heirs, executors, administrators or assigns; and, notwithstanding the unfortunate question of jurisdiction which had arisen, he did not apprehend that it would be disputed in any court that, if an assignment had been executed by an insolvent of the surplus which might accrue to him under his insolvency, the person claiming under the assignment, if the assignment were undisputed and its validity unquestioned, would, under an order of the Insolvent Debtors Court, have the surplus vested in him, as having acquired a right to it under the insolvency. The great question argued in this Court was whether, upon the construction of the act of parliament, 1 & 2 Vict. c. 110. s. 92, there had been conferred upon the Insolvent Debtors Court as a separate jurisdiction, either the right or the duty of adjudication upon questions arising between adverse claimants, where more than one person claimed a surplus. It was obvious that property of such a kind as a surplus likely to accrue to an insolvent, when all his creditors had been paid under the administration of the Insolvent Court, might be the subject of assignment and disposition by him to various persons, and under varying circumstances, which might raise questions of the utmost difficulty and importance, as to the validity of deeds and transactions in which or by which the insolvent affected to deal with the surplus. It had been contended that the 92nd section of the act of parliament (1 & 2 Vict. c. 110.) had conferred upon the Insolvent Debtors Court the right and duty exclusively of deciding upon all such questions. He could not help thinking that if the legislature had had any intention of excluding

(2) 25 Law J. Rep. (N.S.) Chanc. 248: s. c. on appeal, 6 De Gex, M. & G. 596; 26 Law J. Rep. (N.S.) Chanc. 15.

(3) 1 Kay & J. 691; s. c. 24 Law J. Rep. (N.S.) Chanc. 507.

(4) 7 De Gex, M. & G. 1.

the proper jurisdiction of the old established Courts for the decision of questions upon property, and had intended to confer upon the Commissioners for administering the law for the relief of insolvent debtors the exclusive or concurrent jurisdiction of deciding difficult and important questions of that kind, the language of the act of parliament would have been much more ample and explicit than it appeared to be. The words of the act of parliament directed, as to a surplus under an insolvency, that the Court should make an order that such property so remaining should be vested in the person whose debts should have been discharged and satisfied, or his heirs, executors, administrators or assigns; and that such order should have the effect of vesting the same accordingly; and that any deed of release to be recorded in the said court, by which any such debt should be released, should not be liable to the stamp duty. Suppose that, before the Insolvent Debtors Court had ascertained that there was a surplus, but after the insolvency, questions such as had occurred in this case had arisen upon deeds executed and transactions which had taken place, by which an insolvent affected to confer rights and interests in the surplus, and that a litigation had taken place in this court or in any court of law with reference to the validity of any such deed, and that this Court had declared that some of such deeds were void, and one alone was good, he had heard nothing to induce him to think that, notwithstanding the length to which the Insolvent Debtors Court seemed inclined to go as to its jurisdiction, the Court for the Relief of Insolvent Debtors would have taken upon itself to try anew the questions decided by a Court of competent jurisdiction; and if, either by way of appeal, or by a claim made before the Insolvent Debtors Court, one of those persons against whom the other Court had adjudicated still preferred his claim before the Insolvent Debtors Court, he (the Vice Chancellor) had no reason to suppose that the Commissioner would not recognize a decree or decision of a Court of proper jurisdiction for the deciding of such cases, as a decree or decision binding upon him. If that were so, what difference could it make with reference to the litigation in

questions of that kind, whether the litigation in the other court took place before or after the surplus had been ascertained? There was nothing in this section to exclude the jurisdiction of any other Court, and there was nothing that he could find in the act which contemplated that the Insolvent Debtors Court should exercise any contentious jurisdiction whatever as to the circumstances of such a case; and, therefore, he should infer from the plain construction of the language of the act of parliament, that the legislature never intended that the Insolvent Debtors Court should entertain a contentious jurisdiction upon questions of this kind at all. That really was the only question in this case. There might, however, remain this consideration, if the same property had been claimed before the Chief Commissioner of the Insolvent Debtors Court, by various individuals, and he had entertained claims, and either adjudicated upon them, or endeavoured to adjudicate upon them before a litigation in any other court took place, whether the order of the Insolvent Debtors Court should not have the effect of interfering with that litigation. But that seemed to his Honour the same question with the others, for he could find nothing to shew that the Insolvent Debtors Court had authority, with reference to the right to this surplus, to exercise any contentious jurisdiction whatever. It was said, and with some show of reason, that the Court of Queen's Bench had held otherwise, and the case of *The Queen v. Law* was cited as one in which that Court had refused a mandamus to compel the Insolvent Debtors Court to make an order for payment of the surplus to Cook; but the Judges of the Court of Queen's Bench treated the question, as the question was argued before them, as being a question whether the Commissioners of the Insolvent Debtors Court were persons acting ministerially or had judicial functions. Now, that really seemed to him not to be the question now to be adjudicated upon, because there could be no doubt that the Commissioners of the Insolvent Debtors Court were Judges who had judicial functions to perform. All questions relating to the proof of debts, all questions referring to rights of creditors of the insolvent, as between them and

the insolvent, were questions upon which that Court was bound to exercise judicial functions. But he found nothing in the language of any of the learned Judges, the Lord Chief Justice or the others of the Court of Queen's Bench, which sanctioned the notion, that the act of parliament for the regulation of the Insolvent Debtors Court, and which created its jurisdiction, abrogated or took anything away from the jurisdiction of any of the other constituted tribunals, or conferred upon the Judges of the Insolvent Debtors Court any power or authority to adjudicate upon any question of adverse claims to property, except for the purpose of paying the creditors of the insolvent. Looking attentively at the facts, it seemed surprising that the great inconvenience and unseemly nature of the jurisdiction contended for by the defendant Sturgis, as one conferred upon the Insolvent Debtors Court, did not strike more strongly than it seemed to have done those who maintained that argument. In this case, the Judge of the Insolvent Debtors Court, after stating that there was a surplus under the first insolvency, said there were three claimants: first, the plaintiff, Robert Cook; secondly, the defendants Renninson and Taylor; and, thirdly, the Insolvent Debtors Court itself. Why, what a strange thing it would be, that one of the claimants should have a judicial power conferred upon him by parliament, of deciding in his own favour, against the other claimants. It might be said, that it was merely in trust for creditors, that the claim was made, but the Insolvent Debtors Court confessedly had no jurisdiction to authorize its officer, upon any decision of its own, to take possession of any property as against an adverse claim. Suppose the assignee of the Insolvent Debtors Court claimed a certain number of acres of land as the insolvent's property, and that that was in the possession of another man who resisted the claim of the assignee, nobody would say that the Insolvent Debtors Court or the Commissioners of that court, could affect to decide upon an adverse title of that kind. It could not do so. But in principle, what the Insolvent Debtors Court was in this case said to have the exclusive power of determining, was exactly the same sort of

question; because the assignee under the second insolvency claimed adversely to a person who held a deed, which he said had vested in him a legal right, or an equitable right to that property, which was claimed under the second insolvency. Therefore he could imagine really no sort of claim to a jurisdiction by any tribunal more extraordinary than that which was claimed by the Insolvent Debtors Court in this case. Those were his views of the law, and his views as to the jurisdiction of the Insolvent Debtors Court. He certainly had a very clear impression upon it; but it was impossible for any Judge to have entire confidence in his own opinion upon a question of this kind, especially when the question might be submitted, and ought to be submitted, and he hoped would be submitted to the revision of the Judge of a court of higher authority. But he could not help observing that the plaintiff had conducted his litigation in a very unfortunate and imperfect way. He could not help thinking that if his case had been put forward upon his first application to this Court, when he applied to have the surplus paid to him, and if it had been made to appear to the Court that the question was between his claim and that of the assignee under the second insolvency, if the matter had been brought before the Court in a proper shape (perhaps a petition was not the proper shape), this Court, before it parted with the fund, which, under the order of the Lords Justices, was paid over to the Insolvent Debtors Court, would probably have adjudicated upon that claim, and thereby have prevented an application to the Insolvent Debtors Court, an application to the Court of Queen's Bench, and an application for the writ of prohibition, which had been issued by the Lord Chancellor. However, it was enough for him to find that there was now an order of the Lord Chancellor which had prohibited the Court of Insolvent Debtors from exercising that judicial function, which the counsel for the defendant Sturgis had argued before him it possessed. The Lord Chancellor had prohibited that Court from giving the surplus, or disposing of it in any way, except according to the deed under which the plaintiff claimed. The question of jurisdiction,

however, being one upon which he entertained an opinion entirely adverse to the argument maintained by the defendant Sturgis, it remained to be considered how the litigation in this case was to be ended, and what would be the proper decree now to make. The plaintiff, even in this court, had brought forward his case in a most imperfect and crippled state as to evidence. He found from the answer of the defendant Sturgis, which had been very carefully and accurately prepared, that in the Insolvent Debtors Court under that litigation which the Lord Chancellor had stopped, the Commissioner of the Insolvent Debtors Court ascertained that it had not been proved that the whole of the purchase-money which was agreed to be paid, and which ought to have been paid, had been paid by the plaintiff as the price of his purchase of the surplus; it was proved that a considerable sum might still remain unpaid in respect of that purchase. That seemed the result of the proceedings so far as they had gone in the Insolvent Debtors Court. He must, therefore, take it that the case was one in which a purchaser, the plaintiff, had not proved that he had paid the whole price. The view of the Chief Commissioner of the Court for the Relief of Insolvent Debtors was, that, in respect of so much of his purchase-money as the plaintiff had paid, he was to be allowed to go in to prove as a creditor under the second insolvency. That really seemed to him a view of the case which was wholly unsustainable, because before it came to that, the purchase must be annulled; and, though the Chief Commissioner of the Insolvent Debtors Court had gone very far in exercising a jurisdiction, yet he, the Vice Chancellor, did not find that he had made any order, or conceived that he could make any order upon the plaintiff to deliver up this deed to be cancelled. If the Chief Commissioner could not make an order for the delivery up of this deed to be cancelled, and if the deed remained uncanceled, it was a deed of assignment in consideration of money, a part of which had been paid. No argument had been addressed to him, nor could he find any grounds in the case which would justify him in saying, that this purchase ought to be set aside. He

found that the Lord Chancellor had made an order which might have been reversed. It was said to have been made *ex parte*. An application might have been made to the Lord Chancellor to discharge that order for a writ of prohibition to prevent payment to anybody but to the present plaintiff, but that order remaining undischarged; he did not see how he could have jurisdiction in the face of the Lord Chancellor's order undischarged, to declare that the plaintiff's deed was one that ought to be set aside, or to be cancelled, or that he ought to convert it into a deed of conveyance, intended to operate as a purchase, but which, under the circumstances, could only have the effect of giving the purchaser or intended purchaser a mere lien upon the property intended to be assigned for the repayment to him of so much as he had paid. Therefore, the case was one in which he was bound to say that the plaintiff, though imperfectly, had proved his right as assignee to this fund; and, upon the whole, it seemed to him that the proper decree to make would be according to the minutes, which he would now read.

Declare, that the right to the surplus of the estate and effects of G. W. Dyson, vested in the defendant S. Sturgis, as the assignee of the effects of the said G. W. Dyson, under an order of the Court for the Relief of Insolvent Debtors in England, dated the 1st of December 1849, which surplus is mentioned or referred to in the order made or notice given by the Chief Commissioner of the said court, dated the 12th of July 1856, was assigned by the said G. W. Dyson to the plaintiff R. Cook, as purchaser thereof, by the indenture of the 8th of July 1850; and that, under such assignment, the plaintiff is entitled to such surplus, subject to the right of the defendant S. Sturgis, in whom the estate and effects of the said G. W. Dyson are vested, as provisional assignee of the said court, under an order of the said court, dated the 16th of March 1853, to have paid to him what, if anything, remains due in respect of 3,000*l.*, the consideration money for the said assignment, and interest thereon. Direct an inquiry to be made whether any, and what part, of the sum of 3,000*l.*, the consideration money mentioned in the said indenture of assign-

ment of the 8th of July 1850, remains unpaid, and the amount, if any, which remains due for principal money in respect of the said sum of 3,000*l.*, together with interest at the rate of 4*l.* per cent., from the 8th of July 1850; and it is ordered that the plaintiff Robert Cook do pay to the defendant S. Sturgis, as such provisional assignee of the estate and effects of G. W. Dyson, what, if anything, shall be certified to be due in respect of such consideration money and interest. The plaintiff Robert Cook to be at liberty to make such application as he may be advised to the Court for Relief of Insolvent Debtors, to give effect to the aforesaid declaration, and the amount which shall be received by the plaintiff under any order of the Court for the Relief of Insolvent Debtors, is to be paid into the Bank of England to the credit of this cause; this decree to be without prejudice to any question as to the claims of the defendants J. Renninson, G. H. Taylor, and J. MacLeoman, under the deed of the 6th of March 1851, and articles of agreement of the 27th of October 1851, and the deed of the 5th of December 1851, with liberty to any of the parties to apply.

No order as to costs.

Jan. 11th, 1859.—From this decree the defendant S. Sturgis appealed.

Mr. Malins, Mr. Rogers and Mr. W. H. G. Bagshawe, for the plaintiff, cited *The Queen v. Law*.

Mr. Bacon and Mr. Osborne, for Mr. Sturgis, relied upon the authorities cited in the court below, and the statute 5 & 6 Vict. c. 116.

Mr. Hoffman and Mr. Marten, for the other defendants.

LORD JUSTICE KNIGHT BRUCE.—The subject of contention here is not a matter that is at all brought into collision with the first insolvency. As I understand the facts, all claims and all rights under the first insolvency have been fully satisfied, except the payment of the surplus—for surplus there was—to the insolvent. The dispute before us merely relates to that clear and admitted surplus. His equitable title to that clear and admitted sur-

plus he has dealt with, and the plaintiff claims under that dealing. It seems that, after the transaction between the plaintiff and the insolvent in respect of this surplus had been completed as far as contract went, the insolvent became insolvent again. That, of course, did not take away the right of the plaintiff to have his title adjudicated exactly as if there had been no second insolvency; the assignee under the second insolvency being only substituted for the assignor. Accordingly, he is plainly entitled, in this suit, to have his right declared; and that whether there is or is not a concurrent jurisdiction in the Insolvent Court, as to which I desire to be understood as not saying anything. What the decree meant to do was to declare that right. It is said that the right under the instruments under which this gentleman, the plaintiff, claims, is questionable; but not one party to the cause has on any former occasion, or has now, intimated any intention or wish to institute a suit for the purpose of relief against those instruments, or either of them. It must be taken, therefore, that the plaintiff's title is in equity unexceptionable. That title being proved, it is our duty to declare and act upon it, so far as the nature of the title and the nature of this record allow us to do. That is what the decree intended to declare. There are two or three alterations that may be made consistently with the intention with which that decree was made, to which, I understand, the plaintiff accedes.

With regard to the declaration that the decree should be without prejudice to certain matters (which is at the end of it), I doubt also whether that exactly expresses what the learned Judge meant. I think he could not mean to say that the decree was to be without prejudice to any question between the plaintiff and any of the defendants; because the time had arrived for adjudicating upon that. The meaning of the learned Judge was, to declare that it should be without prejudice to any question of title to the 3,000*l.*, the price contracted to be paid by the plaintiff, if that price should appear not fully to have been paid. It seems to me, therefore—and I believe it is the opinion of the Lord Justice also—that that declaration as to the decree being without prejudice should be altered

accordingly, and to that, I understand, the plaintiff has no objection.

LORD JUSTICE TURNER.—In this case, the question being as to the rights of the parties to the surplus under the first insolvency, this Court must originally have had power to adjudicate on the rights of parties who have dealt with insolvent debtors for the surplus of their estates. I cannot think that the Insolvent Debtors Act has taken away the right to adjudicate upon that. It may have given the Insolvent Debtors Court a concurrent right to adjudicate, and looking at it in the point of view of there being two Courts with concurrent jurisdiction, the question seems to me one of convenience as to which of the two Courts can best administer the property. Looking to the language of this act of parliament, I think there would be very considerable difficulty in working out the equitable rights of these parties under the provisions of the act; and I think, therefore, that it is rather a case for this Court. I think the decree has gone a little too far in declaring the plaintiff to be entitled under the assignment of the 8th of July 1856, in the face of the agreement which the plaintiff has himself stated in the bill, by which he has agreed to take the purchase-money which was to be given under that agreement with 500*l.* more, and a moiety of the surplus, and therefore that part of the decree must be qualified accordingly. I think, also, the reservation on the subject of claim “without prejudice to the claim,” is a question which we cannot properly decide in this suit. We can decide this—that, as between the plaintiff and all the defendants, the plaintiff is entitled to his 3,000*l.* and interest, and his 500*l.*, and a moiety of the ultimate surplus; but as to the other moiety of the ultimate surplus, that may be affected by the trust-deed by which that moiety was assigned for the benefit of the creditors, or it may belong to Mr. MacLeoman under the assignment to him. The right to that is a question arising between co-defendants, and therefore I think that also must be reserved by the decree, and probably it will be found convenient to the parties to make some inquiries about it, if it is desired. I think there cannot be much doubt about it, be-

cause, if the agreement between the trustees under the deed of the 6th of March 1851 be established, and those trustees were competent to make that agreement, they would be assignees of the fund, and if they were assignees of the fund one does not see how Mr. MacLeoman would have any claim against them.

WOOD, V.C. }
 Dec. 18; } CATTLEY v. ARNOLD.
 Jan. 15, 28. }

Apportionment — Rent — Parol Demise from Year to Year.

Where a tenancy from year to year has been originally created by the owner of the fee, it is not determined by the death of a tenant for life claiming under the original lessor, and the statute 11 Geo. 2. c. 19. s. 15. does not therefore apply to such a case.

Nor does the 4 & 5 Will. 4. c. 22. apply to rents reserved by parol.

Therefore, where the owner of the fee demised by parol to tenants from year to year and died, having devised the estates to a tenant for life, with remainder over, upon the death of the tenant for life it was held, that the remainderman was entitled to the whole of the rents accruing for the half-year in which he died, without apportionment.

So, also, where the parol demise originated with the tenant for life.

George Henry Arnold, by his will, dated the 1st of November 1839, devised all his real estates whatsoever and wheresoever, subject to the mortgage incumbrances charged thereon, to his wife Susannah during her widowhood, with remainder to his son Henry Arnold for his life, with remainder to the first and other sons of Henry in tail.

The testator died on the 27th of October 1844 and Susannah Arnold on the 28th of April 1851, whereupon Henry Arnold entered into the possession and receipt of the rents and profits of the devised estates as the next tenant for life under the will.

The suit of *Cattley v. Arnold* was inst—

tated by incumbrancers on the life estate of Henry Arnold, for the purpose of obtaining the application of the rents and profits of his life estate in discharge of their incumbrances, and by an order made in the suit on the 5th of December 1854 a receiver was appointed.

Henry Arnold died on the 28th of September 1858, leaving a son, who thereupon became tenant in tail in possession under the will of the testator.

A considerable portion of the estates was held by tenants from year to year under common tenancies from year to year, created by the testator in his lifetime by parol. Other portions were held upon tenancies from year to year granted by the testator by agreements in writing; and none of such tenancies had since been determined. The other portions of the estates were let by Susannah Arnold and Henry Arnold successively to various tenants upon common tenancies from year to year by parol, and these tenancies were also still in force.

The receiver had received the half-year's rents accruing due up to the 29th of September 1858, and the question that now arose was, whether these rents belonged wholly to the tenant in tail, or whether an apportionment was to be made in respect of the life estate of Henry Arnold up to his decease. The infant tenant in tail accordingly presented this petition, praying that proper directions might be given according to his rights as the same should be considered by the Court with regard to the application of the half-year's rents.

Mr. Daniel and *Mr. Rogers*, for the petitioner, claimed the entire half-year's rents on the ground that the interest of a tenant from year to year was not determined by the death of the tenant for life. The act 11 Geo. 2. c. 19. s. 15, therefore, did not apply, nor did the Apportionment Act, 4 & 5 Will. 4. c. 22, apply to rents payable by tenants from year to year which had not been reserved by an instrument in writing.—

In re Markby, 4 Myl. & Cr. 484.

Doe v. Porter, 3 Term Rep. 13.

Rees v. Perrot, 4 Car. & P. 230.

Maddon v. White, 2 Term Rep. 159.

NEW SERIES, XXVIII.—CHANC.

Mr. J. Pearson (with whom was *Mr. Toller*), for the incumbrancers on the life estate of Henry Arnold.—The tenant for life had no power to create or renew a tenancy lasting beyond his own life, and the interest of the tenant therefore ceased at his death. The consequence is, the rent is apportionable.—

Kevill v. Davies, 15 Sim. 466.

Parker v. Constable, 3 Wils. 25.

Right d. Flower v. Darby, 1 Term Rep. 159.

Tomkins v. Lawrance, 8 Car. & P. 729.

Birch v. Wright, 1 Term Rep. 378.

Mr. Daniel, in reply.

Jan. 28.—WOOD, V.C.—The question in this case is new; for after an anxious examination of all the authorities, I have found no case exactly in point, although there is one which comes very near the present. I had a very strong impression that the tenancy being renewed by payment of rent from year to year, a new contract arose year by year, and consequently, that the tenancy was determined by the death of the tenant for life, in which case there would of course be an apportionment. However, it appears from the judgment of Buller, J., in *Right v. Darby*, that as early as Henry the Eighth's time, it was determined that a tenant from year to year was entitled to half a year's notice to quit, to expire at the end of the year. In *Doe d. Rigge v. Bell* (1), which was a case of a parol demise for seven years, with an agreement that the tenant should enter at Lady-day and quit at Candlemas, though the lease was void by the Statute of Frauds as to the duration of the term, yet Lord Kenyon held, that the tenant held under the terms of the lease in other respects, as to the rent, the time of the year when the tenant was to quit, &c., and that a person who entered on that demise and paid rent, would be a tenant from year to year, and that view has been adopted since. There is a very early case of *Legg v. Strudwick* (2), which was a case of a demise to A. *habendum de anno in annum, et sic ultra quamdiu ambabus partibus placeret*, to commence

(1) 5 Term Rep. 471

(2) 2 Salk. 414.

from Lady-day 1703, rendering an annual rent, payable quarterly. The lessee entered, and died on the 17th of December 1706, and the lord distrained for rent for a year and a half, ending at Christmas; and it was held, first, that after the two years the lessor or lessee might determine; but if the lessee held on, he was not then tenant at will, but for a year certain; for his holding on must be taken to be an agreement to the original contract, and in execution of it; and the first contract was from year to year. Secondly, the third year is not in the nature of a distinct interest, because it arises from the same executory contract, and therefore the lessor may distrain the third year for the rent of the second; and such an executory contract as this is not void by the Statute of Frauds, though it be for more than three years, because there is hereby no term for above two years ever subsisting at the same time, and there can be no grant to a purchaser, for the utmost interest that can be to bind him can be only one year. That case is referred to by Buller, J., in *Birch v. Wright*, as authorizing the position, that where a tenant from year to year holds on for several years, the demise may be laid as a demise originally for that number of years; it might be laid as a demise for each succeeding year, but it might also be laid as a demise from the original date of the contract. In many cases it has been held, that a person taking a new interest may lay the demise as a new contract—*Tomkins v. Lawrance*. The effect of the two classes of cases is, that you may either lay the demise as commencing from the time of the original contract, or as commencing with any particular year of the tenancy. The next question is, what is the effect of being able to lay the demise from the date of the original tenancy, in the case of a devise by the original owner to one for life, with remainder in fee to another? Abundant authority has shewn, that all persons claiming under the original lessor are bound by the terms of the original contract, which is not determinable, except by notice expiring at the proper quarter-day, and the tenant for life could not determine the tenancy, except on the same terms as the original lessor through whom he claims must have ob-

served. In *Botheroyd v. Woolley* (3) the facts were these:—A tenant in fee of premises let to tenants from year to year, died in the middle of a quarter, having devised the premises to his widow for life. She died within the year of tenancy following the death of the testator, and it was held, that the deviser not having given notice to determine the tenancy, it continued after his death, and a new tenancy was not created by the tenant for life; and she having died in the middle of a quarter, her administratrix was not entitled to an apportionment of the rent. The exact point, however, which occurs here did not arise in that case, for the tenancy was continued not by the tenant for life, but by the testator's omission to give notice. The case of *Kevill v. Davies* was as follows:—A, on his father's death, became tenant in tail in possession, with remainder to his younger brother in tail, and a suit was instituted on behalf of A. and his brother, who was entitled to a portion out of the estate, and a receiver was appointed. Upon the death of A. without issue, his administratrix was held entitled to a proportionate part of the rents. That case does not touch the point here; for the letting was by the receiver on behalf of the tenant in tail alone. On the other hand, in *Brown v. Candler* (4), which is referred to in the argument of *Botheroyd v. Woolley*, although a receiver had been appointed, the Lord Chancellor, reversing the decision of the Master of the Rolls, directed the whole rent to be paid to the remainderman. Therefore, the whole case comes back to the view taken by the Courts of law. In *Pike v. Eyre* (5) a tenant from year to year subdemised from year to year, and in pleading the latter it was described as a tenancy from year to year, and so from year to year, as long as the parties should respectively please, during the continuance of the demise to the party who subdemised, and this was held to be a proper description of the legal effect of the

(3) 5 Tyrw. 522; s. c. 4 Law J. Rep. (n.s.) Exch. 153.

(4) 9 Law J. Rep. Chanc. 212.

(5) 9 B. & C. 909; s. c. 4 M. & R. 661; 8 Law J. Rep. K.B. 69.

subdemise. *Oxley v. James* (6) was a more singular case. A tenant from year to year had demised for thirty-four years, and the under-lessees again demised for eighteen years; and it was held, that as the lessees of the term actually continued in possession during the thirty-four years, their interest and that of their under-tenant might be described in pleading either as an estate from year to year, or as an estate for the term of years, and therefore they had a reversion upon the subdemise. The observations of Parke, B. made during the argument are important. He says, "If he has a *defeasible* reversion, until it be defeated, has he not a good reversion upon the sublease? *Legg v. Stradwick* and *Bac. Abr. 'Leases' (L, 3)* shew what is the nature of an estate from year to year; namely, a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. A demise, therefore, by such a person for a term of years is no assignment: he never means to part with the whole benefit of that interest. It is a term for so many years, subject to determination by the cessation of the original interest." The effect of that case is, that you take a new interest every year, and refer it to the original contract. That original contract can only be determined by notice. The tenant for life has an opportunity of breaking off the contract at the end of any year of the tenancy; but until that is done I apprehend it is not competent for the reversioner to determine it. I think the true view of the authorities is taken by Parke, B. in *Oxley v. James*. I cannot enter into the question of inconvenience. It is probably by an oversight that the statute of Will. 4. does not apply to leases created by parol, but I cannot remedy that. It will therefore be declared, that the petitioner is entitled to the entire half-year's rent due at Michaelmas 1858, from the tenants who held from year to year without written instruments.

M.R. }
Dec. 14. } POWELL v. HELLICAR.

Donatio Mortis Causa—Symbolical Delivery—Agent—Infants.

A lady had a dressing-case and a box, both containing jewellery; the dressing case was in her possession at the place where she died, the box was at her residence. On her death - bed she delivered the keys to her servant, with directions to deliver both to the plaintiffs in the event of her dying:—Held, that this did not amount to a donatio mortis causa (1).

Elizabeth Fuidge was possessed of a watch, some trinkets and other jewellery; a part of these were kept in her dressing-case and a part in a box. The dressing-case she had with her at Weston-super-Mare, where she had been staying for her health, and the box was at her residence in Clifton. She always kept both locked, and retained the keys in her possession. She was very ill, and under the idea that she was dying, she, on the 13th of July 1858, a week previous to her death, requested Mary Fisher, her servant, to take the keys of the dressing-case and box, and keep them until after her (Elizabeth Fuidge's) death, when she was immediately to deliver the watch and trinkets in the dressing-case and box to the plaintiffs, Catherine Elizabeth Powell, Mary Ann Powell and Charles Turner Powell, who were infants. The servant accordingly complied with this request; she delivered the keys and also the dressing-case and box, with the watch, trinkets and jewellery to the plaintiff C. E. Powell, and she had since retained the same in her possession. It was, however, questioned whether this gift could take effect as a *donatio mortis causa*.

Mr. R. Palmer and Mr. Freeling.—The gift is good: the servant was made the common agent both for the donor and the donee.—

Duffield v. Elwes, 1 Sim. & S. 239; s. c. 1 Bligh, N.S. 497; 1 Law J. Rep. Chanc. 239.

(6) 13 Mee. & W. 209; s. c. 13 Law J. Rep. (1st) Exch. 358.

(1) *Moore v. Darton*, 4 De Gex & Sm. 517; s. c. 20 Law J. Rep. (N.S.) Chanc. 626.

Jones v. Selby, Prec. Ch. 301.

Tate v. Hilbert, 2 Ves. jun. 111; s. c. 4 Bro. C.C. 286.

Bunn v. Markham, 7 Taunt. 224.

Miller v. Miller, 3 P. Wms. 356.

Drury v. Smith, 1 Ibid. 404.

Snellgrove v. Baily, 3 Atk. 214.

Bouts v. Ellis, 17 Beav. 121; s. c. 4

De Gex, M. & G. 249; 22 Law J.

Rep. (N.S.) Chanc. 716.

Mr. Selwyn and Mr. Lindley, for the respondents, referred to—

Reddel v. Dobree, 10 Sim. 244.

Farquharson v. Cave, 2 Coll. 356; s. c.

15 Law J. Rep. (N.S.) Chanc. 137.

The MASTER OF THE ROLLS.—I have a strong impression against this gift; as a *donatio mortis causa* I think it cannot be supported.

M.R. }
Dec. 17. } BURGESS v. HILL.

Injunction—Trade-marks—Costs.

If one trader, by using the trade-marks or labels of another trader, provokes a suit for the interference of the Court, the defendant, though he withdraws the marks or labels, and consents to a perpetual injunction, will still be liable to the costs of the suit, and if he does not pay them, or refuses to pay them, the plaintiff will be justified in setting down the cause and bringing it on for hearing.

The plaintiff instituted this suit to restrain the defendant from using his trade-marks or labels.

The defendant undertook to withdraw the trade-marks or labels, and to submit to a decree for a perpetual injunction, but he refused to pay the costs of the suit. The plaintiff was, therefore, compelled to set the cause down, and it now came on for hearing. The only question, however, was as to the costs.

Mr. R. Palmer and Mr. R. Moore, for the plaintiff, referred to—

Millington v. Fox, 3 Myl. & Cr. 338.

Sirell v. Abraham, 8 Beav. 598.

Chappell v. Davidson, 2 K. & Jo. 123.

Mr. Cottrell, for the defendant.

The MASTER OF THE ROLLS.—This case arises from mistaken advice and erroneous views. The parties might have easily settled this litigation. The plaintiff had a right to a trade-mark or label; it was interfered with by the defendant, to what extent it was impossible for him to tell; he therefore applied to this Court for an injunction to restrain the interference with his rights. I give the defendant credit for his statement when he says that he did not know he was doing wrong. There is, however, a maxim without which no Court could proceed, that *ignorantia legis neminem excusat*; were it not so, it would be impossible to say that a person was liable to make redress to another with whose rights he had interfered, simply because he was ignorant that he was interfering with another's rights. The Court is bound to instruct parties that they must not interfere with the rights of others. It has been said that it would be useful if, on all occasions, a plaintiff, before he filed his bill, were to apply to the defendant and ask him whether he would accede to his demand. In that I concur, but it is not the rule of the Court, and it could not be acted on, as in many cases before an injunction could be obtained the injury would have been completed. In this case, however, the plaintiff had an undoubted right to ask for an injunction to restrain the use of his trade-mark or label. The defendant properly said, "I have no wish to interfere with your trade-mark or label; I was not aware I was doing a wrong, and I will undertake not to do so in future, and I will take the labels off the bottles, that no more may be sold under them"; there would have been nothing more to do had he gone on to say what the defendant did in *Millington v. Fox*, "I will make you compensation for any injury you may have sustained"; or if he had said, "I will pay the costs of the suit," for I should not have required him to make an offer so extensive as that made in *Millington v. Fox*. The language there was, "any injury you may have sustained"; these words would have included not merely the costs of the suit but they would have extended to an injury the plaintiff might have experienced

in his trade by the use of the trade-marks. I should have considered the costs sufficient—all that could have been required of him. The defendant, however, sought an interview with the plaintiff's solicitor, who told him that the costs would be 50*l.*, and he afterwards wrote to him, saying, "You must pay the costs of the suit; they will be 50*l.*" The defendant, probably thinking it a large sum (and it seems a large sum) for costs up to that time, wrote, saying, "I will accede to the injunction being made perpetual, but the parties must pay their own costs." The answer to that was, "No; you must pay the costs of the suit"; and the solicitor adds, "you promised to pay them." The letter can only mean, you must pay the costs, they will be about 50*l.* If the defendant had said in answer, "I will pay you what is reasonable for the costs of the suit, but they must be taxed, so that I may not be called upon to pay more than I ought," I should have viewed the matter in a very different light. There was some further correspondence, but as it was written without prejudice I take no notice of it, as it ought not to be read. Considering, then, the course of the Court, how, under such circumstances, could the defendant come here and say, "the plaintiff must pay his costs"? If the plaintiff had given notice of motion, and the defendant had resisted, the simple effect would have been that the Court would have refused the motion, with costs. He had no means of getting the costs, except by proceeding to the hearing of the cause. It is certainly to be regretted, that it should be made necessary for the plaintiff to incur the further expense of hearing the cause, for the purpose of getting the costs to which he was entitled. In *Millington v. Fox*, where the offer had been to do everything, which, of course, would have included the costs up to the time when he received notice, it was held, that the plaintiff should not have his costs, only on the ground that he went on to do something which he afterwards abandoned. In this case the litigation seems to have proceeded upon some mistake of the rights of the parties, and possibly some little temper. I, however, have power only to administer the law and protect the rights of the parties. If the defendant had offered

the plaintiff what he was entitled to, and the plaintiff had proceeded with the suit, I would not have given him a penny more costs after that period; indeed, I should have striven to make him pay the subsequent costs. As, however, the defendant has made no offer, I must make a decree for a perpetual injunction, and the defendant must pay the costs.

M.R. { CAILLAUD'S PATENT TANNING
Jan. 11. { COMPANY (LIMITED) v.
CAILLAUD.

Costs, Security for—Limited Companies
—20 & 21 Vict. c. 14. s. 24.

The Court will not require from a limited company security to be given for costs at the instance of a defendant who alleges that the plaintiffs are insolvent, since the solvency or insolvency of the plaintiffs can only be ascertained on the accounts being taken.

This suit was instituted, by the company, against the defendant, their late manager, who now moved under the 20 & 21 Vict. c. 14. s. 24. (1) that all further proceedings might be stayed until the plaintiffs gave security for costs. The defendant by his affidavit stated, that the company was incorporated under the Joint-Stock Companies Acts, 1856, 1857, with limited liability; that all the shares, with the exception of one, had been fully paid up by the shareholders; that the one shareholder who had not paid up was a bankrupt; that the company had ceased all business, and had not carried on any mercantile operations for several months; that the whole stock and plant had been sold, and that proceedings had been taken to wind

(1) The section is as follows:—"Where a limited company is plaintiff or pursuer in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter may, if it be proved to his satisfaction that there is reason to believe that, if the defendant be successful in his defence, the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security be given."

up the company; that the company was insolvent and unable to pay its debts, and that the defendant, if he succeeded in the suit, would, in the absence of security, be unable to obtain any costs, as the assets of the company were insufficient to pay them.

Mr. Hughes, in support of the motion.

Mr. Cracknall, for the company.—There is nothing in the defendant's affidavit to shew that the company is insolvent, and the Court will not assume it.

THE MASTER OF THE ROLLS.—The act cannot mean to dispense with the judgment of the Court; it requires proof to the satisfaction of the Court that the assets of the company will be insufficient to pay the costs. Before any such conclusion can be arrived at, the cause must be heard and the accounts must be taken. I am compelled, therefore, to refuse the motion; but as the point is new, the costs must be costs in the cause.

KINDERSLEY, V.C. }
Jan. 17. } BIGNOLD v. GILES.

Legacy—Annuity, Duration of.

*A testator gave a sum of 4,300*l.* consols to his executors, upon trust as to the annual dividends thereof, amounting to 129*l.*, to pay his brother and two sisters an annuity of 20*l.* each during their lives; the remainder of the said dividends he directed to be paid to his nephew during his life; and as and when the brother and two sisters should die, then the three annuities of 20*l.* were to be paid to A, B. and C, the eldest taking the first of the said annuities that should fall in, and the others in like manner by seniority. And after the decease of the survivor of A, B. and C, then the principal sum of 4,300*l.* was given to Ann Beale:—Held, that the bequests to A, B. and C. were gifts of certain portions of the dividends of the capital sum of money, and not annuities; and that the personal representative of one of the three who had died was entitled to receive his annual sum of 20*l.* until the death of the survivor of the three.*

This case came before the Court, on the

7th of December last, when the Vice Chancellor decided the principal question arising in the suit, but directed the case to stand over for argument upon the construction of the will of the testator in the cause, and directed that certain other parties should be brought before the Court (1).

The testator, Joachim Hibberd, by his will, dated the 8th of December 1819, appointed his brother J. Hibberd and Charles Beale his executors; and he directed, as regarded a particular sum of 4,300*l.* in the 3*l.* per cents., that the said sum should remain there and be transferred into the names of his executors, or the survivor of them, their or his executors or administrators for the uses and purposes following, that is to say, as to the annual dividends or interest then payable thereon amounting to 129*l.* per annum, in trust to pay to his brother James Hibberd, and to his two sisters, Patience Lane and Susannah Bowring, one clear yearly annuity or sum of 20*l.* each during their lives, and the remainder of the said dividends or interest of 129*l.* he directed to be paid to his nephew Robert Samuel Hibberd during his life; and as and when the testator's said brother James and sisters Patience and Susannah should depart this life, then he directed that the three several annuities of 20*l.* each should devolve and be paid to Louisa Hibberd (afterwards the wife of Stephen Webb), the said Robert Samuel Hibberd and Elizabeth Hibberd (afterwards the wife of John Riley, and since deceased), the eldest taking the first of the said annuities that should fall, and the others in like manner by seniority; and after the decease of the survivor of them, the said Louisa Hibberd, R. S. Hibberd and Elizabeth, then the testator gave and bequeathed the principal sum of 4,300*l.* in the 3*l.* per cents., and all interest due thereon, if any, to the said Ann Beale, her heirs and assigns, and to be disposed of by will or otherwise as she might think fit. The testator died in 1820, and none of the annuitants mentioned in his will were now living except Louisa Hibberd. The annuitant R. S. Hibberd on his death left Robert Hibberd his personal representa-

(1) *Ante*, p. 238.

tive; and the question now raised was, whether the annuity which was given to R. S. Hibberd during his life terminated upon his death, and then fell into the share given to Ann Beale, or whether the said annuity was to continue until the death of Louisa Hibberd, the last surviving annuitant, and to be paid during such time to the personal representative of R. S. Hibberd.

Mr. Goldsmid and *Mr. Martindale* appeared for the plaintiff.

Mr. Glasse and *Mr. W. Cooper*, for the executors.

Mr. Murray, for the personal representative of Robert Samuel Hibberd.

The following cases were cited:—

Robinson v. Hunt, 4 Beav. 450.

Potter v. Baker, 13 Ibid. 273; s. c. on appeal, 21 Law J. Rep. (N.S.) Chanc. 11.

Pawson v. Pawson, 19 Beav. 146; s. c. 23 Law J. Rep. (N.S.) Chanc. 954.

Wilson v. Maddison, 2 You. & C. C.C. 372; s. c. 12 Law J. Rep. (N.S.) Chanc. 420.

Stokes v. Heron, 12 Cl. & F. 161.

Kerr v. the Middlesex Hospital, 2 De Gex, M. & G. 576; s. c. 22 Law J. Rep. (N.S.) Chanc. 355.

Blewitt v. Roberts, Cr. & Ph. 274; s. c. 10 Law J. Rep. (N.S.) Chanc. 342.

The VICE CHANCELLOR.—It is impossible to avoid saying that the present question is open to a certain degree of doubt. If I am to resort to first principles, irrespective of the authorities, I should say this:—An annuity is a right in some person or persons to receive for life, or some other time, a certain sum of money yearly; that is, an annuity may be given for life, for years, or for any other period; and it may be given to a man and his children. If given to a man and directed to be paid to him out of personal assets, but at the same time given to him "and his heirs," it will go, like real estate, on the death of the person who first takes it, to his heir. So again, an annuity may be given to a man and "the heirs of his

body;" though that gift will not create an estate tail in the annuity, it will impart such a character of realty to it as to create an interest in the nature of a base fee in it. It does not create an estate tail in the annuity, because an annuity is not within the Statute *de Donis*. Although an annuity is a hereditament, it is not a tenement, and so not within that statute. An annuity may be given by almost any form of words to any one, for any period of time, as I have said. It may be given to a man, without mentioning any period of time—it may be simply given to "A." We know that if lands be so given to a man, he has only an estate in them for life; but when an annuity is so given, what, in the absence of any direct authority, is the effect of such a gift? If the annuity is to be considered as of the nature of realty, the want of words of inheritance would, so far as preventing it from descending, restrict the enjoyment to the life of the annuitant. If you regard it as personalty, the simple gift to "A," without more, may confer an absolute interest in it. But then, if we look at the intention of testators, in ninety-nine cases out of a hundred they mean to confer on the annuitant an estate for his or her life only. And I think, now at least, the decisions are to the effect, that the gift of an annuity "to A," without anything further—without any provision for the payment of the annuity, without any specific fund being appropriated, and without any limit being fixed for the enjoyment of the annuity—such a gift of it would be held a gift for the life only of the annuitant. If you add to that gift a direction that the payment of the annuity shall be provided for by the investment of a sum of money in the 3½ per cent. consols—the very provision which this Court, in the absence of any other, would direct to be made to meet the annuity—I should have thought that the addition of such a direction would not have altered the nature of the annuity—would not have affected the limit of its duration. And why? Because you require an investment of some sort to meet a life annuity, as well as an absolute or perpetual annuity. The only real distinction between the two is this—that in the latter case the

annuitant is entitled to the *corpus* of the invested fund. I think, then, it appears clear, that in the absence of authority upon the point, a mere appropriation of a fund to meet an annuity ought not to alter the nature of the annuity. But if the gift of the annuity is such, on a fair construction of the donor's intention, as to shew that he meant, in truth, to give a certain portion of the dividends of a sum of stock; is such a gift on precisely the same footing as the gift of an annuity,—of an annuity, I mean, *simpliciter*, as such? Now, I must own that I think that distinction has been the ground of the decisions pronounced by this court; and what I have to consider here is, whether the gift in this instance is the gift of an annuity *simpliciter*, or of a portion of the dividends of a certain sum of stock, either actually invested or directed to be invested? It does appear to me—looking at the words of this will—that the gift is a gift of the dividends upon a sum of stock. There is a gift of the sum of 4,300*l.*, already invested, to trustees, for the uses and purposes mentioned in the will, that is to say, as to the annual dividends or interest thereon, amounting to 129*l.* per annum, in trust to pay three persons an annuity of 20*l.* each during their lives, and the remainder of the dividends the testator directed to be paid to Robert Samuel Hibberd for life; and as and when the three first-named annuitants should die, then the three several 20*l.* annuities should be paid to three persons, Louisa Hibberd, Robert Samuel Hibberd and Elizabeth Hibberd, the eldest taking the first of the annuities that should fall in, and the others in like manner by seniority; and after the survivor of these three persons, the testator gave the principal sum of 4,300*l.* to Ann Beale. This seems to me to be a totally different gift from that of an annuity *quæ* annuity, *simpliciter*; and by so regarding it, the language of the will directing the devolution of the respective sums is rendered quite accurate. There is a gift of a portion of the dividends of this fund, on the dropping in of certain lives, to three other persons, in sums of 20*l.* each; but a gift of those sums for how long? that is the question. What are the restrictive words? Are there any? We find that

there are; for there is a gift over of the principal fund to Ann Beale. When? Why, after the decease of the survivor of them, the said Louisa Hibberd, Robert Samuel Hibberd and Elizabeth Hibberd. Without the gift over, Ann Beale could not, under this part of the will, take any interest in the 4,300*l.* stock; and she only takes an interest in it—in so much of it as is appropriated to these three annuities, so to say—on the decease of the survivor of the annuitants I have just now mentioned. I may ask, with reference to observations made as to the general principles of the construction of wills by which the Court arrives at the intention of a testator—where a man in one part of his will, in giving an annuity, clearly and distinctly expresses his meaning by particular words, and then in another part of the will he gives another annuity, but omits the one particular word before used—why should you infer that he means the same thing in both instances? Here the testator has elsewhere in his will clearly and distinctly given a life annuity—in plain terms he has so given one, and in terms differing from the gift of the annuities in this instance. I call them annuities, but in strictness, upon principle, and on the authorities, the gift of these sums of 20*l.* is a gift of part of the dividends of a sum of stock, and is not within that series of cases which deals with gifts of annuities to a class of persons, or one of a class. I am of opinion that the gift of the annuity to Robert Samuel Hibberd was a gift of it to him until the death of the survivor of Louisa Webb, himself and Elizabeth Riley. The consequence of my opinion is, that the death of one of this set of annuitants would not prevent his representative from taking it under this bequest. That, possibly, is a contingency which the testator did not foresee, but which, had he been told it, he might have anticipated. That, of course, I cannot say; but, at all events, the representative of Robert Samuel Hibberd is entitled; and Ann Beale, or her representative, takes nothing of the fund appropriated to meet these three annuities until the death of Louisa Webb.

KINDERSLEY, V.C. }
Feb. 14. } LORD v. COLVIN.

Domicil.

A. B., a Scotchman by birth, and having property in Scotland, went to India, and remained there for many years. On his return, he resided for five years on his property in Scotland, expending money upon such property, and considerably improving it. He then left Scotland, in consequence of certain unpleasant domestic events, and went to Paris, where he resided for five years, purchasing expensive furniture and keeping up an establishment there. During this time he still retained domestics at his house in Scotland, and constantly gave directions by letter as to the superintendence of his property, and particularly as to the management of his horses and other animals there. His furniture was left in Scotland, but ready packed up for immediate removal. He died in France :—Held, that his domicil was Scotch, and not French ; the Court acting upon the principle that slighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicil and to resume his domicil of origin, than that he means to abandon his domicil of origin and to acquire a foreign domicil.

This was one of several suits, instituted respecting the property of the testator in the cause, Dr. Peter Cochrane. The present plaintiff represented the widow of the eldest son of the testator, and the defendants were the representatives of the executors under the will. There were two important questions for decision : one was, as to the validity of the marriage of Dr. Cochrane to a native Indian lady, and the other, a question of domicil ; and upon these questions would depend the distribution of the testator's estate. Dr. Peter Cochrane, the testator, was born in 1754, at Kilbarchan, in Scotland, where his family had an estate, called "Clippens," and which estate subsequently came into the possession of Dr. Cochrane by purchase. Dr. Cochrane entered the medical department of the East India Company's service, in the year 1780, and from that time he was resident in India. It was alleged, that in 1790, he was married to a native Indian lady, called Raheim Beebee, at Ferucka-

bad, according to the rites of the Moham-medan faith, by a priest of that religion. On the 17th of December 1807, a daughter was born at Cawnpore, of that alleged marriage, namely, Susan. In November 1808, Dr. Cochrane was married at Cawnpore, to Margaret Douglas Fearon, an English lady, his first alleged wife being still alive, and continuing to live with him as his housekeeper. On the 18th of December 1811, there was a son born of the last marriage with Miss Fearon, called "Peter," and another son, named "John," was born in 1813 of the same marriage.

In December 1818, Dr. Cochrane made a will in India, in the English form, and in January 1819 he left India and came back to Europe. On his return he stayed some time in London and in Edinburgh, and went in the autumn of 1820 to reside at Clippens, where he had had a new house built for him according to instructions sent home from India. He continued to live at Clippens, where he greatly improved the property by building, &c., until the month of May 1825, when he left Scotland, and after visiting Berne, in Switzerland, for a short period, he took up his residence in Paris. It was said, that his departure from Clippens was caused by certain rumours being spread respecting an undue intimacy between Mrs. Cochrane and a groom named Daniel Pearson, and also on account of some quarrel about the rates and taxes of the parish. On the 25th of August 1821, while resident at Clippens, the testator made a second will, which was nearly in the same terms as the will he had executed in India. When he left Clippens, he placed two or three servants in charge of his house and property. In August 1825, the testator's daughter Susan, by Raheim Beebee, who had been brought over to England for education, was sent out to India, where in 1826 she married Capt. Henry Moorhouse, and her father settled 2,000*l.* per annum upon her. When Dr. Cochrane first went to Paris, he resided for six months at a house No. 11, Boulevard des Capucines, where he had furnished apartments. He afterwards purchased the furniture of the tenant, and bought additional costly furniture. In January 1830, he removed from the Boulevard des Capucines, to No. 6,

Place Vendôme, where he took the first floor, unfurnished, upon a lease, determinable at any time by giving three months' notice. His two sons during this time were placed with different tutors in France. Dr. Cochrane, while residing in Paris, had been in the habit repeatedly of writing to his gardener, John Crow, and to his other servants at Clippens, giving the most minute directions as to the way in which he desired everything to be carried on at that place. He had brought once from India several fine Arab horses, and these were all left at Clippens, in the charge of his men. He had also dogs, pigeons and other animals, in which he took considerable interest, and frequently made the most minute inquiries concerning them. In 1829, Dr. Cochrane came over to England, and went to stay in Scotland, at a place near his house "Clippens," which place he repeatedly visited, but he did not sleep in the house. While in Scotland, in 1829, Dr. Cochrane made a deed of settlement or trust disposition, in the Scotch form, which was executed by him in London, on the 13th of October.

By this instrument he conveyed, transferred, devised, &c., to his wife Margaret Douglas Fearon, or Cochrane, David Colvin, James Colvin, and to the senior partner for the time being of the firm of Colvin & Co., of Calcutta, as trustees, his whole means and effects, heritable and movable, of whatever kind or description, and wherever situate, upon trust, after paying debts and funeral expenses, &c., to make an inventory of his furniture and household effects, and deliver the same for a life-rent for his wife for her life, and after her decease to divide the same equally between Peter Cochrane and John Cochrane, his two lawful sons. There was then a gift of all his real property to his wife for life, and afterwards to his son Peter, absolutely, charged with certain annuities, with a gift to Raheim Beebee of 100 sicca rupees monthly and the use of the house in Calcutta. There was an ultimate gift of the remainder of his whole personal property to his sons and their children, the same to be payable to his sons at the age of twenty-five, and in case of their dying without issue, then to the children of Mrs. Susan Cochrane, in manner therein mentioned.

In the year 1831, Peter Cochrane, the son of the testator, married Eleanor Fuller, then a lady's maid in the service of his aunt, Mrs. Baker, clandestinely, which it was alleged had greatly displeased his father. The trust disposition executed by the testator was established as a will in a suit of *Cochrane v. Cochrane*, by a decree of the Master of the Rolls, dated the 6th of June 1834. Under that decree the accounts were directed to be taken on the assumption that the domicile of the testator was English, but doubts had since been raised, and the present suit was instituted, for the purpose of having that and other questions determined. The testator died on the 8th of June 1831. The testator's widow died intestate, on the 19th of September 1834, and administration to her estate was granted to Peter Cochrane, the son. On the 25th of April 1835, John Cochrane died intestate and unmarried; and on the 24th of July in the same year Peter Cochrane also died intestate and without issue, and administration was granted to his widow, Eleanor Cochrane, who then became administratrix to the widow of Dr. Cochrane and his two sons, Peter and John Cochrane.

On the 11th of June 1836, Eleanor Cochrane married her second husband, Charles Barton, who died on the 23rd of February 1840, and on the 14th of June 1842, she married the plaintiff, James Lord. It appeared that the Indian lady Raheim Beebee died in the year 1849.

Upon the two questions as to the validity of the first alleged marriage of Dr. Cochrane with the Indian lady, and as to the domicile of Dr. Cochrane, a considerable amount of evidence had been collected. Upon the first question, however, this being one purely of fact, a full report will not be necessary. The evidence in support of the question of domicile is more particularly set forth in the judgment of the Court. Upon the decision of the two questions, various other matters would have to be argued, which would affect the ultimate disposition of the property left by Dr. Cochrane, which amounted upwards of 217,000*l.*

Sir R. Bethell, Mr. Anderson, Mr. Giffard and Mr. E. F. Smith appeared for the plaintiffs.

The Attorney General, Mr. Rolt, Mr. Glasse and Mr. Welford, for Mr. and Mrs. Moorhouse.

The Solicitor General, Mr. W. Morris and Mr. W. Jackson, for the representatives of the testator.

Mr. Baily, Mr. G. Lake Russell and Mr. Roxburgh, for the Scotch next-of-kin.

Mr. C. P. Cooper, Mr. Shapter, Mr. C. Hall, Mr. C. M. Roupell, Mr. Moore, Mr. Erskine, Mr. Wakefield, Mr. Mackeson and Mr. Park, for other next-of-kin.

Sir R. Bethell, in reply.

The following authorities were cited during the argument :—

Murray v. Grant, 1 Macq. 178.

Whitelocke v. Baker, 13 Ves. 511.

Forbes v. Forbes, Kay, 341 ; s. c. 23

Law J. Rep. (N.S.) Chanc. 724.

Munroe v. Douglas, 5 Madd. 379.

Monro v. Monro, 7 Cl. & F. 842, 877.

Moorhouse v. Colvin, 15 Beav. 341 ;

s. c. 21 Law J. Rep. (N.S.) Chanc. 177, 782.

Taylor on Evidence, 1, 115, 497, 563.

Story's Conflict of Laws, s. 44.

Macnaghten on Indian Law, ed. 1824, c. 7. ss. 56, 72.

Pothier, ed. 1845, p. 3, 20, 59.

Chancery Amendment Act (15 & 16 Vict. c. 86. ss. 26, 32).

Whicker v. Hume, 31 Law Times, 319.

The arguments in the case took place on several different occasions, and his Honour finally gave judgment on the 14th of February.

KINDERSLEY, V.C.—This suit has been instituted for the purpose of determining the rights of the parties claiming to be entitled to, or interested in the personal estate of Peter Cochrane, commonly called Doctor Peter Cochrane. The personal estate, it seems, amounted to about 217,000*l.*, notwithstanding the drain which has been made upon it for costs. Several peculiar and difficult questions have arisen, but two of those questions lie on the threshold, and upon the determination of them will depend what the subsequent questions for discussion and decision may be, and it has therefore been arranged that those two questions alone are now to be decided.

The first question is one of fact, that is, whether the testator was or was not legally married to a native Indian woman called Raheim Beebee ; and the other question is one of mixed law and fact, that is, what was the domicile of the testator at the time of his death, whether it was Scotch or French ?

His Honour then stated at great length the evidence, which was very voluminous, as to the first question, and came to the decision that the evidence was not sufficient to establish the marriage of Dr. Cochrane with Raheim Beebee, and that consequently Mrs. Moorhouse, the only daughter of the testator by that lady, must be considered as illegitimate. His Honour considered that it was quite improbable that any further evidence could be collected in support of the marriage, and it was therefore useless to direct any further inquiry into the circumstances regarding that marriage.

The Vice Chancellor, in giving his decision upon the second point, as to domicile, said :—In the spring of the year 1819, Dr. Cochrane, with his family, arrived in England on his return from India, having amassed a large fortune in that country. His family consisted of himself, his wife and two sons : Peter, the eldest, born the 18th of December 1811, and John, the youngest, born the 12th of September 1813. His domicile of origin was Scotch. He was the proprietor of a small estate in Renfrewshire, in Scotland, called Clippens, consisting of about sixty Scotch acres, namely, twenty acres of ploughable land, and forty of wood and undrained moss, with an old house, of small size. This estate had been the property of his ancestors for about 200 years, and was his own birthplace. He had bought it about the year 1789, when in India, from the trustees for his father's creditors, and had, before his return from India, caused a new house to be built upon it, larger than the old one, but still of moderate dimensions. The old house was left standing. At the time of his return from India, Clippens was occupied by his sister, Mrs. M'Farlane, then a widow, who died in 1820. In June 1820 Dr. Cochrane took up his abode at Clippens, where he continued to reside until May 1825, with occa-

sional absences at Edinburgh. From very nearly the commencement of this period until the end of it, the boys Peter and John had a tutor residing in the family, the Rev. John Birkmyr, afterwards Doctor of Divinity and Minister of the Dean Church, Edinburgh. In each of the five years of the period above mentioned the family made a visit to Edinburgh, and on one or two of those occasions remained there some months. But those occasional absences did not prevent Clippens from being their home; and there can be no doubt that, from the time Dr. Cochrane arrived in Scotland from India, up to May 1825, the domicile of Dr. Cochrane was Scotch, which was his domicile of origin, and which, assuming it to have been previously changed to an Anglo-Indian domicile, by reason of his long residence in India in the Company's service, reverted upon his taking up his abode at Clippens in June 1820. In May 1825 Dr. Cochrane with his family left Clippens, and proceeded to the Continent. From that time neither he nor any of his family ever, during the remainder of his life, returned to reside at Clippens, nor even to sleep there for a single night, nor did they during that period ever return to Scotland, except for a short visit in the year 1829. The question is, whether in or subsequently to the month of May 1825 Dr. Cochrane abandoned his Scotch domicile, and acquired a domicile in France, in which country he resided for the five years preceding his death. He left Clippens on the 18th of May 1825, on his way to Switzerland, and arrived at Berne, in Switzerland, on the 30th of September following, having in the interval stayed about three months in London, and about three weeks in Paris. His object in going to Berne, was to place his two boys at the school of the celebrated M. Fellenberg, at Hofwyl, in the vicinity of Berne. Accordingly, immediately after their arrival at Berne, the boys were placed at M. Fellenberg's, the Doctor and Mrs. Cochrane remaining at Berne, except perhaps for some short excursions. Scarcely six months, however, had elapsed ere Dr. Cochrane, having found, as he says in a letter to Crow of the 4th of July 1826, very substantial reasons for disapproving both of

the personal conduct and the system of education of M. Fellenberg, resolved to remove the boys altogether from his institution, which he accordingly did on the 2nd of April 1826, and on the 6th of May following, Dr. Cochrane with his family quitted Berne for Paris, where they arrived on the 17th of May 1826, and from that day until the day of Dr. Cochrane's death, which happened on the 8th of June 1831, a period rather exceeding five years, they continued to reside at Paris, with only such occasional absences as I shall mention. In each of the five years of the residence at Paris, Dr. Cochrane and his family made an excursion to some bathing-place on the French coast, Dieppe or Boulogne, returning on each occasion to their abode at Paris. Early in July 1829 Dr. Cochrane and his wife and two sons left Paris for Scotland, by way of Boulogne. They arrived in London on the 21st of July, and remained in London a month. On the 21st of August they left for Glasgow. At that time it must have taken them some days, probably a week at least, to get to Glasgow, as they travelled by posting; so that I think they could not have arrived at Glasgow till towards the end of August. They stayed at Glasgow at an hotel three or four weeks, during which time Dr. Cochrane, and no doubt Mrs. Cochrane and the boys, or some of them, went over two or three times a week to Clippens, but none of them stayed a single night there. About the 20th of September Dr. Cochrane and the family left Glasgow, on their way back to Paris; they stayed some weeks at Edinburgh, and arrived in Paris on the 6th of November.

In April 1830 Mr. and Mrs. Moorhouse came to Paris, on a visit to Dr. and Mrs. Cochrane, and stayed with them until near the end of July, a period of about three months, when they returned to England. On the 2nd of November 1830 Peter, the eldest son, being then under the age of nineteen, married clandestinely Eleanor Fuller, who was lady's maid to his aunt, Mrs. Baker. On the 8th of June 1831 Dr. Cochrane and his wife and two sons left Paris for Boulogne, being in a declining state of health; he was accompanied by a medical man named Young. On the first

evening they arrived at Beauvais, and that same night Dr. Cochrane died. I have said that on that occasion he was on his way to Boulogne. Whether he intended to stop there, or to cross over to England, is a subject of some difference in the evidence; but it appears to me not very important with respect to the question of domicil. There is not the smallest doubt whatever that Dr. Cochrane was intending to return to Paris on that occasion. His establishment remained just as it was; except as to what he took with him, everything remained, which seemed to shew that he was going away intending to come back. No doubt, there is contradictory evidence on that subject; but that is the conclusion I unhesitatingly arrive at. An impression prevailed with some that he was coming over for the purpose of altering his will to the prejudice of his eldest son Peter, with whom he was, of course, much displeased on account of his marriage; and that was certainly Peter's own belief, but I do not think it very important. These are the events, so far as they may be considered material, which occurred between the 18th of May 1825, when Dr. Cochrane and his family left Clippens, and the 8th of June 1831, the day of his death. The question then is, whether Dr. Cochrane had lost his Scotch and acquired a French domicil. It is not my intention to enter upon an elaborate discussion of the various definitions which have been given, or attempted to be given, of the term "domicil"; at the same time it is impossible to avoid some reference to them. I concur in the observation of Lord Cranworth, in *Whicker v. Hume*, that many of them are rather illustrations than definitions. Some of them also appear to me objectionable, because they are expressed in language more or less figurative, which ought never to be the case with what professes to be a definition. Some of the Roman definitions are utterly inapplicable to the present condition and habits of mankind. The Roman definition most frequently cited (that is, the definition from the Roman law), is this, *Cod. Lib. 10, tit. 39, b. 7*:—"In eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus si nihil avocet;

unde cum profectus est peregrinari videtur; quod si rediit, peregrinari jam destitit." I confess it has always appeared to me that this sentence is more to be admired for the neatness of its latinity than for its merits as a legal definition. It seems to me to be open to the objection of being (at least in the first branch of the sentence) expressed in figurative language. Moreover, it depends upon the manner in which it is translated whether it accords with the decisions of our Courts; and I know no Latin sentence more difficult to translate. Almost every important word in the sentence presents some difficulty. The word "larem," which even to a Roman was to a certain extent a figurative expression, may perhaps be properly translated "household," meaning by that term the united body, consisting of a man and his wife, and children and domestics, dwelling together in one abode. "Larem," as I understand it, does not signify the place of abode. The words of the definition are, "In eodem loco," in that place "ubi quis larem constituit," that is, a man has his domicil in that place where he has established his "larem"; and whether the word be "larem" or "lares," it must mean, as I understand it, not the place of residence, but the body which resides there; or perhaps, more correctly, the act of co-residence as members of the same family. That is my understanding of the word "larem;" but I should suggest the meaning of the word "household" to be where a man has established his residence. It is not easy to suggest a translation of the words which follow, "rerum ac fortunarum summam," which shall be faithful to the original and at the same time convey to the mind a precise and definite idea. The word "res" probably here signifies "business"; "fortunæ," no doubt, means "possessions" or "property"; but what does "summam" mean? The proper meaning of the word is "the sum or aggregate," but it is perhaps here used to signify "the chief or principal part," in which sense I think it is sometimes used. Chief Justice Story evidently felt the difficulty of rendering this branch of the sentence into English, and in order to give something intelligible, he has sacrificed accuracy of

translation — he has rendered it thus: "There is no doubt that every person has his domicile in that place which he makes his family residence and principal place of his business." This is obviously rather a paraphrase than a translation. I am not meaning to say an inaccurate paraphrase, but not a strict translation. Again, the term "*peregrinari*," in the last branch of the sentence, requires a particular translation to make the definition agree with the decisions of our Courts. The word properly means, "to be in a foreign country;" but if it be so translated, it would not agree with the proposition, now well established, that a man may establish a domicile in a foreign country, and in which he still continues to be a foreigner. The word "*peregrinari*" must, therefore, be translated "to be a wanderer," viz. from home, and so Chief Justice Story translates it. Therefore, if this celebrated passage from the Roman law is to be used as a definition by which our Courts of justice are to be guided, I think it must be translated in some such form as this: "There is no doubt that every person has his domicile in that place where he has established his household, or," if you please, "his family residence, and the chief part or bulk of his business and of his property; from which he is not intending to depart, if nothing calls him away; from which when he goes away he seems to be wandering from home; and from which when he has returned to it he has ceased to be wandering." Thus translated, or in some such way as that, the sentence may not, perhaps, be objected to on the score of inaccuracy, though it is still open to the observation that a man may have his family residence, his "*larem*," whatever it means, in one country, and the chief part or bulk of his property—"rerum"—and even the chief part or bulk of his business, "*fortunarum suarum*" in another. Voet's definition seems to me as little open to objection on the score of inaccuracy as any (1):—"Proprie dictum domicilium est quod quis sibi constituit animo, inde non discedendi si non aliud advocet aliud insuper." *Vattel*, b. 1. c. 19. s. 22, defines "domicil" to be a fixed residence in any place, with an intention

of always staying there. Upon which Chief Justice Story justly remarks, "This is not an accurate statement; it would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed, without any present intention of removing therefrom." I would observe, however, that this emendation of Chief Justice Story, though a decided improvement upon *Vattel*, would not, perhaps, quite agree with the decisions of the English Courts, with respect to Scotchmen going to India in the service of the East India Company. They have always been held by a well-established rule to acquire an Anglo-Indian domicile, and if they die while they have that domicile, their effects will be administered according to the Anglo-Indian law, that is, English law; and yet ninety-nine out of every hundred servants of the Company, when they go out to India, and while they remain there, entertain, and are continually declaring a settled and abiding purpose and intention to return home as soon as they can accumulate a sufficient fortune. I would venture to suggest that the definition of an acquired domicile might stand thus: "That place is properly the domicile of a person, in which he has voluntarily fixed the habitation of himself and his family, not for a mere special and temporary purpose, but with a present intention of making it his permanent home, unless and until something (which is unexpected, or uncertain) shall occur to induce him to adopt some other permanent home." I am disposed to think that the definition thus modified will be found to be in accordance with most, if not all, of the leading decisions on the subject of acquired domicile. But whatever may be the most correct and proper terms in which to frame a definition of domicile, this, at least, is clear and beyond controversy, that to constitute an acquired domicile, two things are required—act and intention—"factum et animus." To use the language of the eminent American jurist, to whose admirable writings I have before referred, "Two things must concur to constitute domicile" (of course he is speaking of acquired domicile): "first, residence; and, secondly, the intention of making it the home of the party." There must be the fact and the

(1) Voet ad Pandectus, lib. 5. tit. 1, 94.

intent; for, as Pothier has truly observed, a person cannot establish a domicile in a place except it be *animo et facto*. Now, in the case of Dr. Cochrane, with respect to the *factum* there is no doubt whatever. It is certain that for full five years next preceding his death he resided in France. During the whole of that time he dwelt with his wife and family at Paris, never quitting it, except occasionally for special temporary purposes, on each of which occasions he quitted it with the intention of speedily returning to it, which intention was always fulfilled except on the last occasion, when death overtook him at the end of the first day's journey from his dwelling. So far as relates to the *factum* of residence, there was, undoubtedly, such a residence in France as would be amply sufficient for the constitution of a French domicile. It remains then to consider what was the *animus*, the intent, of Dr. Cochrane, with respect to this residence in France? And this must be ascertained by a minute examination of the circumstances, the condition and the conduct of Dr. Cochrane, and the expressions used by him, both in writing and verbally. Now it strikes me in the outset that there are some particulars to be noticed in the circumstances and condition of Dr. Cochrane, the tendency of which is strong towards the opinion that he was not likely to intend to establish a permanent abode in a foreign country. He and all his ancestors were Scotch; for some 200 years, the family had been settled at Clippens, which, though but a small estate, made the owner a landed proprietor or laird. He was himself born at Clippens, in the old house, which he did not cause to be pulled down when he built a new one, and which, with reference to old associations, he constantly refused to pull down when urged by his friends to do so, as it was a "desight" to the premises. He had not, indeed, actually inherited the property, for while in India he had bought it from the trustees for his father's creditors, and indeed his letters written at the time seem to me to indicate that he made the purchase with some reluctance; but I think that the evidence tends decidedly to shew that at least after he came to reside at Clippens he felt a great interest in the place, and even a

strong attachment to it. He had returned from India with a large fortune, and had laid out money in improving the premises. As he was by no means without family pride, so also he (as well as his wife) was not altogether free from love of ostentation and display, although he was not so much influenced by these tendencies as to prevent his being a man of strong good sense. His great passion was a love for horses. He had brought over some Arab horses from India, from which he bred, and it seems to me from his letters, and, indeed, from other parts of the evidence, that nothing occupied so much of his time and attention as the increase and improvement of his stud. In connexion with this pursuit he had, in or about 1821, built at considerable expense a spacious riding-school at Clippens, as well as new stables. His love of animals was not confined to horses; his poultry-yard seems to have been an object of his attention, and was numerous stocked with native and foreign breeds. He had a great regard for the pigeons in his dovecote, waging a fierce war with their destroyers, the owls; and even the rooks that frequented the premises found in him a protector against the fowling-pieces of the neighbours. All these tastes and tendencies might obviously be more easily and freely indulged and enjoyed by continuing to reside at Clippens, than by going to reside at any place on the Continent. In short, from these considerations it appears to me that, *prima facie* at least, it would be justly considered very improbable that Dr. Cochrane should at any time entertain an intention of establishing his permanent abode in France, or, indeed, at any other place than Clippens. If he at any time formed such an intention, it must have been under the operation and influence of some motive or motives of no trifling cogency. Let me now inquire, what were the motives which induced Dr. Cochrane to go away from Clippens in May 1825? Three motives have been assigned for Dr. Cochrane's leaving Clippens: first, a desire to educate his two sons at Hofwyl, in Switzerland; secondly, his displeasure with his neighbours at being, as he thought, unjustly assessed for parochial charges; and, thirdly, the finding that his neighbours avoided the society of his family by

reasons of rumours as to Mrs. Cochrane's conduct.

The Vice Chancellor then went through the evidence in support of each of these alleged motives ; concluding with observations to the following effect :—that, although the first motive might have operated most strongly to induce Dr. Cochrane to leave Clippens, though only for a temporary purpose, the third, no doubt, influenced him, not only in leaving Clippens, but also in staying away when the temporary purpose was satisfied. It might be that Dr. Cochrane contemplated an absence from Clippens for some time, but the evidence also tended to the conclusion that he meant ultimately to return to it. He left Clippens for Berne in May 1825. Being dissatisfied with the system of education at Berne, he left that place and with his family arrived at Paris on the 17th of May 1826 ; the desire still to educate his sons abroad appearing to have influenced him in residing in that capital. His Honour then continued as follows.—

The first fact deserving notice is, that from a very early period after the arrival at Paris Dr. Cochrane adopted, and continued until his death, a plan, mode and style, with respect to his abode and his establishment, altogether unusual with persons intending only a temporary sojourn at Paris, and usual only with those who design a permanent or at least a prolonged residence there. Instead of occupying apartments in an hotel or taking furnished lodgings, we find that within two months after his arrival at Paris he rented an unfurnished apartment (suite of rooms) at No. 11, Boulevard des Capucines, which he furnished ; and these he continued to occupy until the beginning of 1830, when he removed to a more spacious and commodious apartment (suite of rooms) at 6, Place Vendôme, which he took unfurnished, and which he furnished, and which continued to be the residence of himself and his family until his death—so that he occupied the first apartment for about three and a half years, and the second for about one and a half. It does not appear for what precise term he agreed to take the first apartment, but the tenancy was determinable at three months' notice, and the rent was

2,400 francs or 2,500 francs a year—about 100*l.* a year, payable quarterly. The apartment in the Place Vendôme was taken by Dr. Cochrane under a lease from a lady named the Comtesse le Clerc (who herself held as lessee from the owner), for one, two or three years, determinable at their respective choice, at three months' notice, the apartment in question being described as the first floor of No. 6, Place Vendôme, with the stables and appurtenances, at the yearly rent of 7,000 francs, that is, about 280*l.*, from January 1830. In both cases the tenant paid the direct taxes. Having regard to the habits prevailing in France, the mode of taking and furnishing these two sets of apartments was equivalent to taking a lease of an unfurnished house in London and furnishing it. According to the description given by M. Proudhomme, the owner of the house No. 6, Place Vendôme, the apartment rented by Dr. Cochrane in that house consisted of ten rooms, besides the servants' room, kitchen and offices. On taking this apartment, Dr. Cochrane, at his own expense, constructed a chimney in the back dining-room in the place of a stove which before existed there, and also a small oven in the kitchen. The furniture which Dr. Cochrane purchased for these two residences is variously described by the witnesses by the terms "commodious," "handsome," "splendid," "magnificent," and one of the witnesses, in the fervour of her admiration, declares that it was equal to that in the King's palace. I think I may justly assume it to have been at least commodious and handsome, and considering Dr. Cochrane's wealth, and the proved tendency to ostentation, at least of Mrs. Cochrane, it is not probable that it was otherwise than handsome and expensive. Mr. Francis Langan, who is the brother of the Abbé Langan, a tutor who lived in the family of Dr. Cochrane, says, the furniture in the Place Vendôme was excellent furniture, and that Dr. Cochrane had great pride in it. Dr. O'Grady says the rooms were magnificently furnished. George Vacher, the son of the upholsterer who supplied a portion at least of the furniture at both Dr. Cochrane's residences in Paris (he, the son, having himself accompanied the furniture on its delivery on the premises), says that it was splendid

furniture. One item of ornamental furniture is mentioned by M. Sourain, the watchmaker, who says, that among several clocks purchased by Dr. Cochrane was one for his saloon, the price of which was 1,400 francs (56*l.*), rather an expensive article of furniture. The establishment of servants, horses, carriages and other matters, both of convenience and of luxury, were in keeping with the position of a family thus located. The number of servants may have occasionally varied in some slight degree, but in general it seems by the evidence to have consisted of four or five men and three or four women. Latterly all the servants (or at least all but one) were French. The number of horses seems to have been never less than five or six (including four carriage horses), and sometimes the total number amounted to seven or eight, one witness says nine. Three carriages were kept; several of the tradespeople who supplied the family with the usual articles of consumption have been examined, and from their evidence it appears that, with respect to all such matters, the course of dealing was entirely on the footing usual in the case of a family having a fixed and permanent abode at Paris, credit being given in a manner and to an extent altogether unusual with respect to an English family intending only a temporary residence. But it may be observed that these tradespeople form their judgment as to whether a person is a permanent or merely temporary resident only, from the fact of his living in a furnished apartment, or hiring an unfurnished one, and putting in his own furniture. Their expression is "living in his own furniture." In connexion with the mention of the stable establishment, I may observe that in August 1828 Dr. Cochrane caused to be sent over to him from Clippens two horses which he had bred there; and moreover, in 1831 he had given directions for two more horses of his stud to be sent over from Clippens, but the execution of that design was prevented by his death. This is proved by Crow and Lockhead. Now, all that I have mentioned respecting the plan and mode of residence, and establishment adopted and maintained by Dr. Cochrane at Paris, in my opinion tends strongly to the inference that he intended a prolonged, if not a per-

manent, residence in Paris; and this strikes me very forcibly, that whatever weight is due to the argument derived from the circumstances attending Dr. Cochrane's residence in the Boulevard des Capucines, as indicating an intention of prolonged residence in France, an argument of far greater force in favour of such intention is to be derived from the circumstances attending his change of residence to the Place Vendôme, when we find that, after no less than three and a half years' residence at the former place, being dissatisfied with the accommodation, or the locality, or the style of the apartment he was living in, he thought fit to remove to a more spacious and fashionable and expensive dwelling, and to fit it up and furnish it at considerable expense. There are, however, three circumstances relating to the dwelling and establishment of Dr. Cochrane at Paris, which may be thought to have a contrary tendency, and which therefore deserve notice. The first is, a stipulation introduced into the leases or agreements under which Dr. Cochrane rented each of his two dwellings, making the tenancy determinable on three months' notice. This, no doubt, at first sight, would seem to indicate that a speedy departure was in contemplation; but having regard to the political events which had taken place at Paris during the half-century next preceding the time of which we are speaking, it would be most natural, and I think not inconsistent with an intention of prolonged or even permanent residence, that an Englishman should by such a stipulation provide for the chance of some political disturbance occurring which might render it expedient to quit the country suddenly. And accordingly Mr. Beavan (one of the boys' tutors), who had resided in France thirty-four or thirty-five years, says, in his affidavit, that it is the general and almost universal practice of Englishmen and other foreigners taking up their abode in France, and who take leases of their residences, to provide in such leases for the contingency of any cause for a hasty removal, by having inserted in such leases provisions for determining tenancies on three months' notice — a very singular thing; but, under the circumstances, it does not appear to me that the making such

a stipulation is necessarily inconsistent with an intention to reside permanently at Paris. The second circumstance deserving of notice is, that, although the furniture at Clippens had been packed up and made ready for removal at the shortest possible notice, Dr. Cochrane did not send for it, but allowed it to remain at Clippens, and incurred the expense of purchasing new furniture for the apartments he rented in Paris; from which it has been argued that Dr. Cochrane abstained from removing the furniture from Clippens, in order that it might be ready for use there upon his return. To a certain extent there may be some ground for this argument. It must, however, be recollected, first, that the furniture at Clippens was of inferior style and quality, and unworthy the style of dwelling which Dr. Cochrane had adopted at Paris, as well as unsuited to Parisian ideas and tastes; and, secondly, that the expense of the transport of it to Paris, together with the import duty, would probably have amounted to nearly as much as the cost of new furniture. And, on the first head, we have the evidence of John Grieve, the upholsterer, who, after Dr. Cochrane's death, was employed to take the furniture from Clippens, to unpack it, and repack it, in order to send it to Mrs. Cochrane, and put it up in her house, in Harley Street, London, who says that the furniture was not very valuable; the dining-room curtains were silk and worsted damask, and the whole of the drawing-room furniture was imitation rosewood. And, upon the second head, we have also the evidence of Mr. Beavan (who had very long resided at or near Paris), who says, in his affidavit, that the purchase of fashionable furniture at Paris would cost but very little more than the expenses (including the import-duty) would amount to of bringing furniture from such a distance as Clippens, besides the consideration that English furniture would not be at all suitable to the style of Parisian apartments. It does not appear to me that the circumstance of Dr. Cochrane having abstained from transporting the Clippens furniture to Paris is necessarily inconsistent with an intention to make the latter place his permanent residence. The third circumstance worthy of notice is somewhat, perhaps, of the same character

as the last; I mean the fact that Dr. Cochrane did not think fit to have his plate brought to Paris from the custody of the Paisley bankers. It appears from the evidence of Joseph Calomé, who was butler and valet to Dr. Cochrane, at the Place Vendôme, for about a year previous to Dr. Cochrane's death, that Dr. Cochrane used English plated goods, which he had brought over from England, and not silver. Mr. Francis Langan, whom I have before mentioned as the brother of the boys' tutor, speaking of the residence of Dr. Cochrane at the Boulevard des Capucines, says, he frequently dined with Dr. Cochrane, that he gave very fine dinners, and his table was groaning with plate. These two statements may perhaps be reconciled by supposing that Dr. Cochrane hired plate for the occasions of dinner parties, and used the plated goods for ordinary occasions. Certain it is, that during the period that Mr. Langan speaks of, during the residence in the Boulevard des Capucines, they were in the habit of giving great dinners, and that during the residence in the Place Vendôme they were not in the habit of giving dinners, or scarcely ever. But, however that may be, it appears to me that the fact is established that Dr. Cochrane abstained from bringing over his own plate from Scotland, and preferred purchasing plated goods in England for the use of his family in Paris. I do not think that his doing so can be altogether accounted for by the considerations of expense of transport, or the import duty which would be payable upon it in France. There is evidence to shew what Mrs. Cochrane said to that effect; but I think the fact in question tends, so far as it goes (though I do not think it of great weight), to negative the supposition that Dr. Cochrane intended to reside permanently in France; it may have its effect in shewing that he intended ultimately to return to Clippens; but I do not think the fact of any very great weight. No account which can be given of Dr. Cochrane's proceedings at Paris would be complete which omitted to notice the circumstance of the continued intercourse of Daniel Pearson (the groom) with the family; though I confess I do not think that this circumstance affords much argument to either party on the question

of domicil. There is, however, another circumstance of some weight as to Dr. Cochrane's intention with respect to domicil, which is this, namely, that he seems to have entertained an idea of purchasing a country-house or landed property in France, for he made inquiries upon the subject of a foreigner acquiring and holding landed property in France, and was anxious to know whether the law of France placed any obstacles in the way of a foreigner acquiring landed property in that country. The tendency of this fact is strongly in favour of an intention to reside permanently in France. As a set-off, however, against this, we have another fact the tendency of which is in an opposite direction, namely, that during Dr. Cochrane's residence in Paris he was anxiously endeavouring to increase his estate at Clippens by the purchase of certain landed properties adjacent thereto. It appears from Crow's evidence, taken in 1844, that before leaving Clippens Dr. Cochrane had entertained such a desire; and it is shewn by Dr. Cochrane's letters to Campbell and to Crow, as well as by other evidence, that during the whole period of his residence at Paris he was in treaty for the purchase of two small properties adjoining to Clippens, the one consisting of two farms called the Green and Mill of Cart, and the other a farm called Ryewraes. His letters evince the greatest anxiety to accomplish these purchases, particularly the latter; and at length, in the year 1831, shortly before his death, he succeeded with respect to Ryewraes, a contract having been then entered into by him for the purchase of that property for 6,000*l.*, which was not completed until after his death. And the eagerness with which he pursued the object of adding to his Clippens estate is manifested by the fact, that the price which he agreed to pay for Ryewraes amounted to no less than forty-three years' purchase. It is true that Dr. Cochrane's desire to increase his property at Clippens may have had reference in some degree to the consideration that it would be the future residence of his descendants, and it may have been a regard to their future interest which induced him to add to the family property. And, indeed, there is distinct evidence that

he did anticipate that his descendants would take up their residence at Clippens. But although Dr. Cochrane's expectation that Clippens would be the future place of residence of his sons may have constituted some part of the motive which made him desirous of increasing his property there, it is impossible, I think, to conclude that it was the whole or the only motive; and the eagerness with which he prosecuted that design appears to me to afford an argument of no slight weight in favour of the proposition that it was not his intention to abandon his Scotch domicil, and adopt a French one. But, besides being anxious to buy property near Clippens, it appears that he desired also to purchase some estate nearer to Edinburgh, and he actually instructed his agents Messrs. Hotchkiss & Meiklejohn (Writers to the Signet, at Edinburgh), to look out for such a purchase for him. Dr. Cochrane, however, abandoned this idea, and did not make any such purchase. He, nevertheless, told Mr. and Mrs. Moorhouse, during their visit to him at Paris in 1830, that he then entertained such an intention; that is, to buy property near Edinburgh. This circumstance, as far as it goes, tends strongly to shew an intention to retain the Scotch domicil. Another fact, which seems to me to tend towards the same direction as that which I have last mentioned is this, that he refused to allow his house at Clippens to be let. This fact also (though not a very strong one) tends to the supposition that he meant to keep Clippens in a state fit for his own occupation whenever he should desire it, and also supplies an argument for the contention that Dr. Cochrane intended to resume his residence at Clippens. I must not omit to mention the will or trust-deed of disposition executed by Dr. Cochrane in 1829, during his short visit to this country, which I have already mentioned. By this instrument, as I have said, he disposes of all his property, real and personal. It is in the Scotch form, and at the same time so framed as to be valid and effectual according to English law; but it does not seem to have crossed the mind of Dr. Cochrane, or of his legal advisers, that it was necessary that it should be framed in conformity with French law, by reason of his having adopted a

French domicil. In this instrument Dr. Cochrane describes himself as of "Clippens," and it is always considered by jurists, that the manner in which a man describes himself in solemn acts and legal documents is an ingredient of an important kind with reference to the question of where his domicil is. Another matter deserving of consideration on the question of Dr. Cochrane's intention is this, that during the whole period of his residence at Paris he not only continued to feel and to manifest a deep interest in Clippens, and everything connected with it, but actually directed in detail the management of the property, and regulated everything that was required to be done with respect to the houses and lands, and the horses and other animals that had been left there, which furnishes as far as it goes an argument—and, as I think, a strong one—to those who contend that Dr. Cochrane's intention was to return to reside at Clippens, and not to fix his permanent abode in France.—[His Honour then read various letters written by Dr. Cochrane on the subject of his property at Clippens, and referred at considerable length to the evidence as to the statements made by him upon the subject at different times, tending to shew that at some future period his intention was to return to Scotland.—He then continued.]

We have here a number of verbal declarations, some strongly tending one way, and some equally strong tending the other way, and I may observe with regard to oral declarations, that jurists seem to be of opinion (and I think the cases proceed on that) that verbal declarations are not of so much weight as written declarations, and that neither verbal declarations nor written declarations would be so effective as the acts of the parties in determining the question of domicil. The result of the evidence which bears upon the question of Dr. Cochrane's domicil appears to me to be this: when I consider the motives which may be supposed to have operated on the mind of Dr. Cochrane, I find that some of them are such as would incline him to a residence in Scotland, others to a residence in France. Three motives are assigned as tending to induce Dr. Cochrane to reside at Paris: first, a taste for Parisian life and society, as well

as for the climate of France as most suitable to his constitution; secondly, the effect produced at Clippens by Mrs. Cochrane's conduct, and the displeasure felt towards the neighbours on that and other grounds; and, thirdly, the desire to educate the sons abroad: the last special and temporary, the other two of a more permanent character. On the other hand, strong motives for intending to return to reside at Clippens may be found in his attachment to his native country, and to Clippens in particular, as being the seat of his ancestors, his own birthplace, his property which he delighted to improve and increase, and the spot where he was surrounded with those objects which best suited his natural tastes and propensities. Among these conflicting motives it is not easy to say which would preponderate in his mind. But a perusal of all the evidence bearing upon the motives rather inclines me to the opinion that these latter motives (that is, those inclining Dr. Cochrane to return and reside at Clippens) would, with Dr. Cochrane himself, outweigh the others. If I examine the acts and conduct of Dr. Cochrane, there is much which, if taken by itself, would lead to the conclusion that he had abandoned his Scotch and acquired a French domicil: the mere fact of his residing in France for full five years is of no slight force, and residence is often considered of great importance on the question of intention. His taking an unfurnished dwelling and furnishing it at his own expense—but especially his doing this a second time, and at still greater expense, after he had already resided three years and a half at Paris, and the expensive establishments of servants, horses and carriages which he kept—are facts which afford a strong argument in favour of a French domicil; and so also is the fact of his having meditated the purchase of landed property in France. On the other hand, there are other portions of his acts and conduct which seem to me to have a strong contrary tendency. The intense interest which he manifested in everything at Clippens, and the minuteness and particularity and constancy with which he continued during his whole absence to direct, regulate and prescribe all the details of the management of the property, and

the treatment of the horses and other animals there, as if his object was to have the place always ready for re-occupation, his refusing to let it, the eagerness with which he prosecuted and effected his purpose of adding to his property there, his endeavours to purchase other property in Scotland, nearer to Edinburgh, his describing himself in his last will or trust-deed of disposition as of Clippens,—all these are circumstances which tend, and tend strongly, in favour of his retention of his Scotch domicile. As to his acts and conduct, then, we have some acts tending one way, and some the other; and it appears to me that the inferences which may be drawn from the acts and conduct of Dr. Cochrane are pretty evenly balanced. Again, when I look at Dr. Cochrane's declarations of intention, whether written or verbal, I find the same sort of inconsistency, some of them tending in favour of a Scotch, and others of them in favour of a French domicile. In such a state of things, what is the principle which ought to govern the decision of the Court on the question of Dr. Cochrane's domicile? There is one principle very well established, namely, that slighter evidence is required to warrant the conclusion that a man intends to abandon an acquired domicile, and to resume his domicile of origin, than is necessary to justify the conclusion that he means to abandon his domicile of origin, and to acquire a new one. And another principle is that which is referred to by Lord Cranworth, in *Whicker v. Hume*, in the House of Lords, namely, that it requires stronger and more conclusive evidence to justify the Court in deciding that a man has acquired a new domicile in a foreign country than would suffice to warrant the conclusion that he has acquired a new domicile in a country where he is not a foreigner; for instance, the Court would more readily decide that a Scotchman had acquired a domicile in England than that he had acquired a domicile in France where he would be a foreigner. In truth, to hold that a man has acquired a domicile in a foreign country, is a most serious matter, involving, as it does, the consequence that the validity or invalidity of his testamentary acts, and the disposition of his personal property, are to be governed by the laws of that foreign country.

No doubt, the evidence may be so strong and conclusive as to render such a conclusion unavoidable, but the consequences of such a decision may be, and generally are, so serious and so injurious to the welfare of families, that it can only be justified by the clearest and most conclusive evidence. In the present case, the question is, whether Dr. Cochrane, whose domicile of origin was Scotch, and whose domicile when he quitted Clippens was decidedly the same domicile of origin, abandoned that domicile and acquired a domicile in France, where he was in every sense a foreigner; for it does not appear that he ever made application for what are called civil rights, which a foreigner might do, as appears by some of the evidence; and it seems to me that the evidence in the case is not of that clear and conclusive character which would justify me in deciding that he had abandoned the Scotch domicile and adopted a new one in France, which was a foreign country. Furthermore, if I try the question by the criterion of the often-cited definition from the Roman law, to which I have had occasion before to refer, it does not appear to me that the circumstances of Dr. Cochrane's residence in France satisfy the requirements of any of these definitions; and I will take in preference the most celebrated definitions to which I have before largely referred. It does not appear to me, as I have said, that the requirements of the definition of the Roman law are satisfied by the circumstances of Dr. Cochrane's residence in France; for admitting that he had established his household "larem," whatever "larem" means, in Paris, how can it be said that he had there established the chief part or bulk of his business, and of his property, that is, "rerum ac fortunarum summam"? How can it be said, that the requirements of that definition were satisfied? So far as he had any business, "res," the business in which he was incessantly engaged was the management and improvement and augmentation of his estate at Clippens, and the directing and regulating of everything connected with it. Business he had none at Paris; and as to his property, "fortunæ," he had nothing at Paris but his furniture and equipage; the chief part or bulk of his property, whatever is meant by

"fortunarum summam," so far as his property had any locality, was certainly at Clippens. Of Scotland only, and not of France, could it be truly said "in eodem loco rerum ac fortunarum suarum summam constituit." It may admit of more doubt whether the subsequent part of the definition would apply to his residence at Paris "unde rursus, non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur; quod si rediit peregrinari jam destitit"; but I strongly incline to the opinion that his intention throughout was at some future time to quit France without being called away by the happening of any special event, and to reside permanently in Scotland; and as to his feeling himself at any time a wanderer from home, I think it was when he left Clippens for the Continent in 1825, and not when he made the short visit to Scotland in 1829. I think his feeling on the occasion of that visit was, that he was revisiting his home (as he expressed himself), though it was but for a short time, and that his feeling was not that he was wandering from it. Now, in the view that I have taken of the evidence, and in the view which I take of the principle which ought to govern the Court where the Court has, as to motives and as to conduct, expressions or declarations, written or verbal, of this inconsistent character, some tending one way and some tending another, I think I am bound to come to the conclusion that Dr. Cochrane did not abandon his Scotch domicil and adopt a French domicil.

KINDERSLEY, V.C. }
Dec. 23. JAMES v. NORTH.

Writ of Ne Exeat—Insolvency.

A writ of ne exeat regno was obtained against a defendant upon an undertaking by the plaintiff to be answerable for damages. The defendant became insolvent, and obtained his protection under the act:—Held, that the writ must be discharged upon payment of costs by the defendant and the plaintiff being released from his undertaking.

This was a motion for the discharge of

a writ of *ne exeat regno* which had been issued against Sir W. Magnay, on the ground that since the issuing of the writ he had taken the benefit of the Insolvent Debtors Act, and had obtained his protection.

Mr. Hardy, in support of the motion, submitted that since, by the insolvency, the debt, as affecting the person of the insolvent, was gone, the writ must cease to operate. There was no reference to such a case in the act of parliament, and no precedent for such an application; but upon principle it was clear that the protection would be of no use if the writ could be put in force. Every shilling which the insolvent possessed had been taken in execution by the plaintiffs. The writ ought, therefore, to be discharged.

Mr. Leach, for the plaintiffs, who were infants, stated that the defendant, Sir W. Magnay, had been trustee for them, and the trust monies, amounting to 20,000*l.*, had got into his hands. He had committed a breach of trust, and had applied this money in speculations, and then threatened to go abroad. The writ of *ne exeat* was thereupon obtained at the Rolls upon an undertaking by the plaintiffs to be answerable for damages. The defendant had then taken the benefit of the act, and though he had obtained protection, it was of the greatest importance to the plaintiffs that he should not go abroad, since they would then be unable to obtain that information from him which would enable the plaintiffs to save any of the property.

KINDERSLEY, V.C.—Although the plaintiffs in this case are infants, and can give no consent to any arrangement, still the Court cannot be governed by that consideration, and cannot be guided by the hardship arising from the breach of trust however fraudulent it might be. The only question for the Court is, whether on principle a writ of *ne exeat* can be continued against a person after he has taken the benefit of the Insolvent Debtors Act, and obtained his protection. Although there is no precedent for such a case, I think on principle, that the writ ought to be charged on certain terms. The purpose of a writ of *ne exeat* is to prevent the d

from going out of the jurisdiction of this Court until the debt is satisfied, and it will operate on his person, not on his property, in order that his person may be kept within such jurisdiction, on the ground that he is a debtor, and that he may not escape from payment of the debt. A decree has been made for payment of the sum for which the writ is indorsed, and for the costs of the suit; therefore, that sum is a debt due from the defendant, and until it is discharged he is not to be allowed to go out of the kingdom. He took the benefit of the Insolvent Debtors Act; that did not discharge the debt, but left after-acquired property subject to that and any other debts there may be, under certain regulations prescribed by the act. Proceedings might be taken to make subsequently-acquired property liable, but not to make him personally liable; on the contrary, the act prescribes that on certain things being done, the Commissioner is to pronounce a formal order for personal protection, which is conclusive and perpetual. In that state of things, the debtor has personally ceased to be liable to the debt. No doubt the debt is not discharged, but he cannot be made personally answerable; and inasmuch as the reason for keeping him within the jurisdiction has ceased, the writ is no longer of any service to the plaintiffs, and ought not to continue. It has been said that the plaintiffs might require some information in the way of evidence from the defendant as a witness to prove something, as between the plaintiffs and some other persons, but that would be converting the *ne exeat* from a writ to operate on a debtor to a writ operating on a witness, which ought not to be. Therefore, that is not a ground on which there is any right in the plaintiffs to keep the defendant in the kingdom. When the writ was granted the plaintiffs gave, as is now required, an undertaking to be answerable for damages in case they should be in the wrong; and one of the terms of discharging this writ must be that the plaintiffs are released from all liability with respect to that undertaking, and from any action or other proceeding on behalf of the defendant with respect to the *ne exeat*, and the defendant must pay the costs of this application. The next

friend of the infants is not wrong in coming to the Court, inasmuch as he, though an adult himself, is not obliged to consent to discharge the writ, except on terms which were not of course provided for by the order of the Rolls.

WOOD, V.C. { MATTHEWS v. THE GREAT
Jan. 28, 29. { NORTHERN RAILWAY COM-
PANY.

Company—Guaranteed Shares—Dividends—Construction of Statute—Acquiescence.

By an act of parliament it was enacted, that it should be lawful for any shareholder who should have paid up one half the amount of any share or shares of the G. N. R. Company, to require each share to be converted into two half-shares, whereof the one half which should be so fully paid up should be denominated deferred half-share, and the other half of such share should be denominated guaranteed half-share; and thenceforth in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued should be applied in or towards payment, in the first place, of interest or dividend after the rate of 6l. per cent. per annum on the amount paid upon the half-share so denominated "guaranteed," and the remainder, if any, should alone be payable to the half-share so denominated "deferred," provided that the company should not pay any other or greater amount of interest or dividend upon the two half-shares than was for the time being paid on each undivided share:—Held, upon the construction of this section, that the holders of guaranteed half-shares were entitled to be paid their 6l. per cent. in each year not only out of the dividends accruing in that year, but out of all subsequent dividends; and, therefore, if in any year the dividends were more than sufficient to pay 6l. per cent. on the guaranteed half-shares, the surplus must be applied in payment, in the first place of all arrears due on those half-shares in respect of past deficiencies before any dividend could be declared on the deferred half-shares.

The holders of the guaranteed half-shares

having in a former year acquiesced in the declaration of a dividend on the deferred half-shares, whilst there was an arrear of dividend due on the guaranteed half-shares, —Held, that although they had precluded themselves from making any claim in respect of those particular arrears, they had not thereby renounced their rights in respect of subsequent arrears.

The bill in this case was filed, by the plaintiffs, on behalf of themselves and all other holders of guaranteed or B. stock in the Great Northern Railway Company, against the company, the directors and secretary, for the purpose of having it declared that the holders of the B. stock were entitled to be paid, or to have provision made that they should be paid such interest or dividend on the amount from time to time paid up upon the B. stock held by them respectively, as would, with the interest or dividends already paid to the holders of such B. stock, make up the full amount of 6*l.* per cent. per annum from the 30th of June 1850 to the day of the payment, or of providing for payment of such full amount, before any payment in respect of dividends or otherwise to any of the holders of the deferred or A. stock in the same company should be made or provided for, and for consequential relief.

The circumstances of the case will appear from the following paragraphs in the bill:—Par. 20. Shortly previous to the Half-yearly Ordinary General Meeting of the Great Northern Railway Company, held on the 12th of August 1848, the directors issued and circulated among the shareholders their report. Such report contained the following passage:—"The bill for the Doncaster and other deviations, &c., for which application to parliament was sanctioned by the special meeting in February last, was unexpectedly thrown out on the second reading in the Commons. A clause therein was subsequently inserted in the 'Isle of Axholme Act,' authorizing the division of the present 25*l.* shares into two shares of 12*l.* 10*s.* each, in the mode and for the purpose explained at the February special meeting. This division of the shares was suggested with the object of relieving those shareholders to whom it may have become inconvenient to pay up

the remainder of the calls, and in the opinion of the directors it will have that effect, and, whilst it cannot injure, it may operate beneficially to the interests of the company generally, by tending to increase the number of the shareholders, and to obtain payment of the arrears of calls. The directors, therefore, under the clause in the act, have resolved to give any shareholder who has paid up 17*l.* per share the option of dividing his shares, and arrangements will be made for carrying out the division, which will be communicated to the shareholders by the 1st of October, to come into operation by the 1st of November next. The plan is as follows: that each shareholder shall have the option of dividing his 25*l.* share into two 12*l.* 10*s.* shares, distinguished as A. or *deferred*, and B. or *guaranteed* shares, the B. (*unpaid up*) to be guaranteed by the holder of the A. (*paid up*) 6*l.* per cent. per annum, and the A. to take the chance of all further dividend or privilege. The B. guaranteed 12*l.* 10*s.* shall be entitled to 6*l.* per cent. *per annum on the amount paid up* out of the interest allowed during the construction of the line, and a preference dividend afterwards up to 6*l.* per cent. per annum before the A. shares shall receive any dividend, and shall have the option of paying up the calls in full and receiving 6*l.* per cent. from the 1st of the month after payment. Another obvious and important advantage that will result from this division of the shares is, that the A. or paid-up portion can be converted into stock, which course the directors recommend, and the notice required for this purpose will be given prior to the next general meeting in February, that it may be then carried out."

21. The said meeting of the Great Northern Railway Company was duly held on the 12th of August 1848, and a resolution for the adoption of the report was put and carried.

24. The Great Northern Railway Act Amendment and Isle of Axholme Extension Act, 1848, contained the following section:—And be it enacted, that within such period as shall be fixed from time to time by the directors, it shall be lawful for any shareholder who shall have paid up one-half the amount of any share or shares of

the said Great Northern Railway Company, to require each share to be converted into two half-shares, whereof the one half which shall be so fully paid up shall be denominated "Deferred half-share," and the other half of such share shall be denominated "Guaranteed half-share," and the same half-shares shall thereupon be registered and certificates issued accordingly, and thenceforth in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued shall be applied in or towards payment in the first place of interest or dividend, after the rate of 6*l.* per cent. per annum, on the amount paid upon the half-share so denominated "Guaranteed," and the remainder (if any) shall alone be payable to the half-share so denominated "Deferred;" provided that the company shall not pay any other or greater amount of interest or dividend upon the two half-shares than is for the time being paid on each undivided share; provided also, that no such guaranteed half-share shall be transferable until at least 2*l.* 10*s.* shall be paid thereon; and that if in pursuance of any powers now vested, or hereafter to be vested in them, the company shall hereafter guarantee the payment of interest or dividends upon any shares in preference to the payment thereof on the ordinary shares of the company, such half-shares, whether guaranteed or deferred, shall be equally liable with the ordinary shares of the company to such preference.

31. A considerable number of the original shareholders applied to have their shares divided, and the company issued to the applicants scrip for as many deferred or A. half-shares of 12*l.* 10*s.* each as corresponded with the number of original shares for which application was made, and also scrip for an equal number of guaranteed or B. half-shares of the same amount.

39. On the 1st of May 1851, the share capital being all paid up was changed into a stock capital, consisting of 2,477,475*l.* original stock, 1,159,275*l.* deferred or A. stock, and 1,159,275*l.* guaranteed or B. stock. Half-yearly dividends upon the original and upon the B. stock were from time to time declared up to the 20th of August 1853, but on no occasion did they amount to 6*l.* per cent. on the B. stock,

and no dividend therefore was declared on the A. stock.

Shortly previous to the half-yearly ordinary general meeting of the company, held on the 25th of February 1854, the directors issued their report, which contained the following passage referring to the original, the deferred (A.) and the guaranteed (B.) stocks:—"The directors recommend that the dividend on these several stocks shall be for the half-year at the rate of 2½*ths* percent. on the original, 3½*l.* percent. on the B, and 1½*l.* per cent. on the A. stock, which, together, will absorb 114,200*l.* 7*s.* 10*d.*, and a balance of 3,940*l.* 18*s.* will remain to be carried to the next account. With respect to the B. and A. stocks it may be useful to observe, that the holders of B. stock being guaranteed a preference dividend of 6*l.* per cent. by the holders of A. stock, *if earned by traffic within the year*, and the B. stock having received for the first half of the year 1853 a dividend equal to 2½*l.* per cent, the B. stock is now entitled to receive a dividend of 3½*l.* per cent., that rate being necessary to make up 6*l.* per cent. for the whole year of 1853."

The half-yearly ordinary general meeting was held on the 25th of February 1854, and dividends were declared corresponding to the rates recommended in the report, and both in 1854 and in 1855 dividends were declared at the rate of 6*l.* per cent. upon the B. stock, and at the rate of 2½*l.* and 2½*l.* respectively on the A. stock. In 1856 it was discovered that stock to the amount of about 220,000*l.* had been fraudulently created and issued by one Leopold Redpath. In consequence of this, no dividend was declared at the next half-yearly meeting, which was held on the 12th of March 1857, but the net revenue was applied in buying up and cancelling an amount of stock and shares equal to the amount fraudulently created. At the half-yearly meeting held in August 1857, a dividend of 12*s.* per cent. only was declared upon the B. stock.

By their report issued previous to the half-yearly meeting held in February 1858, the directors recommended a dividend for the half-year at the rate of 5*l.* 10*s.* 6*d.* per cent. per annum on the ordinary stock, of 5*l.* 8*s.* per cent. for the half-year on the

B. stock, and of 2s. 6d. on the A. stock. At the half-yearly meeting, held on the 19th of February 1858, an amendment was proposed to the resolution for the adoption of this report to the effect, that 5l. 10s. 6d. per cent. should be paid to the holders of B. stock, towards payment of the amount necessary to make up the deficiencies of the previous years. The amendment, however, was negatived and the resolution carried, and the plaintiffs thereupon filed the present bill.

Mr. Daniel and Mr. E. R. Turner, for the plaintiffs, cited—

Henry v. the Great Northern Railway Company, 1 De Gex & Jo. 606; s. c. 27 Law J. Rep. (n.s.) Chanc. 1.

Stevens v. the South Devon Railway Company, 13 Beav. 48; s. c. 20 Law J. Rep. (n.s.) Chanc. 491; 9 Hare, 313

Crawford v. the North-Eastern Railway Company, 3 Kay & J. 723.

Bagshaw v. the Eastern Union Railway Company, 2 Mac. & G. 389; s. c. 6 Rail. Cas. 152; 19 Law J. Rep. (n.s.) Chanc. 410.

Sturge v. the Eastern Union Railway Company, 7 De Gex, M. & G. 158.

Stone v. Godfrey, 5 Ibid. 76; s. c. 23 Law J. Rep. (n.s.) Chanc. 796.

The Attorney General v. Eastlake, 11 Hare, 205.

Tatam v. Williams, 3 Ibid. 347.

Foss v. Harbottle, 2 Ibid. 461.

Mr. Rolt, Mr. Denison and Mr. T. Stevens, for the defendants, contended that, according to the true construction of the act of parliament of 1848, the guaranteed dividends for each year were to be made good only out of the dividends declared for that year, and if in any year there was not sufficient to pay 6l. per cent. the holders of B. stock were not entitled to have the arrears paid up out of dividends declared in subsequent years. This construction was acquiesced in in 1854, and could not now be dissented from—*Cholmondeley v. Clinton* (1).

WOOD, V.C. (without hearing a reply).
—I have looked carefully through the

decision in *Henry v. the Great Northern Railway Company*, and it seems to me that the effect of the judgment of the Court of Appeal was this, that although the term "dividend" or "interest," or any other term, is used in respect of guaranteed shares, where a person holding such shares acquires a right to a fixed payment out of profits, at a certain rate per cent., such payment is in effect in its nature interest chargeable upon profits. The words of Lord Cranworth are important with reference to the general construction of securities of this description. In page 637 he says, "I have come to the conclusion, that what these statutes in fact guarantee to the favoured shareholders is a charge on all accruing profits at the stipulated rate before anything is divided among the ordinary shareholders. This is substantially interest chargeable exclusively on profits. There is nothing in such a use of the word 'dividend' which is at all at variance with ordinary usage. We speak of the dividends payable upon the 3l. per cents, when in truth we mean no more than an annuity of 3l. chargeable upon and payable out of the public revenue." Lord Justice Turner, in the same way, after referring to some observations which he had made in the case of *Sturge v. the Eastern Union Railway Company*, in page 648 says, "It was argued for the appellants that the expression 'interest or preference dividend' in that report meant interest until the shares were fully paid up, and preference dividend afterwards. I am by no means satisfied of this, but even supposing it to be so, there would still remain the question, what was meant by 'preference dividend' after the shares were paid up. The whole tenour of the report shews, I think, that what was so meant was interest." This case is very different in its circumstances from *Henry v. the Great Northern Railway Company*. It is not a contract between the company at large and a certain number of persons whom they wish to tempt to join them by holding out to them a larger rate either of dividend or interest. It is an arrangement which is shewn fully by the history of the case previous to the passing of the Isle of Axholme Act, if that were necessary to be entered into. But I think it quite un-

necessary, and it is more legitimately shewn upon the section of the act to which reference has been made. It is a case in which the benefit is intended to be conferred upon certain shareholders who may wish to avail themselves of the privilege of splitting their shares into two. The object of that splitting is evinced by the preliminary proceedings. The effect of it is exactly coincident with the object of the section of the act, namely, that whereas there were a certain number of persons who held 25*l.* shares, who were not in a condition to pay their 25*l.* a share, the company said to these shareholders, "You may, in order to avoid the forfeiture of your shares, split them into halves if you have paid up a certain amount of call, and you will have the half-share clearly and fully satisfied and paid up and another half-share to dispose of. It is for you to say, before obtaining this act of parliament, what are the terms upon which you would wish to be at liberty to dispose of that half-share, and we, the directors, will embody them for you in our act of parliament, from which time of course you will be put in the position of holding your two half-shares. You will be in a condition to go into the market with one-half share, having certain dividends which will tempt persons who may be disposed to relieve you of your shares to become holders of the half-shares." It is obvious, I think, that the scheme assumed that the holder would be disposed to part with what would be called "the guaranteed share." He might part with both, but in trading with the guaranteed share, he would have an opportunity of tempting the purchaser to relieve him of that half-share by offering the terms which are embodied in this act of parliament. It may well be said, that the object of the act is by no means very definitely expressed with regard to all the purposes which may be supposed to have been in view. However, the words, I think, are sufficiently expressed to indicate the intention which I have already stated, in truth, seems to have been contemplated by the holders of the shares themselves when they were originally issued. It is enacted, "that within such period as shall be fixed from time to time by the directors, it shall

be lawful for any shareholder who shall have paid one half the amount of any share or shares of the Great Northern Railway Company, to require each share to be converted into two half-shares." Then the shareholder will have of course the one half-share fully paid up, and the other half not paid up; and he may dispose of whichever half he pleases. The shareholder then is entitled to require his share to be converted into two half-shares, "whereof the one half which shall be so fully paid up shall be denominated 'deferred half-share,' and the other half of such share shall be denominated 'guaranteed half-share;'" so far the section simply gives two names which are calculated to have a certain degree of effect, no doubt: "and the same half-shares shall thereupon be registered and certificates issued accordingly, and thenceforth" in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued shall be applied in or towards payment in the first place of interest or dividend, after the rate of 6*l.* per cent. per annum, on the amount paid upon the half-share so denominated "guaranteed," and the remainder, if any, shall alone be payable to the half-share so denominated "deferred." The clause, of course, means a warranty of something, and the whole question is, to what extent is the warranty given, and what is the security which is to be the means of enforcing the warranty? The defendants contend, that the right of the preference shareholders attaches only *de anno in annum*, and that the profits for each year are only liable to the claim of the preference shareholders to have their dividends made up to 6*l.* per cent. for that year. The question is, whether the guarantie goes beyond that? It cannot be contended, —and this point I put as striking my mind in favour of the defendants' argument,—that the guarantie is an absolute guarantie; it must be a limited guarantie, at least limited to the whole of the profits made by the railway. It is neither a personal guarantie from an individual shareholder, nor is it a guarantie from the general funds of the company. It must, therefore, be a limited guarantie of some sort, and the only question

is, what is its limit? The defendants say the limit is *de anno in annum*, the annual profit as it accrues. The plaintiffs say it is the whole amount of the dividend accruing to the entire share which is to guarantee the payment at the rate of 6*l.* per cent. Now, as the thing stands, before I come to the proviso in the act, it seems that what is done is this—"Thenceforth," that is to say, after this division has taken place, "in respect of each whole share, the whole of the interest and dividend which in each year would have accrued" except for this "shall be applied towards payment in the first place of interest or dividend after the rate of 6*l.* per cent. per annum." Unless one attaches to "dividend" the very narrow construction that was attempted in *Sturge v. the Eastern Union Railway Company*, and which was attempted also in *Henry v. the Great Northern Railway Company*, namely, that dividend meant *ex vi termini*, that the holder of the B. share is only entitled to the annual division of profits, and is entitled to nothing else by force of the word "dividend," it appears to me to be impossible to sustain the contention which is here raised by the defendants, because the clause does not say that *de anno in annum* you shall pay over to the holder of B. shares 6*l.* per cent. for that given year, but the clause says that it is to be out of the whole interest and dividend which accrues in each year. It is, as it appears to me, a devotion of all the interest and all the dividends which for every year would otherwise have accrued upon those given shares. The expression is, that it shall no longer be paid upon the shares at all, in consequence of the shares having been divided in two, but it shall form a fund to be applied in the first place in or towards the payment of interest or dividend at the rate of 6*l.* per cent. per annum, and the balance only shall be payable on the half-shares denominated deferred. I do not think in that respect the word "towards" is immaterial. Mr. Denison endeavoured to obviate its force in this way:—he said the act had regard to the ordinary custom of paying these things half-yearly, and that in one half-year there would only be perhaps 3*l.* per cent. payable in respect of the half-yearly payments, and that would be

a payment "towards" the 6*l.* per cent. which, on taking the whole dividend, would have to be paid. I do not think that gives sufficient force to the word "towards," because the words are "the whole of the interest and dividends which in each year have accrued." The section contemplates a year's dividend in hand on the contention of both parties. The section contemplates a year's dividend at least, and says that shall go "in" or "*towards*" the payment of interest. It appears to me, therefore, that, in saying "in or towards," the section contemplates the event of the year's dividend not being enough to satisfy that which the act directs to be paid: it says it shall be in payment of that 6*l.* per cent., if you can get it, and towards the payment of it if you cannot get it, and that nothing is to be paid over at any time to the holders of the deferred shares until the complete payment is made. That seems to me, I confess, to be the true sense of the thing. Now when I come to "guaranteed" it is coupled with the direction for the payment of 6*l.* per cent. per annum, and it seems to me that unless I find something expressly limiting the calculation of the 6*l.* per cent. per annum to the current year, the natural meaning of the expression 6*l.* per cent. per annum is 6*l.* per cent. per annum from the time of the advance. That is the natural force of the expression, unless I find something strictly and directly limiting it to the year.

Now the circumstance that the shareholders have seen, in making this arrangement, that the fund which is to form the guarantee is a fund which, in ordinary years, will be divisible yearly (although that is by no means the case at all times), and have said that out of that fund, divisible yearly, 6*l.* per cent. per annum shall be paid to the holders of the B. shares, does not in itself shew that the 6*l.* per cent. per annum is to be limited to the particular year in which that fund is accruing. All that it does is to point out that there is a fund accruing *de anno in annum*. Take the whole of that fund accruing *de anno in annum*; out of that fund so accruing pay whatever payments can properly be made at the rate of 6*l.* per cent. per annum upon the B. share, and when you have done that, and not until you

have done that, hand over the balance to the other party. Now the introduction of "each and every year" seems to me to be the only point, in truth, that could have been used properly in argument in this case for distinguishing it from the previous case of *Henry v. the Great Northern Railway Company*. If it had been simply a payment out of the dividend, without reference to each year, it appears to me the case would have been brought to the same point as before, namely, that there is a clear charge of interest on profits generally. The circumstance of the introduction of these words does not seem to me necessarily, upon due consideration, to be entitled to the force which has been contended for, because, in reality, it is merely an introduction into this clause of that which all parties assumed to be the ordinary course of dealing, namely, the division which annually takes place. In reality, that is not the course which has been pursued: it is not the course which can be pursued when there is no profit in a given year. There is nothing to compel the company to declare annual dividends. That, however, being the most probable state of circumstances, the act points out the fund, and says, here is an annually accruing fund, and that annually accruing fund shall be applied, in the first place, towards the payment of 6*l.* per cent. per annum; and that points out the limitation of the guarantie.

So far I have proceeded upon the wording of the clause itself before the proviso; but I confess it has appeared throughout to my mind that the proviso strengthened that construction. It is said, that according to the construction I have given to the clause the proviso is immaterial and unnecessary. Upon a strict analysis of the whole clause, it is possible it might have been construed as well without it, but it by no means follows that because a clause which is not very well expressed may ultimately be construed to have that meaning which would render the proviso unnecessary, the proviso is therefore inoperative in regard to the possible danger to the general shareholders, who may have no mind to divide their shares, many of them having paid in full. The proviso is put in to protect the mass

of the company from any possible consequence of the wording of the previous portion of the clause. It seemed probable to those who drew the clause that there was a power to compel the directors to issue two kinds of certificates: one for the share called the "deferred share," and the other for the "guaranteed share," and they are directed to pay in future 6*l.* per cent. upon the guaranteed share. In the first place, the very term "guaranteed" may raise questions which it is inconvenient the company should be fixed with; and therefore the clause provides that the company shall not pay any other or greater amount of interest or dividend upon the two half-shares than is for the time being paid on each undivided share. Standing alone, until the ingenious gloss was put upon it in argument, I think nothing could be clearer than that. It says, we must take care not to compromise the other classes of shareholders; and although we call this a guarantie, it is a guarantie entirely between the two classes of shareholders themselves, and not in the slightest degree affecting the general body of shareholders; and consequently the two shareholders might go to the company with their two half-shares, and having got their dividend, divide it according to the terms of the previous section; but they acquire no right as regards the general body of shareholders. That would have been the simple and intelligible meaning to put on that clause.

But, further than that, it seems to me, in some degree, to help the previous construction which I put upon the clause in this respect. The general shareholders, no doubt, were apprehensive unless they put some clause into the act that, under the general operation of the word "guaranteed," some question might be raised which would affect them, and with that question they intended to have nothing to do. That seems to me to be the sensible meaning of the proviso.

I am asked to construe the section as meaning, not that there shall never be payable on the two shares together more than is payable on one undivided share, which I have held to be the plain meaning of it, but that there shall never be paid upon any one half-share in respect of any past year a sum of money which, taken

with the other payments that the holder of that half-share shall have received, shall be 6*l.* per cent. upon a given half-share for the year in which the general body of shareholders did not receive 3*l.* per cent. Can that be the meaning of the clause? It would not have been paid at all on the two half-shares. It would be a payment made on the one half-share only out of the fund appropriated to two half-shares. The payment to the holder of the B. shares in respect of any year, say 1850, out of the sum allotted upon the whole share in 1856 does not in the slightest degree amount to a payment made in the words of this section upon the two half-shares exceeding the payment made on the one undivided share. What is done is only this, that there is paid on the two half-shares exactly what might be paid on every undivided share. That is put by, and from that moment the holder of the undivided share has nothing to complain of.

I cannot conceive a clause more clumsily drawn if the proviso was intended to say that the holders of the guaranteed shares shall not be entitled in any one year to require the arrears to be paid to them for any past year in respect of the 6*l.* per cent.; instead of saying that, the clause says the dividend on the two half-shares, not the dividend on the one half-share, shall not exceed the dividend to be paid on each undivided share. It has appeared to me throughout that the words are utterly inconsistent with the defendants' contention. The company are not paying a dividend at all larger to the one share than to the other. They are paying exactly the same amount of dividend to two halves of the split share as to the whole undivided share, and that dividend so paid is to be appropriated on the principle enunciated in the previous part of the clause, and although it may be said fairly that, according to the construction I have given the clause, this operation would have taken place without any such proviso, because there is nothing which says that the holder of the split share shall have a larger dividend than the holder of the entire share, yet there was enough in the expression "guaranteed," and in the direction to pay 6*l.* per cent. upon the whole amount advanced, to render it at least desirable to

have an explicit declaration which would free the matter from all doubt.

That this was the opinion of the shareholders when the general shares were first issued there can be no doubt, and it is satisfactory to find what the notion was of those who framed the thing. The indorsement on the certificate is this:—"B. ($\frac{1}{2}$ share) during the payment of interest will receive 6 p. c. p. a. on the amount paid up, and when interest ceases will be entitled to all the dividends made in respect of the original 25*l.* share until it receives such 6*l.* p. c., but it will in no case be entitled to receive more than that rate per annum." It says to a B. shareholder, You shall never get more than 6*l.* per cent. per annum, but you will have the dividends made in respect of the original share until it makes 6*l.* per cent. per annum. That is the exact interpretation I have given to it. The whole body of dividend is to be set apart, out of which the 6*l.* per cent. is to be derived. I cannot hold that that is merely an unauthorized scribbling by the directors on the back of the share. The shareholder takes out an A. certificate and a B. certificate, and going into the market with the B. certificate so indorsed tenders it to his customer. It is a representation made by him, and not by the directors, for when he tenders that document nothing is said about in each year, or from year to year, but he says, You shall have all my dividend until you are paid 6*l.* per cent. per annum. Certainly, it is no surprise upon those who first took the shares, for I think it is sufficiently expressed in the section as the thing intended to be done. Unless I could give the interpretation to the proviso which has been contended for on the part of the defendants, it seems to me to be clear that it helps materially to show that the company and the shareholders were afraid that by the operation of the previous section the whole company might become liable to this guarantie.

Then comes the question of *laches*. It does not appear that I can hold parties to be precluded, because they stand by acquiescing in a certain sense, that is to say, not asserting their rights upon a construction adverse to their view taken by the directors as it was taken in the report of

1854. When I say adverse, I do not quite coincide with what Mr. Denison urged, that it does not appear that there was any assertion of right. The directors announced their view, and nobody said anything. They were content to take their dividend. Upon that I hold that they cannot call back the dividends which have been paid down to that time, but I do not think that that precludes them for all time from saying that they have not renounced their rights, or that the persons who may have bought A. shares with the notion that their rights were different from what the Court has now held them to be, can say to the B. shareholders, You who, rather than go into litigation, acquiesced in having the money, which might have been paid in a particular way, appropriated in a different way during a certain period of time, are therefore bound in all time to give up that right. There is nothing in the shape of misrepresentation or fraudulent holding out to make me say, there is an equity to be fastened on all the B. shareholders for all time by reason of their acquiescing in the view which might have been then taken. The only remaining point is as to appropriating the future dividends of the present A. shareholders, in repayment of the 2s. 6d. declared in February 1858. Upon this I must hear Mr. Daniel in reply.

Mr. Daniel, however, consented to waive the claim.

Declare that the plaintiffs and all other holders of the guaranteed stock commonly called B. stock in the Great Northern Railway Company are entitled to be paid, or to have provision made that they shall be paid such interest or dividend on the amount from time to time paid up upon the said guaranteed or B. stock held by them respectively, as will, with the interest or dividends already paid to the holders of such guaranteed or B. stock, and also the dividend of 2s. 6d. per cent. paid to the holders of the deferred stock, commonly called A. stock, in the Great Northern Railway Company, in pursuance of the resolution at the said meeting of the said company on the 19th of February 1858, make up the full amount of interest or

dividends, at the rate of 6l. per cent. per annum from the 31st of December 1855 to the day of payment, or of providing for payment of such full amount of interest or dividends, before any payment, in respect of dividends or otherwise, to any of the holders of the deferred stock, commonly called A. stock, is made or provided for; and order accordingly. Order that the defendants be restrained by injunction from declaring any dividend on the A. stock, without regard to the right of the plaintiffs and all other holders of the B. stock, to be paid in priority such an amount as will, together with the dividends already paid to the holders of the B. stock and the said dividend of 2s. 6d. per cent. so paid to the holders of the A. stock as aforesaid, make up the full amount of interest or dividend at 6l. per cent. per annum on the amount from time to time paid up upon the B. stock held by them respectively, such interest to be calculated from the 31st of December 1855 to the day of payment, and from making any payment for dividends in respect of the A. stock, without first paying or making provision for payment of such amount to the holders of the B. stock. Costs of the plaintiffs to be paid out of any profits of the company applicable to the payment of dividends on the A. stock, except so far as they have been increased by any claim for arrears prior to the 31st of December 1855.

WOOD, V.C. } In the matter of ACOTT'S
Jan. 29. } SETTLEMENT.

Settlement—"Vested Interest"—"Survivors."

On the marriage of J. A. and S. A. a sum of stock was settled by deed, upon trust after the death of J. A. and S. A., and failure of issue of the marriage, to transfer the same unto, amongst and between J. F, R. F, W. F. and E. F. equally; provided that if either of them, the said J. F, R. F, W. F. and E. F, should depart this life without having acquired a vested interest, leaving issue, the share of such person so dying should go to such issue; but in case

either of them should die without having lawful issue, then the share of him, her or them so dying should belong to the survivors or survivor of them. There was no issue of the marriage. J. F. and R. F. died in the lifetime of J. A. and S. A., leaving issue. W. F. survived J. F., and died in the lifetime of R. F. without issue. E. F. survived both J. A. and S. A.:—Held, that she was entitled by survivorship to W. F.'s share in the fund.

By the settlement made on the marriage of Joseph Acott and Susanna Finch, dated the 16th of August 1815, a sum of 1,000*l.* Navy 5*l.* per cent. annuities was vested in John Finch, Robert Finch and William Acott, upon trust after the decease of J. Acott and Susanna Finch, and failure of issue of the marriage (which happened), to transfer, pay, apply, dispose of and retain the same sum, and all dividends, interest and proceeds thenceforth to accrue due and payable thereon, unto, amongst and between and for the benefit of themselves, the said J. Finch and R. Finch, and their brother William Finch, and their sister, Elizabeth Finch, equally to be divided between and amongst them, share and share alike; provided that, in case either of them, the said J. Finch, R. Finch, W. Finch and E. Finch, should depart this life without having acquired a vested interest in the said stocks, funds and securities, leaving lawful issue of his, her or their body or bodies, then the share or shares of him, her or them so dying of and in the said trust funds should go and accrue to such children, if more than one, in equal shares; but if only one, to such only child, such children or child respectively taking only his, her or their parent's share of and in the said trust stocks, funds and securities. But in case either of them, the said J. Finch, R. Finch, W. Finch and E. Finch, should die without having lawful issue of his, her or their body or bodies, then the shares or share of him, her or them so dying of and in the said trust stocks, &c. should go and belong unto the survivors or survivor of them, the said J. Finch, R. Finch, W. Finch and E. Finch for their, his or her own use and benefit.

Joseph Acott died on the 14th of September 1835, and Susanna Acott on the 27th of September 1858.

John Finch died on the 5th of July 1819 leaving six children, of whom three died in the lifetime of Susanna Acott.

William Finch died on the 7th of February 1827 without leaving any issue, but leaving Robert and Elizabeth Finch and also five of the children of John Finch surviving.

Robert Finch died on the 11th of July 1832, leaving five children, all of whom were still living.

The present trustees of the settlement transferred and paid the trust fund, with a dividend which had been received since Susanna Acott's death, into court, and Elizabeth Finch now presented her petition claiming to be entitled to one-half of the trust fund, that is to say, her own original one-fourth, and also the one-fourth originally given to William, on the ground that she was the survivor at the period of distribution.

The case was argued by

Mr. Jessel, for the petitioner.

Mr. Wickens, for the administratrix of one of the children of John Finch.

Mr. Smart, for the children of Robert Finch, and

Mr. Osborne, for other parties.

The authorities cited were—

Ive v. King, 16 Beav. 46; s. c. 2 *L.*

Law J. Rep. (N.S.) Chanc. 560.

Cripps v. Wolcott, 4 Madd. 11.

Jenour v. Jenour, 10 Ves. 562.

Crowder v. Stone, 3 Russ. 217.

2 *Jarman on Wills*, 619.

Wood, V.C. held, that the word "survivors" applied only to such as survived the period of vesting, and the children therefore of those who died before that period could take no more than the original share of their parents. The result was, that the petitioner was entitled to one-half of the trust fund, and the residue would be divided between the children of John and Robert Finch equally *per stirpes*.

M.R. }
Dec. 8. } GASKELL v. CHAMBERS.

Practice—Company—Service of Bill.

Where a company amalgamate with another, and cease to have either officers or any place of business, the Court, upon a bill being filed, ordered the service to be made upon the late deputy-chairman and secretary, and directed that it should be good service upon the company.

The London Mutual Life and Guarantee Society was amalgamated and merged in the Eagle Life Insurance Society. The company was never formally dissolved, but the place of business was given up, and the directors, secretary and other officers ceased altogether to act. Upon a bill against the company, the late directors were made parties.

Mr. R. Palmer and Mr. Beavan, for the plaintiff.—The company has ceased to exist. In the absence of officers, the bill cannot be served in the usual manner; it is necessary, therefore, to ask the Court to direct on whom service should be made.

The MASTER OF THE ROLLS.—The bill is against the company; let the service be made upon Mr. Chambers, the late deputy-chairman, and Mr. Laundry, the late secretary. Direct that it be good service upon the company, and let this order be served with the bill.

M.R. }
Dec. 15, 16. } GASKELL v. CHAMBERS.

Company—Directors' fiduciary Position.

The directors of a company are trustees for the shareholders; and, therefore, where directors contracted for an amalgamation of their company with another, and, without the knowledge of the shareholders, contracted for payments to themselves of sums of money as a compensation for their prospective interest in their fees, they were, upon a bill filed by a shareholder for an account, compelled to pay such monies into court.

This was a motion, by the plaintiff,
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asking that the defendants, late the directors of the London Mutual Life and Guarantee Society, might pay into court divers sums of money which, by their answers, they had severally admitted to have received.

The London Mutual Life and Guarantee Society was established in London, in the year 1848; and in 1857 it was amalgamated with and merged in the Eagle Life Insurance Society.

The plaintiff was a member of the London Mutual, and he filed this bill, on behalf of himself and all the other members of the society except the defendants, against seven of the late directors, the secretary, medical officers, auditors and solicitors of the society, and against the personal representatives of a deceased director, praying for an account of all monies severally received by the deceased director and the defendants from the Eagle Insurance Company under a private agreement stated in the bill, and that they might be declared trustees thereof for the London Mutual Life and Guarantee Society; and that they might be decreed to refund the several sums, and pay them into court.

The facts admitted by the defendants in their answers were, that the London Mutual Life and Guarantee Society was established in London in 1848; that a deed of settlement was executed, by which a temporary capital of 50,000*l.* was to be advanced for working the company in the first instance, and provision was made for paying it off, and so long as any capital should exist the profits were to be divided between those persons, who were to be considered members and shareholders from having effected insurances with the company, upon the terms that they should participate in the profits, and who should have paid five yearly premiums, in the proportions of one-sixth to the former and five-sixths to the latter, in proportion to the value of their respective policies; and as soon as the shareholders should be repaid their capital, then the members insured were to be entitled to the whole of the profits. The deed also authorized an extraordinary meeting to sell any portion of the business of the company to any other company.

The board of directors comprised a

chairman, deputy-chairman and six other directors, all of whom were remunerated by fees, but the chairman and deputy-chairman received a larger sum than the other directors. Business was commenced by the company in November 1849; one-tenth only of the capital was raised, and that, it was alleged, had since been paid off, so that the entire profits then became divisible among the members only.

On the 23rd of January 1853 the plaintiff assured his life with the society for 499*l.* 19*s.*, on the terms that he was to participate in the profits.

From the reports made by the directors from time to time, it appeared that the business of the company increased steadily, and was profitable to the end of the year 1856, at which time it was ascertained that the business of the year had increased by 50 per cent., so much so that the year ending in December 1856 was found to be one of great prosperity. In the year 1857 the directors, as they alleged, considered that the prospects of the younger mutual assurance offices were not encouraging, consequent on the depression of trade and the great competition amongst the offices then recently established for business; and being influenced by the retirement of one of the directors of the company, which had been detrimental to its interests, they entered into negotiations with the Eagle Insurance Company, with a view to the sale of their business and assets to that company; in August 1857 the terms of amalgamation agreed upon were, that the Eagle should give to those policyholders in the London Mutual who had received profits the bonuses already added to their policies, and a reversionary bonus of 40*l.* per cent. on the amount of premiums paid by them since the last division of profits, and should also give a like reversionary bonus of 40*l.* per cent. upon the premiums paid by all policyholders assured for the whole term of life, who had not then participated in the profits, and should give to all the assured an equal participation in every future quinquennial division of profits with the assured in the Eagle; and should guarantee that, as far as the assured in the London Mutual were concerned, such future bonuses should never be less than 30*l.* per cent. The

directors, the defendants, stated in their answer that these were alone and exclusively the considerations given, or intended to be given, to the London Mutual for the transfer of the company's business and policies to the Eagle.

While the negotiations between the two offices were proceeding, the Eagle proposed to appoint four of the directors of the London Mutual to be trustees of the Eagle, with a salary to each of 50*l.* per annum, and that as opportunities offered they should be appointed directors with a director's allowance of upwards of 100*l.* per annum, and that the chairman, deputy-chairman and two remaining directors should receive from the Eagle compensation for the loss of their fees, calculated with reference to the average amount of fees received by them as directors, and that the chairman in consideration of services to be rendered to the Eagle should receive an annuity. It was also proposed that the solicitor, medical officers, secretary or actuary, auditors and two of the principal clerks and the messenger should receive compensation. The four annuities proposed to be given to the four directors who were to be made trustees, were valued, according to the ages of the parties, at from 2,200*l.* to 2,600*l.*; these sums the Eagle proposed to pay to them instead of the salaries; but ultimately the form in which the compensation was to be given to the directors was agreed upon as follows, that the four directors to be appointed trustees were to act without salary, and were to be eligible to become directors of the Eagle, and that 4,000*l.* should be distributed by the Eagle amongst the directors other than the chairman, and that he should receive in lieu of compensation and for services to be rendered to the Eagle an annuity of 130*l.* a year for life.

The directors alleged, that before these terms were finally agreed upon, they inquired of Mr. Jones, one of the actuaries employed about the amalgamation, and ascertained that the bonus to be paid to the policyholders of the London Mutual would not be affected in any degree by the compensation to be given to the directors and other officers, and that the proposed bonus was according to the actual value set upon the policies, and that it

was the highest which could be given under any circumstances.

On the 19th of August 1857, an agreement embodying the terms of amalgamation between the two offices was drawn up. Article 5. was, that the Eagle should pay to the several persons whose names were mentioned in the memorandum or schedule signed by the parties to that agreement, who were the directors and other officers of the company, by way of compensation for any loss sustained by them by reason of the sale or transfer of the business, contracts, assets, &c. of the London Mutual to the Eagle, the respective annual or other sums set opposite to their names in such memorandum or schedule at the time therein mentioned.

Article 6. was, that four of the directors of the London Mutual should be appointed trustees of the Eagle.

On the 29th of August 1857, the directors of the London Mutual issued a circular to the policy-holders, informing them that they had made a conditional arrangement with the Eagle for amalgamation, on the terms as regarded the policy-holders before stated, and that to secure the interests of the members the Eagle had agreed to appoint four of the directors trustees, with a view to their being appointed directors as vacancies occurred. There was no mention of any arrangement that compensation was to be made to the directors and other officers of the company.

The policy-holders were requested to sign a letter sent with the circular, assenting to or dissenting from the proposed amalgamation. Seventeen hundred members returned the letters assenting to the arrangement. Seven members only returned letters of dissent.

The directors of the London Mutual immediately convened an extraordinary meeting to be held on the 24th of September 1857, to confirm the agreement, and to authorize the sale of any part of their business to the Eagle. This meeting was attended by a large number of members, and, with one dissentient, they passed a resolution, authorizing the directors to carry the agreement into effect, which had accordingly been done.

The sum of 571*l.* 8*s.* 7*d.* was paid to each of the seven directors, and the an-

nuity of 130*l.* per annum which was to be paid to G. Wilson, the chairman, since deceased, was valued at 1,000*l.*, and this sum was paid to him. Sums of money were also paid to the secretary, the two medical officers, the two auditors, and the two solicitors.

The directors, by their answer, stated that they believed many of the members present at the meeting to be aware that the agreement contained provisions giving compensation to the directors, and that it was the custom on the amalgamation of two companies for the directors and officers of the retiring company to receive compensation; and, consequently, that they did not think it necessary to direct the attention of the members specially to the agreement. They denied, however, that they had concealed the facts of such agreement. They also said that the chairman at such meeting had stated that the agreement was in the hands of the solicitor, who was sitting next to him, and that he asked the meeting if they desired that it should be read, and that the answer was in the negative; that a question was put by one of the members, whether the officers of the company had been properly taken care of in the arrangement; and that the deputy-chairman, in answer, said that all persons connected with the office were to be liberally compensated; that another member wished to know the particulars of such compensation; but that another member suggested that such a question was uncourteous to the board, and that it was unnecessary, unless members were dissatisfied with the terms which had been made on their own behalf in the amalgamation of the companies.

The directors of the London Mutual also stated that they believed the plaintiff was aware of the arrangement proposed and carried into effect, though he was not present at the meeting.

Mr. R. Palmer and *Mr. Beavan*, for the plaintiff.—The plaintiff asks that the defendants may pay the sums severally received by them into court. They were the trustees of the London Mutual Society, and, as such, they could never be allowed to derive personal advantage from their position. This Court would never permit trustees to deal

for their own advantage behind the backs of their *cestuis que trust*. The answers admitted that they had received sums of money, and that they had not applied them for the benefit of the members; but this money was affected with a trust for the benefit of all the persons interested in the society. It was received in consequence of their position as trustees: it was received while they were acting for their *cestuis que trust*, and in that position they could not make any contract for their own individual advantage. If it were otherwise, a trustee might as well stipulate for an advantage to himself while contracting for the sale of an estate he was intrusted to dispose of.—

Lewin on Trusts, 3rd ed. 318.

Rothwell v. Rothwell, 2 Sim. & S. 217.

Vigrass v. Binfield, 3 Madd. 62.

Collis v. Collis, 2 Sim. 365.

M'Hardy v. Hitchcock, 11 Beav. 73, 77; s. c. 17 Law J. Rep. (N.S.) Chanc. 256.

Hichens v. Congreve, 1 Russ. & M. 150.

Wiglesworth v. Wiglesworth, 16 Beav. 269.

Mr. Selwyn and Mr. W. D. Lewis, for the defendants.—The plaintiff was seeking to establish an equity upon several sums of money paid to the directors and other officers of the company. He had not made out any *prima facie* right sufficient to support the suit; so long, therefore, as the title of the plaintiff was doubtful, his Honour would not order the money into court; and even if it were in court no order would be made to transfer it to the credit of a cause in court. If the plaintiff considered the admissions sufficient to entitle him to a decree, he could set the cause down on the bill and answer. This money was impressed with no trust, to enable the Court to take possession of it.—

Peacham v. Daw, 6 Madd. 98.

St. Victor v. Devereux, 13 Sim. 641.

Boschetti v. Power, 8 Beav. 98; s. c. 14 Law J. Rep. (N.S.) Chanc. 63.

The MASTER OF THE ROLLS.—After reading the answer of the directors, I do not find that it contains more than was stated by counsel during the argument; and assuming all the statements contained in it to be true, taking them at

the same time most unfavourably to the pleader, I am of opinion that these defendants are trustees of the fund received by them, and that they must pay the amount into court. I am also of opinion that they are trustees for the plaintiff, and for those on whose behalf he sues. The answer clearly admits that each of the directors has been paid a sum of 571*l.* 8*s.* 7*d.* I have no desire to go into the details or to prejudice the hearing, since it may, as stated, be possible that when the evidence is given a different complexion may be given to the transaction; but as the case stands on the answer, I must order the directors to pay the money into court.

M.R.
Dec. 13, 22. } GASKELL v. CHAMBERS.
Jan. 1.

Production of Documents—Company—Solicitor—Privilege.

If a solicitor, party to a suit, admits by his answer the custody of papers relating to a company, he will, if the directors and the company are before the Court, be compelled to produce them, notwithstanding, by their answers, the directors say that the papers are in the hands of a third party, and the solicitor says that he has the documents, but that in his hands they are privileged.

The plaintiff filed the bill in this suit, on behalf of himself and the other shareholders of the London Mutual Life and Guarantee Society, against the directors, the secretary, medical officers, auditors and solicitors of the company, praying for an account of all monies received by them.

The business of the London Mutual had been practically merged in and amalgamated with the Eagle Insurance Company, and the latter company had, in divers sums, paid to the directors and other officers of the London Mutual sums amounting to about 4,000*l.*, which this suit now sought to recover for the benefit of the shareholders.

The directors, by their answer, said that certain papers, &c. were in the possession of the defendant Charles Shephard, as one of the solicitors of the society.

Joseph M. Yetts, another solicitor of the society, by his answer, said that he had in his possession certain other documents, as solicitor of the directors, and he insisted that they were privileged. These documents were not mentioned in the answer of the directors.

A summons was then taken out, by the plaintiff, against the directors, and against J. M. Yetts, for the production of all the documents.

The MASTER OF THE ROLLS directed that the society should be served with notice of the application. This was done accordingly, but the company did not appear.

Mr. R. Palmer and Mr. Beavan, for the plaintiff, now moved for production, on the ground that the parties interested in the papers, and the party holding them, were both before the Court.—

Blenkinsopp v. Blenkinsopp, 2 Phill. 607; s. c. 17 Law J. Rep. (N.S.) Chanc. 343: reversing 10 Beav. 143; s. c. 16 Law J. Rep. (N.S.) Chanc. 88.

In re the Cameron's Coalbrook, &c. Railway Company, 25 Beav. 1.

Mr. Selwyn and Mr. W. D. Lewis, for the directors, offered no objection to the production of the papers, but asked for the costs of the adjournment of the summons into court, on grounds which it is not necessary to state—*Murray v. Walter* (1).

Mr. Lloyd, for the defendant J. M. Yetts.—No order for production can be made against a solicitor. Such an order could only proceed on the admissions in the answer of the clients, and certainly not upon the answer of the solicitor. He only held the papers for the clients, and he had been improperly brought before the Court.

The MASTER OF THE ROLLS considered that as the parties interested and the parties holding the papers were before the Court, the documents ought to be produced.

STUART, V.C. } LLOYD AND OTHERS v.
Dec. 15. } EAGLE.

Assignment—Pension of retired Government Officer—Insolvent—Injunction.

The defendant, a retired storekeeper of one of Her Majesty's dockyards, entitled to payment from the Treasury of a pension or superannuation allowance of 155*l.* a year, assigned such pension to the plaintiffs, to secure a loan of money. The defendant afterwards became insolvent, and included the debt due upon the plaintiffs' security in his schedule of debts. The Commissioner of the Insolvent Debtors Court, by his order, made in the presence of counsel for the plaintiffs, recommended that 50*l.* a year, part of the insolvent's pension, should be paid by the Paymaster-general to the provisional assignee of the Insolvent Debtors Court, for the benefit of the general creditors of the insolvent. The plaintiffs declined to prove as creditors under the insolvency; but, having filed their bill, moved in this Court for an injunction to restrain the defendant from applying for, or receiving, or enabling any other person to receive the balance of his pension left after the appropriation of the annual sum recommended by the Commissioner. Ordered accordingly.

William Eagle, a retired storekeeper in the Ordnance department, and grantee of a pension or superannuation allowance of 155*l.* a year by Her Majesty, payable under the warrant of the Commissioners of the Treasury, by deed dated in February 1857, assigned the said pension to the Indisputable Life Policy Company, to secure a sum of 100*l.*, advanced to him by way of loan. The deed provided that, on payment of the said debt of 100*l.* by instalments of 25*l.* a year, with interest as therein mentioned, the company would not proceed to enforce a covenant on the part of the said W. Eagle for payment of the said principal sum and interest. The deed likewise provided, that in case default should be made in payment of any or either of the said instalments or interest, it should be lawful for, but not imperative upon, the said company to receive from the Paymaster-general the said pension

of 155*l.*, and thereout to retain the said instalments or interest, and pay the surplus of such pension to the said W. Eagle. And W. Eagle thereby appointed Alexander Robertson, or other the manager for the time being of the company, his attorney to receive the said pension.

In September 1857 the business of the London Indisputable Life Policy Society was transferred to the Eagle Insurance Company, whereby W. Eagle's above-mentioned debt and security became vested in the latter company.

W. Eagle made default in payment of the instalment and interest which became payable in February 1858, whereupon the Eagle Insurance Company applied to the Paymaster-general to be allowed to receive the pension under the provisions of the indenture of the 8th of February 1857; but to this application the Paymaster-general declined to accede, on the ground that he could not properly be called upon to determine whether default in payment of the principal and interest had been made by W. Eagle.

In October 1858 W. Eagle, being then in prison under an arrest for debt, filed his petition in the Court for the Relief of Insolvent Debtors in England; whereupon a vesting order was made in the November following, and the Chief Commissioner of the Court, by his order, made in the matter of the insolvency, recommended that a sum of 50*l.* a year, part of the above-mentioned pension, should be paid by the Paymaster-general to the provisional assignee of the Insolvent Debtors Court, for the benefit of the insolvent's creditors generally, and directed that a communication to that effect should be made to the Paymaster-general.

The plaintiffs, representing the Eagle Insurance Company, then filed the bill in this suit, praying for an injunction to restrain the defendant, William Eagle, from applying for, obtaining or receiving the above-mentioned pension or superannuation allowance, or the balance thereof after payment to the provisional assignee of the said sum of 50*l.* a year, as above mentioned, or empowering or enabling any person other than the plaintiffs to receive the same respectively, so long as any money remained due to the plaintiffs on

the security of the said indenture of February 1857.

The bill alleged that the plaintiffs had not proved, and did not intend to prove their claim under the insolvency against the estate of the defendant, but that they did not object to the appropriation of the portion of the pension recommended by the Chief Commissioner for the general creditors of the insolvent.

The provisional assignee of the Insolvent Debtors Court was not made a party to the bill.

Mr. J. N. Higgins now appeared in support of a motion for an injunction in the terms of the prayer of the bill, and referred to—

Stat. 1 & 2 Vict. c. 110. s. 56.

Tunstall v. Boothby, 10 Sim. 542;
s.c. 9 Law J. Rep. (N.S.) Chanc. 294.

Knight v. Bulkeley, 27 Law J. Rep. (N.S.) Chanc. 592.

Mr. Hislop Clarke, for the defendant, said that the debt claimed by the plaintiffs was amongst those entered by the insolvent in his schedule, and that the Commissioner, a Court of competent jurisdiction, had, at the hearing, and in the presence of the plaintiffs' counsel, made an order providing for the payment of all the debts included in such schedule. He submitted, therefore, that the plaintiffs, as they had offered no opposition to the order made by the Commissioner, were estopped by that order from making any further claim upon the defendant's pension.

STUART, V.C. observed that the defendant could not be allowed to violate the contract made by him with the plaintiffs, and made an order for an injunction to restrain the defendant, William Eagle, from receiving the balance of the pension in the pleadings mentioned, which should be left after payment to the provisional assignee of the Court for the Relief of Insolvent Debtors, of the said sum as in the pleadings mentioned.

The costs to be costs in the cause.

M.R. }
Jan. 27, 28. } MASON v. BATESON.

Legacy — Indefinite Class — Blanks in Will.

A legacy to a class not definitively fixed will be carried into effect so far as the objects can be ascertained, but blanks in a will cannot be filled up, though the testator apparently contemplated an extension of the class.

Joseph Warhurst, by his will, dated the 15th of November 1832, devised and bequeathed all his real and personal estate to Richard Bateson and Robert Gill, their heirs, executors, administrators and assigns, upon trust to pay to his sister Rebecca Mason the annual sum of 20*l.* during her natural life, and, subject thereto, upon trust to pay the annual income to his daughter Ede for her life, and after her decease he directed that the whole of his real and personal estate should be in trust for the children and child of his daughter as tenants in common, and their respective heirs, executors, administrators and assigns, with benefit of survivorship. The will also contained a provision for the maintenance of them, and proceeded as follows:—"And I hereby direct, that in case my daughter shall die without leaving lawful issue her surviving, or leaving such issue, all of whom shall die under the age of twenty-one years, then the whole of my real and personal estate and effects shall so remain and be in trust for all and every my nephews and nieces, the sons and daughters of my sister Rebecca Mason, including — who — the — illegitimate — of the said Rebecca Mason, equally to be divided between and amongst them, share and share alike as tenants in common, and their, his or her heirs, executors, administrators and assigns." The testator appointed his trustees executors of his will.

The testator died on the 16th of March 1833. His residuary estate consisted of 6,793*l.* 6*s.* 5*d.*, which had been invested upon mortgage, and a copyhold estate, which was let at 138*l.* a year.

The testator's daughter Ede was born in the year 1812. In the year 1844 she intermarried with Horatio John Webster.

She was still living, but had never had any children or child.

On the 15th of February 1807, Rebecca Warhurst, the testator's sister, intermarried with Thomas Mason. She had five children — viz. first, the plaintiff Harriet Sorby, born 1798, now the wife of the plaintiff, Charles Sorby; second, the plaintiff Sarah Burgin, born 1801, now the widow of Thomas Burgin; third, the plaintiff John Monsford Mason, born 1805; fourth, Hannah, born in 1813, now the wife of Samuel Bagshaw; and fifth, Harry Mason, born 1815, who died in January 1854, intestate, leaving a widow and children, but no letters of administration had been taken out to his estate and effects.

The testator's sister Rebecca died in November 1857.

The bill was filed, by the three eldest children of Rebecca Mason, alleging that they were within the words of the will, and praying that, subject to the life estate of the testator's daughter, and the contingent interest to her children, they, the plaintiffs, might be declared entitled to three equal fifth parts of the residuary real and personal estate of Joseph Warhurst, and that the trusts of the will might be carried into effect.

Mr. R. Palmer and *Mr. Busk*, for the plaintiffs.—The will shews the intention of the testator; it also demonstrates the persons whose names were intended to fill up the blanks. Extrinsic evidence therefore may be given to shew the circumstances under which the will was made, and why the blanks were left. The words "all and every my nephews and nieces, the sons and daughters of my sister," clearly referred to a class, and the word "illegitimate" extended it to those who otherwise would not be included. That word must receive a construction; it could not be rejected: had there been illegitimate children only, they must have taken.

Mr. T. Stevens, for Mr. and Mrs. Bagshaw, declined to offer any opposition to the prayer of the bill.

Mr. Selwyn, for Mr. and Mrs. Webster, as next-of-kin of the testator.—The class entitled ought to be ascertained at the death of the testator. The bequest must be confined within some limit; it was evident that

the testator did not mean that all the children of the sister should take; there was nothing from which it could be collected whether the testator intended to fill the blanks in with the word, "is" or "are," or whether it was to be confined to the two eldest or two youngest illegitimate children, or whether he preferred the girls to the boy. The plaintiffs had not made out their claim; the estate, therefore, ought not to be burthened with the costs: on the contrary, the plaintiffs ought to be made to pay the costs of the suit.—

Pratt v. Mathew, 22 Beav. 328; s. c. 25 Law J. Rep. (N.S.) Chanc. 409, 686.

Taylor v. Richardson, 2 Drew. 16; 23 Law J. Rep. (N.S.) Chanc. 9.

Doe d. Gord v. Needs, 2 Mee. & W. 129; s. c. 6 Law J. Rep. (N.S.) Exch. 59.

Mr. Follett and Mr. C. Hall, for the trustees, as representing the widow and children of Henry Mason, deceased (1).—The gift was complete so far as the legitimate children were concerned; it was, however, incomplete as to the illegitimate children; something further was intended, and as there were no means of filling up the blanks, they must be rejected.—

Illingworth v. Cooke, 9 Hare, 37; s. c. 20 Law J. Rep. (N.S.) Chanc. 512.

Mr. Palmer, in reply.—The Court was bound to consider the generality of the gift, the intention of the testator, and to construe the words he had used; none were to be rejected, if there were means to construe them.

The MASTER OF THE ROLLS.—I cannot give any effect to the gift to the illegitimate children. The blanks may be filled in either in the singular or plural number; they may be supplied either with the name of a son or a daughter; and whichever way they were filled in, still it would apparently give effect to the will. There appeared, however, but little doubt that the testator left the blanks to be filled in upon facts to be subsequently obtained. The words "all and every" are general, and seem to

create a difficulty and doubt, but that must mean all the legitimate children born, and to be born, as well those who were living as those who were dead. If, however, I filled in the blanks, I should be making a will for the testator. I will read the will before finally deciding.

Jan. 28.—The MASTER OF THE ROLLS.—It seems very clear that the testator meant the blanks to be filled up on information to be subsequently ascertained; I must, therefore, consider the gift void altogether in favour of the illegitimate children; I also think that the next-of-kin have no interest in the fund. I shall, therefore, dismiss the bill, without costs, and direct the trustees to be paid their costs as between solicitor and client, out of the fund. The costs of the other defendants must also be paid out of the fund.

WOOD, V.C. } THE ATTORNEY GENERAL v. WILKINSON.
Feb. 21; Mar. 2. }

Poor—Judgment Creditor—Execution against—Property of the Union—Money in the Hands of the Treasurer—Extraordinary Charges.

Semble—The real and personal property vested in the guardians of a union for the general benefit of the parishes in the union are liable to the debts of judgment creditors.

But money raised by rates for the relief of the poor is impressed with a definite trust, and as it would be a breach of trust to apply such money in the discharge of outstanding debts, a creditor who has obtained judgment in respect of a debt incurred prior to the year for which the rate was raised will be restrained from levying execution against the money so raised.

Whether a judgment creditor of the existing year can levy execution against such money—quære.

This was a demurrer to an information and bill filed, on the part of the Attorney General and by the guardians of the poor of the City of London Union, against a judgment creditor of the board of guardians, and also against the sheriff of London and Middlesex, praying that it might be de-

(1) 15 & 16 Vict. c. 86. s. 42. rule 9.

clared that the lands and hereditaments, and the goods and chattels in and about the union workhouse and premises were held by the plaintiffs, in trust for and on behalf of the union, and that the same were not liable to satisfy the claims of the creditor under his judgment, and that the defendants respectively might be restrained from levying writs of *fi. fa.* and *elegit*, and levying execution against the goods, chattels, lands, hereditaments, monies or property of the said board.

The City of London Union consisted of ninety-eight parishes, and Charles Guerino Manini was the collector of rates for nine parishes within the union. In December 1856, Manini and one John Paul, the assistant clerk of the board, absconded, and it was then discovered that they had embezzled upwards of 24,000*l.*, and the result was, that at Christmas 1856 the board found themselves indebted in this amount to various tradesmen and to the treasurer of the union. In order to discharge these debts, and to make provision for the current expenses of the ensuing half-year, the board sought to raise a sum of 61,000*l.*; and, accordingly, on the 17th of February 1857, they made orders upon the overseers of every parish in the union, for the payment of certain sums of money towards the relief of the poor of the parish, and for the contribution of the parish to the common fund of the union, and for such other expenses as were chargeable by the guardians on the said parish; and in the estimate upon which the orders were founded the clerk of the union had included, as extraordinary charges to which the union would be liable in the ensuing half-year, the amount of the outstanding debts.

The validity of these orders was disputed by many parishes, on the ground that the rate so sought to be raised was retrospective, inasmuch as several of the debts intended to be discharged out of it had been accruing for several years previously to the 17th of February 1857, and on the 4th of May 1857, the churchwardens and overseers of the poor of the parish of St. Stephen, Coleman Street, obtained from the Court of Queen's Bench a rule nisi, to bring up the order which had been made upon them, for the payment of

2,800*l.*, the apportioned share of that parish of the 61,000*l.*; and thereupon a special case was directed to be and was stated for the opinion of the Court; the questions being, first, whether the call or order of the 17th of February 1857, was valid and enforceable for the whole, or for any and what portion of the 2,800*l.*; and, secondly, whether the churchwardens and overseers of the parish of St. Stephen, Coleman Street, were liable and bound in law to pay any and what portion of the said sum of 2,800*l.* The Court of Queen's Bench decided in favour of the board of guardians; but this decision was reversed, on appeal, by the Court of Exchequer Chamber, which decided both questions in the negative (1).

Pending the appeal, the defendant, Josiah Wilkinson, commenced an action in the Court of Queen's Bench against the guardians of the union, to recover 1,031*l.*, the amount of one of the outstanding debts of the union, and on the 17th of January 1859 signed judgment for the debt, interest and costs, and was now about to sue out writs of *fi. fa.* and *elegit* against the personal and real property of the board of guardians.

The proper authorities of the parishes comprised in the union paid up to the board, in the course of the litigation, about one-half of the several sums of money which, by the orders of the 17th of February 1857, they were required to pay, and out of these monies the ordinary expenses of the union had been paid, but the board of guardians had not now in their possession or power any monies which could be legally applied to the payment of the outstanding debt.

The bill stated, that the board of guardians had no property against which these writs could be executed, except the goods and chattels in and about the union workhouse and the board-room and offices of the union, and the monies for the time being in the hands of the treasurer; and it was submitted that the board of guardians were only trustees of the property for the benefit of the union. It was further alleged, that the monies levied under the

(1) Waddington and others v. the Guardians of the Poor of the City of London Union, 28 Law J. Rep. (N.S.) M.C. 113.

authority of the board of guardians from the several parishes comprised in the union, were paid by the proper officers to the treasurer of the union, in whose hands there was frequently a large sum of money applicable by law to the relief and sustenance of the poor for the time being within the union, which monies in the hands of such treasurer were at law the property of the board; and the defendant Wilkinson threatened and intended, by attachment or otherwise, to seize and appropriate such monies in or towards satisfaction of his judgment debt.

Mr. Daniel and *Mr. Speed*, in support of the demurrer, referred to art. 81. of the Consolidated Poor Law Order (1847), 5 & 6 Will. 4. c. 69. s. 3, 1 & 2 Vict. c. 25, 5 & 6 Vict. c. 18. s. 4, and contended that this was an extraordinary charge, to which the ratepayers were liable to contribute under the 81st article of the Consolidated Order (2). The debts were *bond fide* contracted, and the guardians were at liberty to sell the property of the union, in order to provide payment of them.

Mr. W. M. James and *Mr. Fischer* (with *Mr. Roll*), in support of the information.—It would be a breach of trust to apply the property of the union in payment of these debts—*The Attorney General v. Compton* (3). It has been settled by the decision in the Exchequer Chamber, that the parishes other than those for which Manini was collector are not liable for the debt; and to allow execution to be issued, would be to overrule that decision.—

The Guardians of the Poor of the Wycombe Union v. the Guardians of the Poor of the Eton Union, 1 Hurl. &

(2) By the 81st article it is ordered that "the clerk of each union shall, four weeks at least before the 25th of March and 29th of September respectively, in each year, ascertain the cost to each parish in the union for the maintenance of the poor, and other separate charges, as well as for the common charges incurred in the half of the last year, corresponding to the half-year next coming, and shall estimate, and as near as may be divide among the parishes any extraordinary charges to which the union may be liable in the coming half-year, and shall then prepare the orders on the several parishes for the sums which, upon such computation, it shall appear necessary for them to contribute to the expenses of the union for the coming half-year."

(3) 1 You. & C. C. C. 417.

N. 687; s. c. 26 Law J. Rep. (N.S.) M.C. 97.

4 & 5 Will. 4. c. 76. s. 15.

5 & 6 Vict. c. 57.

Clauses 47. & 48. of the Consolidated Order of 1847 (4).

Mr. Greene, for the sheriffs.

Mr. Bovill and *Mr. Watkin Williams* watched the case on behalf of the parish of St. Stephen, Coleman Street.

Mr. Daniel replied.

Wood, V.C.—A difficulty arises in this case from the demurrer embracing a variety of subjects, the principal difficulty being as to the money in the hands of the treasurer of the union. I do not feel so much difficulty upon the other parts of the case. It appears to me that when those who have property vested in them for their *cestuis que trust*, and having power to contract for those *cestuis que trust* do enter into contracts, there is nothing in principle to lead this Court to say, that they having that power, and having express power to sell the property for the purpose of satisfying and discharging the debts, there should not be execution upon the property. But the difficulty in this case, which I do not see my way to overcome, arises from the present state of the law as laid down by the Exchequer Chamber with regard to money in the hands of the treasurer; because the land and other property of the union, with the exception of these monies, is vested in them absolutely as part of the union property for the general benefit of the parishes, without any definite application being impressed upon any portion of that property beyond its being for the benefit of those parishes, and subject to their debts and capable of being sold for those debts. But when we come to deal with the monies, they are paid into the hands of the treasurer of the union for a specific purpose under the act. The monies are contributed by the parishes upon these terms, and upon these terms only: they are asked for and received as being monies for the poor-rates of the parish, to be contributed towards the relief of the poor thereof, and as the contri—

(4) See Glen's Poor-Law-Board Orders. Battersworth, Fleet Street.

bution of the parish to the common fund of the union for the purpose of defraying such expenses as are chargeable on the guardians of the parish. For those purposes, and for those purposes alone, are they placed in the hands of the union. There is a definite set of objects, therefore, impressed upon these monies, and accordingly there would be a right on the part of the ratepayers, at the suit of the Attorney General, to come here to restrain any improper application of the fund. Now, what is the result of the decision of the Court of Exchequer Chamber? It is that by no possibility can any funds now coming into the hands of the treasurer from rates be applied towards the payment of debts, and that a rate made for that purpose is illegal. I presume that these gentlemen will act legally, and that they will only call for funds which they can legally receive for definite purposes, and as they cannot call for money for the purpose of paying the defendant, the money cannot be, when in their hands, applicable for that purpose, which is neither for the relief of the poor nor for a contribution to the common fund for the purpose of paying such casual and other expenses as are chargeable by the guardians of the parish. That makes an end of the case, for the Court of Exchequer Chamber says it is not an expense chargeable on the parish. It is true there are strange words with reference to extraordinary expenses on which a good deal of argument was founded, which prevailed in the Court of Queen's Bench; but the Court of Exchequer Chamber has said that this debt is not to be paid out of any rate now to be raised. The averment in the 12th paragraph of the bill is, that "the overseers or other proper authorities of the said several parishes comprised in the said union paid up to the said board of guardians in the course of the aforesaid litigation, about one-half of the several sums of money which, by the said orders of the 17th of February 1857, they were respectively required to pay, and by and out of such monies the ordinary expenses of the said union had been duly paid and kept down, but the said board of guardians had not then in their possession or power any monies which could be legally applied to the payment of the aforesaid

outstanding debts and liabilities of the said union." And the 19th paragraph states, that "the monies levied under the authority of the said board of guardians from the several parishes comprised in the said union are paid by the proper officers of such parishes to the treasurer of the said union, in whose hands there is frequently a large sum of money applicable by law to the relief and maintenance of the poor for the time being within the union, which monies in the hands of such treasurer are at law the property of the board of guardians, and the said defendant, J. Wilkinson, threatens and intends, by attachment or otherwise, to seize and appropriate such monies in or towards the satisfaction of his said judgment debt." That seems to me to amount to an averment that out of those monies coming to their hands by rate which cannot be applicable to this particular debt, according to the decision of the Court of common law, the execution will have the effect of paying that debt to which, according to that decision, the money is not applicable. In other words, it would be a breach of trust. It would be as plain and explicit a breach of trust to pay this debt out of monies which cannot be so applied, as it would be to pay any other debt or demand to which the monies paid in by the several parishes are not properly by law to be applied. I think it is a very lamentable state of things that these creditors should remain unpaid; and if the state of the law be such that they remain unpaid, the probable result will be that no one will ever supply the union except for ready money. I am by no means certain that any creditor of the existing year could not take out execution, if he were alert enough to obtain a judgment for a debt of the year. Probably, if ever it should become necessary to determine that question, it would be held that he might take out execution for that; but it appears to me, looking at the existing state of things and this demurrer extending to the whole bill, whatever may be the result if it is further proceeded with, I cannot hold that this is property in the hands of the treasurer which can be applied to the payment of the defendant's debt. The demurrer, therefore, must be overruled.

March 2.—Upon motion made for an injunction according to the prayer of the bill, the following order was made:—"The defendant, J. Wilkinson, undertaking not to issue an *elegit* without leave of the Court, restrain him from levying upon the money in the hands of the treasurer or upon any goods purchased since the 25th of March 1858, with liberty to apply in case the parties differ with reference to such last-mentioned goods.

[IN THE HOUSE OF LORDS.]

1858. }
July 6, 8, 9, 13, 16. } WHICKER v. HUME.

Will—Domicil—Mortmain Act—Colonial Law.

G. was born in Scotland, and went when quite a young man to India, where he entered into the service of the East India Company. After being there more than twenty years, he returned to Scotland. He took a house and married in Edinburgh. He afterwards became offended with the people there, and using very strong expressions as to his intention never to return there, he came to London. He brought his books and his property to London, and lived in London for some years, and engaged in various occupations. He then left London and went to Paris, but left his books, some ornamental furniture, and other things in London, telling the persons with whom he left them to keep them until his return. He lived in Paris for some years, made his will there, made it in the English form, but described himself in it as "of Edinburgh"; and he died in Paris:—Held, that he had lost his domicil of origin, which was Scotch, and had acquired, and never lost, an English domicil.

In his will he gave property to trustees, to appropriate the same as they in their "uncontrouled discretion should think proper for the benefit, advancement and propagation of education and learning in every part of the world":—Held, that the will was valid, and that there was a valid bequest of a charitable nature which was not void for uncertainty.

The testator had lands in New South Wales, which were to form part of the property given to trustees for the purposes of the charity:—Held, that these lands would

pass, and that the Mortmain Act was not applicable to New South Wales.

The questions in this case arose upon the will and codicil of Dr. John Borthwick Gilchrist, made at Paris, on the 8th of December 1840, in the English form, and executed and attested to pass freehold estates in New South Wales, which were devised by the will, but not so executed as to pass heritable property in Scotland, which was also included in it.

By the will, the testator, after giving his household furniture and other things to his wife, proceeds:—"And as to and for and concerning my estate, commonly called 'Gilchrist Place,' situate at or near Sydney, in New South Wales, and my house or flat in Hunter Square, Edinburgh, with their respective appurtenances, and also all the rest and residue of my real estate and hereditaments whatsoever and wheresoever; and also as to all the rest and residue of my personal estate and effects of what nature or kind soever, I devise and bequeath the same unto and to the use of Joseph Hume, of Bryanstone Square, in the county of Middlesex, esq., M.P., Charles Holland, of Queen Street, May Fair, in the same county, Esq., M.D., John M'Gregor, Esq., one of the Secretaries of the Board of Trade, John Bowring, of London, Esq., Doctor of Laws, and Robert Verity, of the city of Paris, Esq., M.D., Physician to the British Embassy, their heirs, executors, administrators and assigns, according to the natures and qualities thereof respectively, upon trust," that they should sell and convert into money all the residuary personal estate, not being ready money, and also absolutely sell and dispose of the real estate and hereditaments. The will then declared that the trustees should stand possessed of "the said trust money, stocks, funds and securities," upon trust, out of the annual produce thereof, to pay an annuity to his wife and various legacies. And it then proceeded, "And as to and for as concerning all the residue or surplus of the said trust monies, stocks, funds and securities, I direct that the trustees for the time being of this my will, do and shall stand possessed thereof, upon and for such trusts, intents and purposes, and with;

under and subject to such powers, provisions and declarations as I by my codicil or codicils hereto shall direct, limit or appoint."

Then, by a codicil which he made on the same day, he directed and appointed that the trustees or trustee for the time being of the said will, "Do and shall stand possessed of and interested in the residue or surplus of the trust monies, stocks, funds and securities thereby to them bequeathed in trust, upon trust to apply and appropriate the same in such manner as they, my said trustees or trustee, shall in their absolute and uncontrouled discretion think proper and expedient for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit."

The testator was born in Scotland, went to the East Indies, returned to London, where he lived for some time, and had all his books and furniture; then, leaving them here, went to Paris, where he continued for some years, and made a will in the English form (describing himself, however, as "of Edinburgh"), and died in Paris.

The evidence as to change of domicile, on the question as to what was his domicile at the time of his death, was very voluminous, and is substantially set forth in the report of the case when it was first heard before the Master of the Rolls (1). His Honour decided that the testator's domicile of origin in Scotland had been lost, that he had acquired an English domicile, and had such domicile when he executed the will and codicil, and that the will was valid.

The case was taken, by appeal, before the Lords Justices (Lord Justice Knight Bruce and Lord Cranworth), who affirmed the decision, and held that the words "education and learning" in the will were to be read "education in learning," and that there was a good charitable bequest. They also held, that the 9 Geo. 4. c. 83, which provides that all laws and statutes of the realm shall be enforced in the administration of justice in the colonies so far as the same can be applied, means "reasonably applied" (2), and that the statute 9 Geo. 2.

c. 36. (the Mortmain Act) is inapplicable to lands in New South Wales (3). This was an appeal against both decisions.

Mr. Rolt, Mr. Greene, Mr. W. Morris and Mr. Springall Thomson appeared for the appellant.

Mr. Roundell Palmer, Mr. Anderson and Mr. Bagshawe were for the respondent.

The Solicitor General and Mr. Wickens attended on behalf of the Crown.

The appellant's counsel cited the following cases: first, on the question of the domicile of the testator and the effect of the probate.—

Phillimore on Domicil, 100, 140, 144.

Somerville v. Somerville, 5 Ves. 750.

Munro v. Munro, 7 Cl. & F. 842.

Dalhousie v. MacDouall, Ibid. 817.

Thornton v. Curling, 8 Sim. 310.

The Attorney General v. Forbes, 2 Cl. & F. 48.

Forbes v. Forbes, Kay, 341; s. c. 23 Law J. Rep. (n.s.) Chanc. 724.

Bremer v. Freeman, 10 Moo. P.C.C. 306.

Allen v. M'Pherson, 1 H.L. Cas. 191.

The Carron Company v. Maclaren, 5 Ibid. 416.

On the question whether the words in the will were sufficient to pass the lands in New South Wales, there was cited—

Roe v. Walker, 3 Bos. & P. 375.

On the question whether the Mortmain Act, 9 Geo. 2. c. 36, applied to New South Wales, there were cited—

9 Geo. 4. c. 83.

The Attorney General v. Stewart, 2 Mer. 143.

Campbell v. Hall, 20 State Trials, 289; Cowp. 204.

On the question whether the devise for the advancement of learning in every part of the world was valid as a charity:—

Williams v. Kershaw, 5 Cl. & F. 111.

Ellis v. Selby, 1 Myl. & Cr. 286; s. c. 5 Law J. Rep. (n.s.) Chanc. 214.

Morice v. the Bishop of Durham, 9 Ves. 399; s. c. 10 Ves. 522.

Browne v. Yeall, 7 Ibid. 50, n.

Shelford on Mortmain, 63.

Vezey v. Jamson, 1 Sim. & S. 69.

James v. Allen, 3 Mer. 17.

For the respondents these cases and

(1) 20 Law J. Rep. (n.s.) Chanc. 369.

(2) See on this subject Clark's 'Summary of Colonial Law,' pp. 7, 8, 9 and notes.

(3) 21 Law J. Rep. (n.s.) Chanc. 406.

authorities were commented on, and the following cited, in addition.

As to the domicile:—

Stanley v. Bernes, 3 Hagg. 373.

De Bonneval v. De Bonneval, 1 Curt. 856.

As to the will being valid as disposing of property for a charitable purpose:—

Coole on Mortgages, 68.

Ommanney v. Butcher, Turn. & Russ. 260.

The Attorney General v. Stepney, 10 Ves. 22.

The Attorney General v. the City of London, 1 Ves. jun. 243.

Mitford v. Reynolds, 1 Phill. 185; s. c. 12 Law J. Rep. (n.s.) Chanc. 40.

Townsend v. Carus, 3 Hare, 257; s. c. 13 Law J. Rep. (n.s.) Chanc. 169.

Powerscourt v. Powerscourt, 1 Moll. 616.

Nightingale v. Goulburn, 5 Hare, 484; s. c. 17 Law J. Rep. (n.s.) Chanc. 296; 2 Phill. 594.

The President of the United States v. Drummond, at the Rolls, May 12, 1838.

Ludlow v. Stevenson, before Wood, V.C., not reported.

Moggridge v. Thackwell, 7 Ves. 36.

Horde v. the Earl of Suffolk, 2 Myl. & K. 59.

The Solicitor General was heard, on behalf of the Crown, to maintain that the testator lost his Scotch, and acquired an English domicile, which he ever afterwards retained, and that the will was valid.

The LORD CHANCELLOR moved the judgment of the House.—The will in this case was, though made at Paris, executed in the English form, so that it would pass real estate in New South Wales, but not heritable property in Scotland, though some property of that kind was included in it. The property was given to several eminent persons as trustees, “upon trust to apply and appropriate the same in such manner as they shall in their absolute and uncontrouled discretion think proper and expedient for the benefit and advancement and propagation of education and learning in every part of the world, as far as circumstances will permit.” Upon the argument at the bar three main

questions were raised: first, what was the domicile of the testator; secondly, whether the Mortmain Statute, 9 Geo. 2. c. 36, applied to lands in New South Wales; and, thirdly, whether the devise constituted a true charitable bequest. The first question was disposed of by the fact, that the Ecclesiastical Court had granted probate of the will as that of an English will; and against that decision there had not been any appeal—*Douglas v. Cooper* (4). But though the will itself was thus established, the question of the testator's domicile at the time of his death was, with reference to other matters, still open to discussion. By birth a Scotchman, he went to India in 1782 and remained until 1804, having there acquired what was called an Anglo-Indian domicile. In 1804 he returned to this country and went to Scotland, where, in 1808, he married; he quitted Scotland in 1817, never permanently to return. At first he established himself in London, with the especial purpose of selling his Oriental works. As one of the means of doing this, he obtained employment from the East India Company as a professor of the Hindostanee language. From 1817 to 1828 he resided in London, partly in houses taken on short leases, and partly as tenant at will, making during the time several excursions to the Continent. In 1828 he went abroad, and resided abroad until 1831. He returned to London for a short time, again went abroad, and returned to London in 1833. In that year he set up a newspaper, which failed, and in 1834 he went abroad, where he lived to the period of his death, but returned occasionally to London, especially in the years 1839 and 1840. He lost his Scotch domicile or domicile of origin in 1817. Did he then acquire a domicile in England? There seemed little doubt that he did. His books and papers were here; the great object of his life was to sell them and to extend the study of the Oriental languages, on which they treated, and his residence abroad was travelling, for his home was here. He did not lose that domicile, and he did not acquire another, for a domicile could only be acquired *animo et facto*; and there was

here no evidence of the *animus* to change the English domicile for a foreign one. He certainly took apartments in Paris upon a three, six or nine years' lease, determinable after the first year's occupation on a six months' notice, but still he did not manifest an intention of abandoning the domicile he had acquired here. On the contrary, besides leaving his books and papers here, he left also a handsome ornamental clock and some pictures, which a friend was to keep for him till his "return." All the evidence shewed that he did not intend to acquire a French domicile. Now, he had lost his Scotch and had acquired an English domicile. As he shewed no real intention to acquire a French one, he must have retained that which he had acquired here. Then came the question as to the Mortmain Laws. These laws did not appear to apply to colonies—*The Attorney-General v. Stewart*; and though that case was decided with reference to a conquered colony, and New South Wales was a planted colony, yet the reasoning of Sir W. Grant in that case appeared to apply equally to both kinds of colonies. But even if that were not so, and the question should be required to be determined on this, whether the Mortmain Laws were by that statute applicable to the colony of New South Wales, he was prepared to answer that question in the negative. The 9 Geo. 4. c. 83. s. 24. did not get rid of the difficulty, for that statute did not leave it doubtful what were the general laws under which the people of New South Wales were living, since so to leave it would have been a great public mischief, but applied only to the laws regulating the administration of justice, as to the applicability of which the Courts of the colony were to decide as occasion required. Then came the last question, whether this was a good charitable bequest. The great difficulty in this case arose from the introduction of the words "and learning" after the word "education," the word "learning" being one of very extensive signification, and "learning" being capable of being benefited in various ways which would not be charitable; so that, if this bequest could be brought within any such case, it would be invalid. But that argument was a begging of the question, for it

first assumed a meaning for a word more extensive than it was shewn generally to bear, and then assumed a consequence as the result of the assumed meaning. If there were two meanings capable of being applied to a word which was used by a testator, that which would effectuate, not that which would defeat, his evident intention was to be preferred. Here there was enough to say that the word "learning" had the meaning of imparting knowledge by instruction or teaching, and if so, then "learning" and "education" must be treated as mere repetitions the one of the other. Then it was objected that the bequest was too general, as it extended over the whole habitable world, but to that objection the principle stated in the case of *The United States v. Drummond* afforded an answer. There a bequest to found an "institution for the increase of knowledge among men" was held valid, and that was certainly as extensive a bequest as the one contained in this will. Upon the whole, therefore, he thought that the decree ought to be affirmed, and affirmed with costs.

LORD CRANWORTH said, that his noble and learned friend had gone so fully into the case that he should feel himself called on to make but few observations. The first question, namely, whether the grant of probate was not conclusive evidence of domicile, was the most important. In his opinion, it proved no more than that the instrument was testamentary according to the law of the country where the probate was granted. To give effect to the will itself, it must be known in what country the testator was domiciled. Here there was nothing to lead to the notion of anything but an English domicile. As to that point, it seemed clear that in 1817 the testator quitted Scotland with the intention of quitting it for ever, not, perhaps, not to visit it again, but not to reside there.—[His Lordship here went through the circumstances, which shewed that though the testator was frequently in Paris, his home must be considered to have been in London.]—These circumstances shewed that he must be considered a domiciled Englishman; and it ought to be considered as a rule, that the Courts would look with suspicion

on any circumstances adduced with a view to shew that a man had voluntarily changed his domicile from his own to a foreign country, had left his own country to reside in one where there must always be difficulties in his own individual position and in the conflict of the duties which he owed to one country and to the other. The citations from the Roman law did little to illustrate this subject. They were instances of an endeavour to explain something by something which itself still more required explanation, *clarum per obscurum*. "Domicil" meant permanent home, and if that was not understood by itself, no illustration would help to make it intelligible. The question of domicile had been not improperly raised in this case, but those who had raised it had failed to shew a domicile anywhere out of the country.

With respect to the question as to the application of the statute of Geo. 2. to the colonies, he thought the decision of Sir W. Grant on that subject was perfectly conclusive. It was often difficult to say what laws were adapted to a colony, but it was not difficult to determine that matter with regard to the Statute of Mortmain. Some of the provisions of the statute could not possibly be complied with by residents in the colony, nor was the evil which this statute was meant to provide against one which had as yet afflicted the colony. He was therefore of opinion that the statute did not apply to New South Wales.

As to the words "education and learning," he thought that the one was but the correlative or repetition of the other. "Learning" was here meant to be education for the benefit of those who were to be taught, and they were to be taught what commonly passed in the world under the name of learning. But then this was to be extended all over the world. That was a silly provision, but it did not invalidate the will. The learning was not to be applied all over the world, but only so far as circumstances would permit, and in settling the scheme for this charity, which was a perfectly valid one, it would be the duty of the Court to see that it was as extensive as the nature of the income would permit.

LORD WENSLEYDALE entirely concurred. The question of domicile here was one of

fact, and had been very properly decided in the court below. He agreed entirely with the proposition that our Courts must look very narrowly into the evidence before they deprived an Englishman living abroad of his English domicile. If the question of domicile was, as he thought it, rightly decided, it was unnecessary to discuss the effect of the grant of probate of the will in the Court of Canterbury. Probate was conclusive evidence of the title of the executors to all personal property which the testator was capable of disposing of, and conclusive evidence that it was in the proper form of the place of his domicile. It would be a mere question, what would be the effect of a probate if the testator died domiciled in a country where there was no power to make a will at all. His own impression was, that until probate was revoked in solemn form, it would still pass, as far as England was concerned, all the property to which the English law applied, and that the objection could not be set up after the will had passed the Ecclesiastical Court.

As to the application of the Mortmain Act to New South Wales, he entirely concurred with the opinion of his two noble and learned friends. And he also agreed with them that the testator did not intend that any part of his property should be diverted to the purposes of learning unconnected with education. He therefore concurred with the advice that had been given, that the decree of the Court below should be affirmed.

*Decree appealed from affirmed,
with costs.*

KINDERSLEY, V.C. }
Feb. 16. } HAYWARD v. LOWNDES.

Public Health Act, 1848, and Local Government Act, 1858—Power to construct Sewers.

The powers of local boards, under the Public Health Act, 11 & 12 Vict. c. 63, for the construction of sewers, are confined to their own district; and the Local Government Act, 21 & 22 Vict. c. 98, extends the exercise of those powers beyond the district only where it may be necessary for the purpose

of outfall or distribution of sewage, and not for the purpose of making new sewers.

The plaintiffs were the owners of certain lands in the township of Burslem and Wool Stanton, in Staffordshire, and the defendants represented the local board of health of Tunstall, in the same county. The defendants had commenced the construction of a sewer, which was to pass out of their own district and through the lands belonging to the plaintiffs. The plaintiffs alleged that the defendants had no power to go out of their own district for the purpose of making a sewer, and filed this bill for an injunction to restrain the defendants from constructing any sewer beyond their district; and affidavits were filed by the plaintiffs to shew that considerable injury would be done to their property if the intended sewer were constructed according to the plans proposed by the defendants.

There were also affidavits on behalf of the defendants, alleging that it was impracticable to construct the sewer in any other manner than that proposed; that if the sewer were confined to the defendants' own district it would be necessary to go to much greater expense, and to purchase a house; that, consequently, it was necessary for them to go out of their district, and they had powers for this purpose given them by the Local Government Act. They also alleged acquiescence on the part of the plaintiffs.

The question depended upon the construction of the Public Health Act, 11 & 12 Vict. c. 63. ss. 43, 45, 46, and the Local Government Act, 21 & 22 Vict. c. 98. s. 30.

By the 11 & 12 Vict. c. 63. s. 43. it is enacted, that all sewers, whether existing at the time when this act is applied or made at any time thereafter (except sewers made by any person or persons for his or their own profit, or for the profit of proprietors or shareholders, and except sewers made and used for the purpose of draining, preserving or improving land under any local or private act of parliament, or for the purpose of irrigating land and sewers under the authority of any Commissioners of Sewers appointed by the Crown), together with all buildings, works, materials and things belonging or appertaining

thereto, shall vest in, belong to, and be entirely under the management and controul of the local board of health.

By section 45, it is enacted, that the local board of health shall from time to time repair the sewers vested in them by this act, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this act; and the said local board may carry any such sewers through, across or under any turnpike-road, or any street or place laid out as or intended for a street, or under any cellar or vault which may be under the pavement or carriageway of any street, and after reasonable notice in writing in that behalf (if upon the report of the surveyor it should appear to be necessary), into, through or under any lands whatsoever; and the said local board may from time to time enlarge, lessen, alter, arch over, or otherwise improve all or any of the sewers vested in them by this act, and discontinue, close up or destroy such of them as they may deem to have become unnecessary.

By section 46, it is enacted, that the local board of health shall cause the sewers vested in them by this act to be constructed, covered and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed and emptied; and for the purpose of clearing, cleansing and emptying the same they may construct and place, either above or under ground, such reservoirs, sluices, engines and other works as may be necessary, and may cause all or any of such sewers to communicate with and be emptied into such places as may be fit and necessary, or to cause the sewage and refuse therefrom to be collected for sale for any purpose whatsoever, but so as not to create a nuisance.

The Local Government Act, 21 & 22 Vict. c. 98. s. 30, enacts that local boards may exercise the powers given by the 46th section of the Public Health Act, 1848, also without their district, if necessary for the purpose of outfall and distribution of sewage, upon making due compensation, to be settled in the manner provided by the 144th section of the Public Health Act, 1848.

Mr. Baily and *Mr. Jessel* appeared for the plaintiffs; and

Mr. Glasse and *Mr. Humphry*, for the defendants.

KINDERSLEY, V.C.—The question is, whether the plaintiffs are entitled to an injunction to restrain the local board of Tunstall from constructing a sewer for the drainage of Tunstall. With regard to the jurisdiction of this Court over such a question generally, there can be no doubt. It has been suggested that under some of the clauses of one or other of these acts, the Court ought to come to the conclusion that in fact the jurisdiction to consider this matter is vested in the Secretary of State, or in some other officer. It appears to me that the jurisdiction of this Court, which exists in this class of cases, is not in the smallest degree interfered with by any section in either of these acts of parliament. That jurisdiction is an extremely wholesome jurisdiction, and is well established, but at the same time a jurisdiction which ought not to be exercised, except where there is a clear right in the plaintiff to call for the exercise of it. The question turns entirely upon the construction to be put on the Public Health Act, 1848, and the Local Government Act, 1858. Three questions have been suggested: one is, whether the local board have a right to make a new sewer out of their own district, against the will of the owners of the land through which they propose to make the sewer? Another is, whether, if they have such a power, they are exercising it in such a manner as to create a nuisance, in which event they ought to be restrained? And a third is, whether the plaintiffs have not so acted as to shew an acquiescence, and to induce the Court not to interfere? I may dispose of this last question at once, by saying that I think the plaintiffs have not so acted as to preclude the interference of this Court.

With regard to the first question, what appears to me to be the general intention of the act is this: that unless there be in any clause a specific direction to the contrary, the power and jurisdiction of any given local board is to be confined to their own district; that is, to the district in which that local board is constituted for the purpose of public health. That appears to me to be the scope of the act of parliament. No doubt there are words of gene-

ral import, which, if you are to take them merely by themselves, and without reference to the whole context, would lead you to a different conclusion; but if you do so take them, they would go to this: that the jurisdiction of every local board of health would be co-extensive with the kingdom. That of course cannot be; therefore, there must be some limit, and some restriction intended to be put on these general words. It appears to me, on looking at the whole of the acts of parliament, that the intention is to limit the local board to the district for which that board is constituted.

I will take first of all the 43rd section of the Public Health Act, the effect of which is to vest in the local board all sewers, whether existing at the time the act was passed or made at any time thereafter (except certain sewers specifically mentioned), and all buildings and works belonging to them. It does not say that all sewers within the district are vested in the local board of that district; but that all sewers are vested in the local board. Yet nobody will pretend to say that the act meant to vest in such local board all the sewers in England:—it is too ridiculous to be suggested; so that we have here in the first clause general language used, which it must be admitted by anybody requires, not only some restriction, but that restriction which I have suggested, namely, a restriction confining its application to the limits of the district. Then we go on to the 45th section of the same act, where it is enacted, that the local board of health shall from time to time repair the sewers vested in them by that act. It appears to me that according to the 43rd section the sewers vested in the local board are the sewers within the district for which that local board is appointed; and by this 45th section it is enacted, that the local board of health shall from time to time repair the sewers vested in them by this act (that is, the sewers within their district): “sewers then made or thereafter to be made, shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of that act.” I apprehend that that section clearly means that those sewers, which they are thus

empowered to make as necessary for effectually draining their district for the purposes of this act, must be sewers within the district. See the absurdity that would follow if this act meant to authorize them to make a sewer not only co-extensive with their district, but extending beyond their district, and running into another district; the effect would be this: that although they made the sewer, this very act would vest that sewer, which would not be in their district, but in the neighbouring district, in another body, who might cut it off, intercept it, and do just what they pleased with it; and why? because they found it vested in them by this act. Again, no sewer is vested in the board by this act but the sewers within their own district; if, therefore, they had the power, as contended for, of making a sewer out of their own district, they would have no power to enlarge or lessen it, to alter or arch it over, or improve in any manner the sewers out of their own district. If this contention is to prevail, you would have that species of conflict between the two districts which it is impossible to suppose the legislature could have intended. Therefore, it appears to me that, not only to make the act reasonable and rational, but to render it quite consistent with itself, the Court must apply a similar restriction to the effect or language of this, as of the former section; and I must hold, that the 45th section speaks only of "sewers within their own district." But, then, further on in the same section, we find the words "into, through, or under any lands whatsoever." It was suggested that these words, taking them as they stand, would mean lands "anywhere" in the county of Cornwall or in the county of Cumberland within or without their own district; but does the same section mean streets, place, cellar or vault, &c. out of their own district? Does it mean that the local board of Tunstall may carry their sewers through or under the streets of any neighbouring town? It is quite obvious, when you come to look at the whole scope of the clause, that it must mean lands in their own district. Then come powers to alter or enlarge sewers, but these powers, for like reasons, must be confined to sewers within their own district. If not so confined,

they might make them out of their district, but could not alter or enlarge them; and the local board of the next district might alter or cut them, or make them pass as they pleased. It appears clear to me, therefore, that the 45th section must also receive the same restriction, so as to make the general powers apply to sewers and lands within the district only. Then the 46th section, again, can only apply to sewers in their own district; otherwise, if they make sewers out of their own district they are not required to cover and keep them so as not to be a nuisance; and though they must make sewers within their own district so as not to be a nuisance, yet without their own district they may do what they please. The only purpose for which they may make these works is to cleanse sewers within their own district, and they have no power to do anything else, except within their own district. Then comes the question whether the 30th section of the Local Government Act in any way gives that power which, in my opinion, the former act does not give; that is to say, to go out of their own district.—[His Honour, having read the 30th section of the Local Government Act, continued]—Now, it appears to me that this clause makes it still more clear, or, I may say, necessary to construe the former act as confining the powers to the district, for if by the former act there was power to go out of their district, it would be unnecessary that this second act should give them these powers. I must hold, that the legislature itself has told me that until this act was passed they had not power to go out of their district. Now, this second act only gives them a right to exercise the powers of the 46th section, which are to construct reservoirs, &c., but not to make sewers under other districts. Why the legislature has thought fit to give them powers to go out of their district for such a purpose, but not power to make sewers out of their own district, may admit of a question, but it is clear that the 46th section does not give that power, and that is the only section which is extended. But suppose I came to the conclusion that the second act did give them power, then I should have to consider whether it was necessary to go out of the district for the purpose of outfall or

distribution of sewage (for "and" must here be read "or"). When I look at the plan in this case, it is obvious that it is not necessary, and that the outfall may just as well be accomplished by keeping within as by going out of the district. But it was said that if they made it within the district, they would have to buy a house; but suppose they have to buy a house, is not that one of the obligations imposed upon them by the act? Is it necessary, merely because they wish to avoid buying a house that they should go out of the district? It may be that if the compensation were such an enormous sum as that it could not be raised out of the rates, then it might be *necessary*. But here the house is a single blacksmith's shop or shed, and there does not appear to be anything whatever of that necessity which the act meant for going out of the district. It appears to me that there is here no right whatever to go out of the district; because there is no necessity for it. I am, therefore, bound to say that this board are departing from their powers, and that I must grant the injunction.

KINDERSLEY, V.C. }
Jan. 13. } HAMILTON v. SMITH.

Company, Promoters of — Partnership Liabilities.

Certain persons joined together for the purpose of forming a joint-stock company, and with that view purchased property and incurred debts and expenses. The project became abortive, and upon a bill filed for an account, on the footing of a partnership, it was held, that this was not a partnership; and the bill was dismissed.

The bill in this suit stated that previously to the month of July 1854, the defendants Frederick James Smith and Robert Galloway were proprietors of a patent for refining sugar, known as "Dr. Scoffern's Patent." In April 1853, F. J. Smith, together with other parties, purchased for the sum of 1,500*l.* a lease of certain business premises, situate at Pleasant Row, White-chapel, for the purpose of practically exhibiting the operation of the refining process; and in October 1853, the lease

of these premises was assigned by way of mortgage to Messrs. M'Naughten & Parry, sugar-brokers, who were creditors of Smith, and his coadjutors, for the sum of 3,800*l.* Messrs. M'Naughten & Parry having applied for payment of their debt, F. J. Smith, with the assistance of Henry Hayward, took measures for the formation of a joint-stock company, in order that the premises in Pleasant Row might be secured, and the business of sugar-refining carried on. It was finally arranged that 1,500*l.* should be provided by F. J. Smith, of which 250*l.* should be the contribution of Robert Galloway, and a further sum of 500*l.* was to be provided by Edward Jackson, so as to make up 2,000*l.*, and the premises were then to be purchased for the sum of 4,000*l.*, of which amount, the above 2,000*l.* was to be paid at once, and the remaining 2,000*l.*, by instalments, within eighteen months. On the 27th of September 1854, a meeting of the promoters of the company took place, which was attended by the Messrs. F. J. Smith, Barnes, Hamilton, Jackson, Hayward, Hoyles and Taylor, and at this meeting the arrangements for the purchase of the above premises and the formation of the company were agreed to, and the premises were accordingly purchased, and the deposit of 2,000*l.* was paid in the manner before mentioned. Various subsequent meetings of the promoters of the company took place, which were attended by all the plaintiffs, and steps were taken for the formation of the company.

On the 19th of December 1854 the company was provisionally registered, and the following gentlemen were described as promoters:—Messrs. F. J. Smith, Barnes, Hamilton, Jackson, Hoyles, Munro, Hayward, sen. and Hayward, jun., Herbert and Dering.

The company was never completely registered, nor was the deed of settlement signed. After this the premises in Pleasant Row were further charged with a sum of 1,000*l.*

On the 5th of November 1855 a meeting of the promoters of the company was held, at which it was resolved that the project should be abandoned and the affairs of the company wound up; and in pursuance of other resolutions, the mortgaged property was sold by public auction

for the sum of 3,000*l.*, which sum was paid over to the mortgagees. Considerable expenses having been incurred about the purchase and sale of the premises and connected with the formation of the company, the last-mentioned sum of 1,000*l.* was applied towards such expenses. On the 30th of June 1857 the defendant F. J. Smith commenced an action against Messrs. Hamilton, Hoyles, Munro, Herbert, Hayward, sen. and Hayward, jun., Dering and Barnes, to recover the sum of 1,250*l.*, being the amount contributed by him, and the bill was thereupon filed for an injunction to restrain the action, and for an account, and a declaration as to which of the parties were liable to pay the said sum, and to what extent and in what proportions; and if the Court should be of opinion that the plaintiffs were liable to reimburse Smith, then that the money advanced by him and by Galloway and Jackson might be included in the account, and that both the plaintiffs and the defendants were liable to contribute.

The action was stayed by arrangement between the two parties, and the cause now came on for hearing.

Mr. Swanston and *Mr. Webb* appeared for the plaintiffs, and contended that this was a case of partnership where the parties had actually purchased property for the purpose of carrying on a business, and all the partners were therefore liable to contribute. It was not like the ordinary case of persons joining together to attempt to form a company.

Mr. Glasse, *Mr. Dickinson* and *Mr. Hobhouse* appeared for the defendants, and submitted that a bill could not be sustained in this case on the footing of a partnership. It was the same as any ordinary case of persons uniting together to form a company, and the only remedy would be under the Winding-up Acts.

The following authorities were cited:—

Norris v. Cottle, 2 H.L. Cas. 647.

Bright v. Hutton, 3 Ibid. 341.

KINDERSLEY, V.C.—I have been much perplexed by the extraordinary nature of this case; and that perplexity is not entirely removed. The bill is filed upon the

footing that certain persons agreed to form, and did form, an actual partnership or adventure; that the plaintiffs and the defendants were co-partners, and that some were entitled as against the others to an account and a winding-up of the concern. The bill prays an injunction to restrain one or more of such partners from bringing an action to recover specific sums, which should form items in the general account. Unless it can be proved that this is a partnership, the bill cannot prevail. Now one thing is clear: if half-a-dozen persons enter into a specific adventure for the sale of tea, or silk, or a share in a ship, they are *pro hac vice* partners; and it may be thought that such a rule would apply to an undertaking with a view to establish a joint-stock company. But the law has determined otherwise; whether rightly or wrongly it is not for me to say. I may say, however, that I wish it had been decided that it would, and that all the parties to such an undertaking were liable; but that is a mere matter of private opinion, and all that I can do is to administer—not make—the law. Well, then, persons combining as promoters of a joint-stock company, either by charters, under an act of parliament, or taking advantage of an existing statute, are not partners. In a partnership all the partners are liable to the expenses of carrying on the joint business or object, although each of them may not have personally concurred in incurring them; but such is not the case with promoters of a company. A company cannot be said to exist, as such, until it is formed; and from that moment a new state of things arises. What, then, is the effect of such a company not being formed? Why, that each promoter is only liable for that portion of the expenses which he himself, either actually or impliedly, by law may be held to have sanctioned. That rule is acted on every day under orders to wind up inchoate associations. The present case presents an instance of an association very much of that character; and therefore the promoters are only contributories as to those expenses which they caused to be incurred. The bill, however, proceeds on the footing of a partnership, which is not applicable to the state of things I have just instanced.

The parties here were not, in reality, partners; and although the Joint-Stock Companies Winding-up Acts have established the principle that you may have a winding-up order to embrace all persons, they still are only liable piece-meal, so to say; and each is only liable for his personal portion of the expenses. I am happy to say it has never yet been established that you may file a bill in such a case, and I hope it never will be so decided. There is not in such a case any principle enabling the Court to make a decree, and administer what might be regarded as the equities among the parties. Such a jurisdiction would introduce all those mischiefs and anomalies now confined to proceedings under the Winding-up Acts. The plaintiffs can, therefore, have no relief upon this bill. It has been argued that, in point of fact, this is a case of an actual partnership, and not of parties combining to promote a joint-stock company; that it is the case of parties who, having bought property to the amount of 4,000*l.*, had thereby done that which constitutes a partnership. That argument is ingenious and very striking at first sight; but when considered, it is not tenable. The purchase was made according to a determination at a meeting, when none of the defendants, except Smith, were present, and for the benefit of the company, "if ever formed." The project failed, and the property remained in the hands of those parties to answer the expenses incurred in endeavouring to form a joint-stock company. Why should those expenses stand on a different footing from expenses incurred to a surveyor, engineer or solicitor, in trying to form a railway? It was, no doubt, right that the property should be sold and the parties so far recouped; but how does that make persons who have not incurred the expenses liable in this? If Smith was liable, Galloway and Herbert were not. The property was not conveyed to Smith, and supposing those to whom it was conveyed were trustees for him, how came they to sell his property? In the correspondence Smith treated himself as a party concerned; but the plaintiffs have treated him as having nothing to do with the property; and he was never invited to any of their meetings. It is, therefore, impossible to say that they

regarded him as a partner. Expenses were incurred for which those only who authorized them were liable. Neither Galloway nor Smith could be liable, and the bill entirely fails on the general principle. Smith and Herbert, however, so acted as to give a colour to the plaintiffs' supposed right to have an account; and, moreover, with respect to the actions which Smith brought and Galloway threatened to bring, they were for specific sums, which as to Smith he treated or allowed to be treated as an advance on account of shares to be taken in the company. Upon the whole case, and the general principles of this Court, the bill must be dismissed with costs as against Galloway; but without costs as against Smith and Herbert.

LORDS JUSTICES. }
 March 7, 8. } HUMPHREY v. OLVER.

Power of Appointment — Fraud — Corrupt Bargain for Benefit of Appointor.

Where a person having a power of appointment over a fund in favour of her children, made an appointment under such circumstances as led the Court to believe that the appointor intended to derive some benefit to herself, but it was not proved that she actually derived any benefit, excepting that the fund appointed was applied partly in payment of debts of the appointee for which the appointor was a surety, the Court of Appeal (reversing a decision of the Master of the Rolls) set aside the appointment.

Where there is proof that an appointor at one time intended a benefit to herself, the onus of proof that at the time of the appointment she had abandoned that intention lies upon those who support the appointment.

This was an appeal from a decision of the Master of the Rolls. The very short facts were these:—By indenture of settlement, dated the 11th of March 1822, 924*l.* consols, 116*l.* 17*s.* 10*d.* New 3*l.* per cent. and twenty-three shares in the United States Bank, were settled in trust for Mrs. Webb for her separate use for life, and after her death for her husband for life, and after the death of the survivor, upon trust for the children of Mrs. Webb, in such shares as she should appoint, and in

default of appointment for such children in equal shares. There were four children of the marriage. The husband died in 1847. In 1852, Sophia, one of the daughters, married the defendant, Olver.

By a deed of appointment, dated the 17th of August 1853, Mrs. Webb appointed 800*l.* consols out of the trust money, after her decease, to her daughter Mrs. Olver, for her separate use. In May 1854 Mrs. Olver raised 300*l.* by annuity secured upon her appointed share. She died in January 1855, having by her will appointed her whole share to her husband.

Mrs. Webb made a will previously to her daughter's death, whereby she gave the residue of the trust fund to Mrs. Olver, but after her death Mrs. Webb executed another will appointing the same residue among her three other children. Mrs. Webb died in June 1857.

The present suit was instituted by her surviving children, to set aside the appointment to Mrs. Olver, on the ground that it was a fraud upon the power, having been made partly for the benefit of Mrs. Webb, the appointor.

At the hearing of the cause at the Rolls, at the end of 1858, the Master of the Rolls decided in favour of the appointment, incorporating in his judgment the evidence on either side, saying "The question in this case is, whether the appointment made by Mrs. Webb is void, as being made in fraud of the power which she professed to exercise. It is contended that this appointment was, in fact, made partly for the benefit of Mrs. Webb, the appointor, and not for the sole benefit of her daughter, the appointee. The evidence upon which the plaintiff's case is founded is, that Mrs. Olver, at the time of her marriage, and at the time of the appointment, was in a state of health from which it might be assumed that she would shortly die, and would therefore obtain no benefit from the appointment, and that, in fact, she did die of consumption in January 1855, within a year and five months after the date of the appointment; that previous to the appointment various ineffectual attempts had been made by Mrs. Webb and Mr. Olver to raise money; that this appointment was made for the purpose of enabling money to be raised; that 300*l.* was raised by annuity,

upon the security of the appointment; that the money so raised was intended to be employed for the joint benefit of Mrs. Webb and Mrs. Olver; and that if it was not so employed, still that Mrs. Webb obtained the benefit of the appointment to this extent, that the money so raised was partly employed in the payment of debts of Mrs. Olver for which Mrs. Webb was surety. Beyond this, it is contended, that the evidence establishes that when the appointment was made, it was so made by Mrs. Webb in the belief and under the promise from Mrs. Olver, that part of the money should be applied for her benefit, and that although it was not so applied, this breach of the agreement entered into by Mrs. Olver could not make good an appointment which was made for the purpose of obtaining a benefit of which Mrs. Webb was afterwards unexpectedly deprived. Now, certainly, if the evidence had established the fact that Mrs. Webb executed the appointment with the view and for the purpose of benefiting herself, even though she failed in obtaining the advantage which she had anticipated, I should be of opinion that the appointment was void. But the evidence does not satisfy me that such was the case. The documentary evidence consists of testimony drawn from Mrs. Webb, certain letters and a declaration signed by her. Previous to the death of her daughter, Mrs. Webb had made her will, leaving her daughter Mrs. Olver the residue of her estate, consisting of 643*l.* consols; and this, as far as it goes, is in favour of the *bona fides* of the appointment. After her daughter's death she executed another will, by which she gave the 643*l.* consols to her other children. A fortnight before she made this second will, she wrote a letter to her solicitor, in which is the following passage:— 'It is true, I was pressed to make the deed of gift in favour of my late daughter, which I always felt the greatest reluctance in doing, and which I did consent to only upon one condition, and that which was solemnly promised, of my having a share in the benefit to be derived from it; but when I saw you take 200*l.* out of 300*l.*, I found I had no chance, and was left with many others to do as well as we could; the promise was a mere bribe held out to me.' This document affords abundant

evidence to shew that Mrs. Webb had changed her mind respecting the appointment; but it does not, in my opinion, shew that the appointment itself is bad, because it is impossible that I can, as against the appointee, take the statement of this lady to be absolutely true as against him. It does shew this, that she derived no benefit, or that she considered that she derived no benefit from the appointment; but I do not find that she makes any complaint prior to the decease of her daughter Mrs. Olver. This statement also is contradicted by a declaration which she made in February 1854, which is attested by two witnesses, in which she asserts the purity of the motive in making the appointment. The latter document itself is undoubtedly of little value for the purpose of confirming the appointment; the only effect of it is to shew that Mrs. Webb, or those who advised her at that time, thought that a question might be raised as to the validity of the appointment. But it is also of value for the purpose of shewing how little reliance can be placed upon the subsequent statement of this lady, who had made this solemn declaration, that she had no corrupt motive in making the appointment. Whether any weight is to be attributed to the circumstance that one of these documents was made before and the other after her daughter's death, I am unable to ascertain; nor can I tell what the motives were which actuated her to make these statements; but it is obvious that I cannot have recourse to either for the purpose of invalidating or confirming the appointment. That is a question which must rest upon distinct and independent testimony. I pass over, as matters which cannot affect my decision, all the evidence, of which there is a considerable amount, as to the statements made by Mrs. Webb to the witnesses subsequently to the appointment. Assuming it to be proved, and the evidence to be admissible, it amounts to no more than what she wrote in the letter I have already alluded to, and to which, for the reason I have given, I am of opinion I cannot attach any weight. The *visd voce* evidence respecting the health of Mrs. Olver establishes that she was taken ill before her marriage; that she was afflicted with a pulmonary complaint, which put an end to

her existence three years after marriage. But this alone is not sufficient to avoid the appointment, for, notwithstanding her state of health, Mrs. Webb made Mrs. Olver her residuary legatee, and the appointment complained of preceded Mrs. Olver's decease by upwards of a year and a quarter. The evidence of the transaction being clandestine also fails. Notice was given to the trustees of the settlement very shortly after the date of the appointment by the parties who had advanced the money upon it; and this was in substance all the notice that could be required or could have been expected. I attribute no weight to the fact, that the parties to the appointment did not mention it publicly in the family. There is evidence which, so far as it goes, supports the case of the plaintiffs, namely, that Mrs. Webb was greatly in debt at the time she made the appointment. This undoubtedly is evidence of the existence of a motive for fraud in the exercise of the power; but whether this would be sufficient to invalidate the appointment is a question which I could not determine without further evidence. This leads to the consideration of the only additional evidence which goes to the root of the matter, and which is of considerable importance. It is the evidence of Mr. Huxtable, the medical gentleman, who speaks to what occurred prior to the execution of the appointment. He says, 'In the early part of the year 1853, I pressed Harriet Webb and Olver for the payment of my account. They both stated they were unable to pay the same; but they proposed to raise money upon the marriage settlement of Harriet Webb, and that when they had done so I and the other creditors should be paid in full. They informed me that Harriet Webb was about to make a will and dispose of the reversionary interest under her marriage settlement in favour of Sophia Olver, for the purpose of enabling the defendant Olver and his wife to raise money upon the will, and that out of such money I should be paid the amount due to me, and they requested me to allow my account to run on until they could raise the money in the manner stated. A will was afterwards executed by Harriet Webb in my presence, and at the earnest solicitation of Harriet Webb I subscribed the same as

one of the attesting witnesses. Soon after the execution of the will, I inquired of Harriet Webb and Olver whether they had succeeded in raising the anticipated sum of money, but they informed me that they could not obtain the money, and that their object could only be accomplished by making a deed in favour of Sophia Olver, and that Harriet Webb intended to make such deed, and that their solicitor was preparing such deed.'—'Upon one occasion, in 1853,' he says, 'I was going to the west end of London, together with Harriet Webb and Olver, to consult a physician upon the state of health of Mrs. Olver; we called upon Mr. Chidley, the solicitor of Harriet Webb, at his office (Guildhall Chambers), and upon such occasion the subject of the proposed deed and borrowing the money was discussed, and it was frequently mentioned to me by Harriet Webb and Olver; and Harriet Webb informed me that she was in greatly embarrassed circumstances, and the defendant Olver also informed me that he was greatly in debt when he married, and upon this ground, because they were in great want and unable to pay their creditors, I agreed not to insist upon the payment of my account until they received money. Harriet Webb and Olver always told me the money intended to be borrowed was to pay their debts,—mine, among others, more particularly; but I have never received any portion of the money due to me.' Various observations occur upon this evidence. In the first place, it is stated, that the money was to have been raised expressly for the purpose of paying Mr. Huxtable among other creditors; but, although the money was raised, no portion of it was applied towards the payment of Mr. Huxtable's debt. The whole passage is expressly denied by the defendant Olver, who swears that the appointment was the spontaneous act of Mrs. Webb, and was not at all the effect of any corrupt motive or agreement between her and Mr. Olver. Certainly, the money was not applied for the benefit of Mrs. Webb at the time, as she herself afterwards complained, but she made no observations respecting it until after the death of her daughter. In that state of things, I think there is not sufficient to justify me in coming to the conclusion that the ap-

pointment was made by Mrs. Webb with a view to benefit herself. The burden of proof lies upon the plaintiffs; and, although I cannot say the case is one not involved in a good deal of suspicion, I am of opinion that the plaintiffs have failed to prove the corrupt agreement; I must, therefore, dismiss the bill, but without costs."

From this decision the plaintiffs appealed, and the Lords Justices required that Mr. Olver should submit himself for examination, a course which had not been pursued in the Rolls Court, as the plaintiffs had filed a replication to his answer. The witness Huxtable was not cross-examined for the defence, nor was Mr. Chidley, who prepared the deed of appointment, examined by either side, either on the original hearing or on the appeal.

Mr. Olver was cross-examined at length on his answer, and in general terms adhered to the statements therein contained.

Mr. Shapter and Mr. Dickinson were for the appellants.

Mr. Wellington Cooper (with *Mr. Roundell Palmer*), for the defendant Olver, and for one of the trustees of the deed of appointment, supported the decision of the Master of the Rolls.

Mr. Southgate, for the other trustee of that instrument.

Mr. C. M. Roupell, for the trustees of the original settlement.

LORD JUSTICE KNIGHT BRUCE said that the defendants had not cross-examined Mr. Huxtable, and that Mr. Chidley, who prepared the deed, had not been called as a witness by either side. It might be, considering the circumstances, not unreasonable that those who impeached the appointment should have abstained from examining Mr. Chidley; but that observation could by no means apply to the defendants, who supported it. In his Lordship's opinion, it was clear that the Court could not rely upon the accuracy of the defendant Olver's memory as to circumstances of fact; on the other hand, having regard to the evidence of the plaintiffs generally, and particularly to the nature of Mr. Huxtable's, his Lordship was satisfied that the disputed appointment had not been determined on, prepared and executed solely

with a view to the benefit of Sophia Olver and her husband, but that it was intended—in part at least—to be for the benefit of Mrs. Webb, the appointor; and that consideration was, of course, fatal to its validity.

LORD JUSTICE TURNER was also of opinion that this appointment could not be upheld. The defendants had contended that there was in the circumstances of this case nothing beyond suspicion, and that a transaction of this nature would not be overthrown by this Court merely upon suspicion. That was, no doubt, true; but it was different where there was a just inference of a wrongful intention from the facts established. The question to be considered was, whether there was to be drawn from the circumstances of this case such an inference that the appointment was in any manner intended for the benefit of the appointor. It seemed impossible to doubt that, at all events, there had been such an intention in Mrs. Webb's mind; but it was contended, that that intention had been abandoned—and of this abandonment his Lordship said he could find no proof. In his opinion, if the evidence established that such an intention had ever been entertained, the burden of shewing that it was abandoned previously to the execution of the appointment lay upon those who supported it. Here the defendants had not thought proper to cross-examine Mr. Huxtable, or to call Mr. Chidley; and he (the Lord Justice) was not satisfied with the evidence given by Mr. Olver. His Lordship said that everything that could be urged in support of the appointment had been very ably urged by Mr. Wellington Cooper; but his opinion was, notwithstanding, that the appointment by the deed must be set aside, and that the fund must be declared to have been well appointed by the will amongst the other children of Mrs. Webb.

LORD JUSTICE KNIGHT BRUCE added, that he entirely agreed that Mr. Cooper had said all that could be said in favour of the appointment, and that the parties had no reason to regret the absence of their leading counsel, Mr. Roundell Palmer.

M.R. { WILSON v. FOSTER.
Jan. 13, 14. { In re THE LANCASHIRE
AND YORKSHIRE RAIL-
WAY COMPANY.

Company—Reinvestment—Costs.

Upon a petition by a tenant for life for the reinvestment of purchase-money for lands taken by a railway company,—Held, that the costs of the appearance of the reversioner and of the trustees of a deed of separation between the tenant for life and her husband, ought to be paid out of the fund, and not by the railway company.

This suit was instituted to carry into execution the trusts of the will of Sir H. Wilson, deceased; by which will various real estates were settled to the use of the defendant Mary W. H. Wilson for life, with remainder to the plaintiff in this suit. The Lancashire and Yorkshire Railway Company took a portion of these estates for the purpose of their undertaking, and the purchase-money was paid into court.

By this petition M. W. H. Wilson now asked for a reinvestment of the purchase-money in other lands. It was also prayed that the costs might be paid by the company. The plaintiff, as reversioner, and the trustees of a deed of separation between the petitioner and her husband, consented to the prayer of the petition.

Mr. Barry appeared for the petitioner.

Mr. Rogers, for the plaintiff.

Mr. Warren, for the trustees of the separation deed.

Mr. Humphreys, for the Lancashire and Yorkshire Railway Company.—The costs of the reversioner and of the trustees ought not to be paid by the company. It was never contemplated that parties with remote and indefinite interests would appear upon an application for a reinvestment of the purchase-money of lands taken by the company; it was certainly not within the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. s. 83.—*In re Hore's Estate* (7).

Mr. Rogers and *Mr. Warren*.—Both the trustees and the reversioner were served with a copy of the petition; their consent was necessary in the suit, and they could

not be joined as petitioners. Their solicitors, also, without the papers could not advise them on the proper course to pursue; even then they had no discretion: they were served and were compelled to appear, and act according to the circumstances brought before the Court.

THE MASTER OF THE ROLLS.—The company cannot be asked to pay the costs either of the trustees or the reversioner. Where petitions are presented asking for the reinvestment of the purchase-money of lands taken by companies, it may happen that parties who are defendants to a suit cannot join in the petition, but in such cases they ought neither to appear nor to interfere with the petition. In this case, however, the costs of serving the petition upon the trustees and the reversioner ought to be borne by the company, but the rest of their costs must be paid out of the fund.

M.R. }
Jan. 28, 31. } CARTER v. SEBRIGHT.

Tenant for Life—Copyholds—Fines on Admission of New Trustees.

A copyhold estate was devised to trustees for a tenant for life, with gifts over to other persons in remainder. Upon the admission of new trustees to the copyhold estate,—Held, that the fines and fees must be borne by the tenant for life and those in remainder in proportion to the value of their respective interests.

Richard Howard, by his will, dated the 16th of February 1843, gave and devised to James Walter Sebright and Frederick James Hall, their heirs and assigns, all his freehold and copyhold hereditaments, in trust to receive the rents and profits thereof and pay the same unto his wife (now Mary Ann Sebright) for life, and after her decease to pay such rents and profits unto Julia Elizabeth (the wife of Alfred Hall) for her separate use for life, and after her decease to all her children or remoter issue as she should appoint, and in default of appointment, to all her children living at her decease.

The testator also bequeathed various leasehold premises to the same trustees, upon trusts similar to those declared of the copyhold estate. He also appointed Messrs. Sebright and Hall executors of his will, to whom he subsequently added his wife. The will also contained a power authorizing the executors or administrators of the last surviving trustee to appoint new trustees in their stead for the purpose of fully executing the trusts in the will declared.

The testator died on the 13th of January 1844, and his trustees alone proved his will.

The copyhold premises were held of the manor of Kingshold, in the parish of Hackney, in the county of Middlesex, and the trustees were admitted to them and their heirs, upon the trusts of the will, according to the custom.

James Walter Sebright survived his co-trustee, and on the 11th of May 1848, he intermarried with the testator's widow. On the 13th of October 1851 he made his will, giving the whole of his property to his wife, and he appointed her his sole executrix.

On the 17th of March 1857, J. W. Sebright died, leaving his wife surviving, and she proved his will.

By an indenture, dated the 29th of April 1858, Mary Ann Sebright, by virtue of the power in the will of Richard Howard, appointed Thomas Carter and Colville Hillary to be trustees, and by the same deed she assigned the leaseholds to them, and she further covenanted with Messrs. Carter and Hillary to be admitted to the copyhold premises, and surrender the same to them, upon the subsisting trusts of the will of Richard Howard.

Neither M. A. Sebright nor the trustees, however, were admitted to the copyhold estate.

The annual value of the copyholds amounted to no more than 28*l.* a year, yet the fines and fees demanded on the double admission, the one being merely for the purpose of transmission, amounted to 149*l.* 2*s.* 10*d.*

In February 1854, Mr. and Mrs. Sebright mortgaged her life interest in the trust estate to John Law, to secure the repayment of 300*l.* and interest, and on

the 26th of May 1856 they again mortgaged her life interest to Henry Strong, to secure the repayment of 250*l.* and interest.

The will of R. Howard made no provision for the payment of the fines and fees becoming payable on the admission of the new trustees.

Mrs. Sebright, as tenant for life, denied her liability to pay any part of such fines and fees.

Messrs. Carter and Hillary now filed the bill in this suit, praying that Mrs. Sebright should be admitted, and then surrender the copyhold premises to them, and that the fines and fees consequent on these double admissions might be raised by a sale or mortgage of the copyhold estate, and, if necessary, of the leasehold estates. The bill also prayed for a declaration that the interest of the monies so raised ought to be borne by the tenants for life for the time being, and that M. A. Sebright, as tenant for life of the copyhold estate, ought to contribute to the fines, fees and expenses attending the admissions, and to the costs of the plaintiffs, in proportion to the benefit she might derive therefrom, and that, if necessary, inquiries might be directed as to what she ought to pay, and what securities she ought to give. It also prayed for inquiries whether it would not be beneficial to the parties to abandon the copyhold premises.

Mr. R. Palmer and *Mr. Piggott*, for the plaintiffs, referred to—

Playters v. Abbott, 2 Myl. & K. 97;
s. c. 3 Law J. Rep. (N.S.) Chanc. 57.

Mr. Selwyn, for Mary Ann Sebright, cited—

Jones v. Jones, 5 Hare, 440.

Bull v. Birkbeck, 2 You. & C. C.C. 447.

Huddleston v. Whelpdale, 9 Hare, 775.

Greenwood v. Evans, 4 Beav. 44.

Mr. Lloyd and *Mr. C. Hall*, for the mortgagees.

Mr. Follett and *Mr. C. T. Simpson*, for Alfred Hall and others entitled in remainder, referred to—

Lord Kensington v. Mansell, 13 Ves. 240.

Lewin on Trusts, 207, 344, 393, 402.

Jan. 31.—The MASTER OF THE ROLLS.

—The question is, whether the fine that must be paid for the renewal of a copyhold is to fall upon the tenant for life and the person in remainder, in proportion to their interests in the property. No distinction ought to be made between a fine for the renewal of a copyhold and a fine for the renewal of a lease. The authorities are clear and decisive upon the subject, as far as legal estates are concerned. If a devise of a copyhold is made to A. for life, with remainder to B. in fee, it is quite certain, according to Lord Eldon and the subsequent authorities, that the fine to be paid for the admission of the tenant for life, if the admission is to enure to the benefit of the remainderman, is to be paid in proportion to the interests which they have in the estate. If, here, Mrs. Sebright were admitted only for her own life, then the fine would be proportioned to the value of her interest. Where a trustee is a person who is admitted for the benefit of the parties entitled for life and in remainder, exactly the same rule and the same principle applies. In *Scriven on Copyholds* it is considered as a question not to be doubted or disputed, but the case of *Playters v. Abbott* also recognizes that as the principle to be followed. I adopt the argument that if it be so with respect to legal estates, *à fortiori* it is so with respect to equitable estates; because there can be no question that it is according to the justice of the case, when an admission is made for the benefit of persons who have various interests in an estate, and one admission enures to the benefit of all, that they ought to pay the expenses of admission in proportion to their interests. It is the same principle as that which applies to the costs of the appointment of trustees, which is very similar. The expense is paid out of the estate generally. That diminishes the interest of the tenant for life and of the person in remainder. I am of opinion, therefore, that the fine must be borne by the tenant for life in proportion to her interest, and that she must give security in the usual way for payment of her share of the fine.

KINDERSLEY, V.C. } KINGSFORD v. SWIN-
 } FORD.
 Jan. 31.

*Injunction—Common Law Procedure Act
 —Equitable Plea.*

Upon bill filed to restrain an action at law for damages by reason of the non-performance of a covenant in a deed to pay premiums upon a policy, the Court held that, under the Common Law Procedure Act of 1854, it was optional and not compulsory upon a defendant at law to put in an equitable plea; and that if the defendant did not choose to avail himself of his right he could not be compelled to plead an equitable defence, although the question might be more proper for the decision of a Court of law. Injunction granted upon motion to restrain the action until the hearing.

This was a motion for an injunction to restrain the defendant from prosecuting an action at law under the following circumstances :—

The plaintiff and James Swinford (a son of the defendant, John Swinford) had been in partnership together as chemical manufacturers, but dissolved their partnership in the year 1855. At that time the partnership was indebted to the defendant in the sum of 4,278*l.* 17*s.* 5*d.*, the payment of which sum the plaintiff took upon himself, all the interest of his partner in the business being transferred to the plaintiff. A deed was then executed, dated the 19th of November 1855, by which the plaintiff covenanted to pay to the defendant the above sum, and he gave to the defendant eight promissory notes for the amount. An agreement in writing was afterwards entered into between the plaintiff and the defendant, dated the 5th of January 1856, by which the plaintiff agreed to deposit certain policies of assurance on his own life, to the amount of 2,000*l.*, as a security for the payment of the promissory notes, and covenanted to pay the premiums and to execute a mortgage of the policies, with a power of sale. The defendant also agreed not to give notice to the insurance office of the deposit of the policies until default should be made in payment of the premiums. The plaintiff paid several of the promissory notes, amounting in all to the sum of 1,087*l.* 17*s.* 7*d.*, but suspended

payment on the 18th of August 1856, at which time a deed of inspectorship was signed by him and his creditors, the defendant being one of the creditors who signed the deed; and by this deed it was provided, that the plaintiff should still continue to carry on the business; that the money and assets to be realized by him should be distributed in the same manner, and that the same rights and equities should prevail as if an adjudication in bankruptcy had been made at the date of the deed; that any application of such monies or assets not strictly in accordance with the rules in bankruptcy should be qualified and controuled by the stipulations of that deed; and it was further provided that nothing therein contained should extend to prevent the creditors, parties thereto, their heirs, executors, administrators or assigns, from enforcing any mortgage, claim, charge or lien on the estate, or from proceeding against any person as well as the plaintiff, liable to the creditors, either as indorsees, drawers or acceptors of promissory notes or otherwise. The deed contained a statement that no creditor signing or assenting to the resolutions in the deed should be in any way prejudiced with respect to his rights and remedies against third persons, or with respect to any security or lien he might have for his particular debt; and a proviso that the deed might be pleaded as a release by the plaintiff.

The plaintiff, on his part, complied with all the requisitions of the last-mentioned deed, and duly proceeded to wind up his affairs under it. On the 31st of December 1856 the inspectors indorsed on the back of the deed a certificate that a proviso for making void the said deed therein contained had become incapable of taking effect, and that, in accordance with the stipulation in the deed, it operated as a release to the plaintiff. Three dividends were declared under the agreement; the defendant participated in them, and proved for his whole debt. In 1856 the plaintiff, considering his debt to the defendant as cancelled by the effect of the deed of inspectorship, discontinued the payment of the premiums on the policies, and ultimately surrendered them to the office, taking a new policy for the benefit of his family. The defendant,

however, treated the plaintiff as still liable under the agreement to pay the premiums, and after some correspondence an action was, on the 7th of January 1859, brought in the Court of Queen's Bench for breach of the agreement to pay the premiums; and for damages, laid at 2,000*l*.

The plaintiff in equity, being advised that he had no legal defence, filed the present bill to restrain the action, and now moved for an injunction to restrain the defendant until the hearing of the cause from further prosecuting the action, and from commencing or prosecuting any action at law against the plaintiff, for the same or any similar purpose, or any other action for the recovery of damages in respect of any alleged breach of the agreement of the 5th of January 1856, or in respect of the surrender of the policies.

Mr. Baily and *Mr. Wickens* appeared in support of the motion, and contended that a defendant at law was not bound, under the Common Law Procedure Act, to put in an equitable plea. It was optional with him to do so or not. In this case the question depended upon the construction of a deed; and this could not be made the subject of a legal defence unless it was pleaded as an equitable plea. Such a case was more fit for the decision of a Court of equity; and it appeared very doubtful even whether it was such a plea as might be pleaded at law. They cited *Elder v. Beaumont* (1).

Mr. Glasse and *Mr. H. Stevens*, contra, submitted that the defence set up by the plaintiff in equity was just such a question as could best be decided by a Court of law, particularly as the action was for damages, and not for a particular sum. The Common Law Procedure Act gave the defendant at law the right to plead an equitable plea to an action, and it was for the Court to say whether he was not bound to do so in this case—*Wild v. Hillas* (2).

KINDERSLEY, V.C.—I confess I have felt considerable hesitation during the argument as to the course which ought to be pursued in this case—more hesitation

about that point than upon the question of the construction of the instrument, although that question is also one of some nicety. In the view which I take of the case, the matter presents these questions:—Supposing that there were no act of parliament giving to the defendant at law a right to plead an equitable defence, supposing no such act had ever passed, then the matter would stand simply thus:—here would be a case where an action at law is brought, in which the defendant at law comes into this court and says,—I have got a certain equitable defence, which depends upon what will have to be decided at the hearing of the cause in equity. In such a case, unless it were clear that there was no equity at all—no substantial point to be decided at the hearing of the cause—I should be of opinion that I ought, upon proper terms for the protection of the plaintiff at law, to grant the injunction. That would be the ordinary course. Now, here, putting aside, as I am doing for a moment, what is the effect of the act of parliament, which enables the defendant at law to make an equitable defence by plea—what case have I here? I have an instrument of a very peculiar character, an instrument, upon the construction of which will depend the question whether, under the circumstances that exist, the plaintiff at law ought or ought not to have the right of recovering damages from the defendant, by reason of the non-performance of the covenant to pay the premiums on the policy. In such a case as that I do not hesitate to say, that even although I might be in a condition to form some judgment upon it at the hearing of the motion, still, as the whole case really depends upon that question, I ought not to decide it upon motion, but ought to reserve the decision of the question until the hearing of the cause. That would be the state of the case supposing there had been no such act of parliament. Now comes the question, what is the effect of that act of parliament? And I confess, in the course of the argument I felt a strong disposition to take this view of it—that inasmuch as that act of parliament enables the pleading of an equitable plea, that is, making an equitable defence by way of plea at law, that the

(1) 8 E. & B. 353; s.c. 27 Law J. Rep. (N.S.) Q.B. 25.

(2) 28 Law J. Rep. (N.S.) Chanc. 170.

object of the act of parliament being to prevent the necessity of parties coming into two different courts of judicature, to have their rights decided in one and the same way, and inasmuch as, more especially, this is a matter depending upon the legal construction of an instrument, and a matter in which the result of the action, if it succeeded, must be, not the giving of a fixed sum in the shape of a debt, but damages, and therefore more properly for a Court of law,—I confess, that I felt a very strong disposition to take this course—to say that, as you can plead an equitable plea, you ought to plead it. But I should have had to ask myself this question:—If an equitable plea be pleaded, is it such an equitable plea as a Court of law would entertain and deal with finally? In other words, is it such an equitable defence as can be properly and conveniently pleaded by way of plea in an action at law? Now, in the case which has been referred to of *Elder v. Beaumont*, it appears to me that the opinion of the Judges of the Court of Queen's Bench, is, that if this had been a case of actual bankruptcy, such a defence might be made by a plea; that is, although an equitable defence, it might be made by plea. I think Lord Campbell enunciated that proposition, not only in the interlocutory observations which fell from him during the argument, but also when he was solemnly and deliberately enunciating the opinion of the whole Court. I think that is the effect of it; and I do not see why, although in this case there has been no actual bankruptcy,—if, as the plaintiff in equity contends, it is to be treated under the terms of the deed, precisely in the same manner as if there had been an actual bankruptcy,—such a plea might not be well pleaded; or why, if pleaded, it would not be duly considered by the Court of law by virtue of that act of parliament.

Then I come to this question:—when I look at the act of parliament, the act, as I understand, merely gives an option to the defendant at law to plead such a plea. It does not impose upon him the obligation to plead it. As has been justly said, until that act of parliament passed, it was a matter of right to come into this court

and ask upon equitable grounds to stay the action at law, alleging there was no legal defence; and that act of parliament says, instead of doing so, the defendant at law may, at his option, but not as a matter of compulsion upon him, instead of coming into a court of equity, plead his equitable defence at once in a Court of law, and the Court of law will take notice of it. That seems to me to be the effect of the act of parliament.

Then comes this question:—can I say, because I think you can plead such a plea, I will determine that, under the act of parliament, which makes it entirely optional and not compulsory, I will compel you to plead it? Supposing I were to adopt that view, which I am free to confess was the view I was very much disposed in the course of the argument to adopt, the effect might be this: I decline to give you the injunction in equity, because I think you ought to go and plead that plea at law. Therefore, the result of that would be that I should say,—Let this motion stand over until I see what the effect of that pleading at law is, and then I will deal with it according to the justice of the case. Supposing I took that course, and the defendant at law said,—I shall not plead that plea; I will plead a legal defence, if I have any, or will plead the general issue, and I will take my chance of what will turn up; I will not plead an equitable defence; I am advised by my common law counsel, that it is, at all events, doubtful whether the plea will lie; but even if the plea will lie, my counsel tells me that it is very questionable whether I shall have it considered in the same way by the Court of law as by the Court of equity. Then, supposing he should refuse to plead that plea, and I find the result of the case is a judgment against him,—what am I to do when the motion comes on? Am I to say, that because you did not choose to plead the equitable plea, I will refuse you equitable relief. Is not that, in other words, saying that that which the act of parliament makes entirely optional shall, by this Court, be determined in the particular case as compulsory upon the defendant, and he shall not be entitled to that relief which, independently of the act of parliament, he would otherwise have had, because he

does not choose to avail himself of the option which the act of parliament gives him. After some hesitation in the course of the argument, I arrive at this result, that I have no right to compel him to plead that plea. The case that has been cited of *Wild v. Hillas* stood on different ground. There I had a case of an action pending, in which there had been the very identical plea pleaded. The equitable plea was there pleaded, and the parties were at issue on that plea, and in such state of things the party who had exercised the option of pleading that plea, making his defence at law upon the equitable ground, thought fit then to come into a court of equity and say, "Although I have exercised the option you gave me, yet I will now change my mind and ask for equitable relief in equity." I was of opinion, that being the state of the case, that I could not give him equitable relief where he had already exercised his option. That was the ground that I took there, but it does not exist here. It really appears to me to come to this question, whether I have a right to compel him to exercise that option which the legislature has given him to make his defence at law. If I thought I had a right to do it, I confess that this is a case in which I should be very glad to exercise the right, because, on all grounds, I think that it would be best and most convenient that the matter should be tried by a Court of law: first, because it is clear that the equitable defence may be very well set up by the deed there; and, secondly, because the result of the action would be to obtain damages and not a given sum; but still, feeling upon the whole that the result which I have arrived at is correct, that I have no right to alter the effect of that act of parliament, and make compulsory what the act says is only optional, I am bound to treat the case as if that act did not exist, that is, as if the party has a right to come into this court for equitable relief. Then, ought he to have it? It appears to me that there is a very fair question. I abstain from going into the clauses of the deed for the purpose of expressing my opinion upon them, because they will have to be determined at the hearing; indeed, if I come to the conclusion that I ought to let him go on at law,

I ought not to express any opinion upon the present application which could affect the question, or be supposed to affect the question that will have to be decided either at the hearing before me or at the trial at law. It appears to me, without expressing any opinion as to the merits of the case upon the construction of the deed, that there is a fair question to be tried at the hearing of the cause, and, as under ordinary circumstances in a case for equitable relief, I shall grant the injunction, but upon terms so as not to make the granting of it more prejudicial to the rights of the plaintiff than the justice of the case requires.

Now it is not a case in which, from the very nature of it, I ought to say you must pay into court a given sum of money: for example, I never could say, your action being brought for 2,000*l.*, you shall pay in 2,000*l.*, because I have no ground for saying that the result of the action would be to recover 2,000*l.* as a given sum, or anything like that, whatever the success of the case might be. It appears to me that it is a case in which, to do justice to the plaintiff, I ought to require judgment to be given, and if it were an action for a given sum I might require judgment to be given for that sum, but it is an action to recover damages, the damages being laid at 2,000*l.* It is an action for damages for breach of covenant for non-payment of premiums on a policy. There is a special judgment which is obtained, in some particular manner, by the plaintiff in a case of default by the defendant, which is a judgment not for a given sum, or, at all events, not for a nominal sum, but only for the amount of the actual damages to be recovered, to be ascertained by subsequent proceedings, usually I believe, in the Sheriffs' Court. It appears to me that that is the sort of judgment that I ought to require the defendant to give. The mode of working it out in the order must depend upon more accurate and definite knowledge of the technicalities and proceedings at law than I can venture to assume to myself at this moment; but that appears to me to meet the justice of the case, and upon such terms the injunction will be granted.

LOrDS JUSTICES. { THORNDIKE v. HUNT.
Jan. 31. { BROWNE v. BUTTER.

Trustee and Cestui que Trust—Trustee of two Funds—Breaches of Trust—Sale of one Fund to replace the other—Right to follow Fund though paid into Court—Bonâ fide Purchaser—Accountant General a Trustee of Funds paid into Court.

*Mrs. E. Linzee, by her will, gave stock to her three daughters for life, with remainder to their children respectively. W. A. H. was one of the trustees. He ultimately became possessed of the whole fund, and sold out part and applied the same to his own purposes. G. E. V. by his will, gave 8,000*l.* consols to Mrs. Thorndike for her life, with remainder to her children. W. A. H. was one of the trustees. He ultimately became possessed of this fund, and sold it out and applied the proceeds to his own use. Mrs. Thorndike filed a bill against him (Thorndike v. Hunt) and an order was made that he should transfer into court the amount sold out, and he accordingly transferred into court 3,253*l.* consols (which in fact was part of the trust estate of Mrs. Linzee). The dividends were paid for many years to Mrs. Thorndike. W. A. H. became insolvent, and the parties beneficially interested under the will of Mrs. Linzee filed a bill (Browne v. Butter), and soon afterwards presented a petition in both suits, praying that the 3,253*l.* which originally belonged to the trust estate of Mrs. Linzee, but which had been transferred to the name of the Accountant General in the suit of Thorndike v. Hunt, might be transferred to the suit of Browne v. Butter, and that the dividends which had been paid to Mrs. Thorndike might be repaid; and the Master of the Rolls ordered accordingly, on the ground that the 3,253*l.* was part of Mrs. Linzee's trust estate. The plaintiff in the first suit, Mrs. Thorndike, appealed to the Lords Justices, who held, reversing that decision, that the legal estate in the fund had by transfer become vested in the Accountant General for the purposes of the suit of Thorndike v. Hunt; that Mrs. Thorndike was a purchaser for valuable consideration without notice of the fraud, and was entitled to hold the fund against the parties interested under Mrs. Linzee's will.*

Strictly, a bill ought to have been filed,

though the merits were so plain that their Lordships felt themselves enabled to decide upon petition.

W. A. H., who was a solicitor of the Court, was ordered to shew cause why he should not be struck off the roll, and was struck off.

This was an appeal petition against an order of the Master of the Rolls. The petitioners were Mrs. Mary Ann Thorndike and her infant children, the plaintiffs in the suit of *Thorndike v. Hunt*. The facts, which were of a very complicated nature and undisputed, were as follows:—

Emily Linzee, late of Plymouth, widow, deceased, by her will, dated the 24th of March 1822, after certain specified legacies, bequeathed to George Hunt, the Rev. Warwick Young Churchill Hunt, and Capt. Francis Holmes Coffin, all her stock and monies in the Bank of England, upon trust to pay and apply the dividends, &c. for the maintenance, education and support of her five children, namely, Emily Woolridge, afterwards the wife of Warwick Augustus Hunt the elder, Susannah Inman, afterwards the wife of William Cheselden Browne, Mary Ann Charlotte, afterwards the wife of James Warwick Woolridge the elder, Samuel Hood Linzee and John Linzee, during their minorities, but so that no more than one fifth part of such dividends should be applied for the maintenance, &c. of each such child; and when her son S. H. Linzee should attain twenty-one years, then to transfer to him his one-fifth part, together with all accumulations, for his own use and benefit; and when her son J. Linzee should attain the same age, to transfer to him his fifth in like manner; and when and as her three daughters should attain their several and respective ages of twenty-one years, then upon trust to pay unto, or permit and suffer each of them to receive the dividends on one-fifth part of the stocks and monies and unapplied dividends for their respective lives, with remainder as to one-fifth each to the children of her three daughters, with provision for their maintenance and education during their respective minorities. Emily Linzee died on the 22nd of March 1825, and her will was proved by the trustees and executors, and her

personal estate was ultimately represented by 25,800*l.* consols, and 300*l.* 3*l.* 10*s.* reduced annuities, standing in the names of the trustees.

The testatrix's children all attained twenty-one; Samuel died in 1831, intestate, and his share of the above securities was transferred to his administratrix; the share of J. Linzee was transferred to him on his attaining his majority, and the fund was thus reduced to 15,480*l.* consols and 225*l.* 3*l.* 10*s.* reduced annuities.

G. Hunt and the Rev. W. Y. C. Hunt both died before any of the breaches of trust subsequently mentioned had been committed, leaving Capt. Coffin the sole surviving trustee of the will. In 1830 Emily Woolridge Linzee married Warwick Augustus Hunt, and a settlement was executed, by which the life interest of Emily Woolridge Hunt was vested in John Butter and George Hunt, for her separate use, with a restraint upon anticipation. Upon the death of George Hunt, Charles Shea was appointed a trustee in his place. In 1836 Susannah Inman Linzee married William Cheselden Browne, and upon that marriage a settlement was executed, by which the life interest of Susannah Inman Browne was vested in G. Hunt and W. A. Hunt for her separate use, with a restraint upon anticipation. In the year 1838 Mary Anne Charlotte Linzee married James Warwick Woolridge; and her life interest became in like manner settled to her separate use, and vested in W. C. Browne and W. A. Hunt. In 1836 the remaining sums of 15,480*l.* consols, and 225*l.* reduced annuities, were standing in the names of the three trustees named in the will, two of whom, however, were dead, and the petition alleged that W. A. Hunt, who is a solicitor, induced Capt. Coffin, the surviving trustee, to transfer into the names of J. Butter and C. Shea one-third of those funds, viz., 5,160*l.* consols and 75*l.* reduced annuities, and a like third into the name of himself, and that in the year 1837 he in like manner induced Capt. Coffin to transfer the remaining third part into the names of the said W. C. Browne and himself. Capt. Coffin died in 1842, intestate and insolvent, and no administration to his estate was ever taken out. The sums transferred into the names of

J. Butter and C. Shea continued standing in their names, until they were transferred into court in the suit of *Browne v. Butter*. The two former transfers having, however, been effected, W. A. Hunt sold out one-third of the consols, and appropriated the entire proceeds thereof to his own use; but he, notwithstanding, continued until January 1855 to pay to Susannah Inman Browne the amount of dividends which the stock would have produced, and she and her husband were up to that time wholly ignorant of the sale. He also sold 75*l.* reduced annuities; but this sum he paid to Mr. and Mrs. Browne. In August 1848 W. A. Hunt induced W. C. Browne to execute to him a power of attorney, authorizing the transfer into his name alone of another third, to which Mrs. Woolridge was entitled for her life, pretending that W. C. Browne was to be discharged from the trusts of the settlement on that lady's marriage. W. A. Hunt then transferred 3,253*l.* 0*s.* 6*d.* consols into his own name, but he sold out the remainder and applied the proceeds to his own purposes. Still he continued to pay to Mrs. Woolridge an amount equal to the dividends of her one-third share. These were the facts relating to the fund subject to the trusts of Mrs. Linzee's will.

By the will of George Elliott Vinnecombe, dated the 16th of April 1840, J. Butter, Samuel Mallock, and W. A. Hunt were appointed trustees of a sum of 8,000*l.* consols, in trust to pay the dividends to the testator's widow Dorothy Vinnecombe for her life, and upon her decease to pay the same to his granddaughter Mary Anne Vinnecombe, for her life for her separate use, with remainder to her children, and in default of issue of Mary Anne Vinnecombe, the 8,000*l.* was to be held in trust for her, her executors, administrators and assigns absolutely. The testator died in October 1841, and his will was afterwards proved by the executors, and the 8,000*l.* consols was transferred by them to Butter, Mallock and W. A. Hunt. Dorothy Vinnecombe survived her husband, but died in the same year. Mary Anne Vinnecombe afterwards married the defendant Charles Franc Thorndike, and was the plaintiff in the first suit. S. Mallock died in July 1845. In April 1846 J. Butter retired

from the trusts, and Frederick Cresswell was appointed in his place, whereupon the 8,000*l.* consols was transferred into the names of W. A. Hunt and F. Cresswell. On the 3rd of August 1847 they sold out and transferred 4,746*l.* 19*s.* 6*d.*, part of the 8,000*l.*, leaving 3,253*l.* 0*s.* 6*d.* standing to that account. On the 20th of August 1847 there was transferred to them a sum of 1,146*l.* 2*s.* 8*d.*, which was on the 10th of February 1848 sold out and transferred. On the 9th of February 1848 they sold out and transferred the sum of 3,253*l.* 0*s.* 6*d.*, and the whole of the proceeds of the sales was received by W. A. Hunt.

Proceedings in Chancery being threatened against him on behalf of Mrs. Thorndike and her children in respect of this 8,000*l.* consols, W. A. Hunt the elder stated that the 4,746*l.* 19*s.* 6*d.*, part of it, had been invested on a mortgage, and in the month of August 1848 he procured W. C. Browne to execute to him the power of attorney before mentioned, and on the 8th of that month he caused 3,253*l.* 0*s.* 6*d.*, part of the sum of 5,160*l.* consols, then standing in the joint names of himself and W. C. Browne, to be transferred from that account to the names of himself and F. Cresswell.

Later in the month of August 1848, the first-mentioned suit of *Thorndike v. Hunt*, in which the defendants were W. A. Hunt the elder and F. Cresswell and C. F. Thorndike, the husband of the plaintiff, was instituted, to make W. A. Hunt and F. Cresswell liable in respect of their dealings with the 8,000*l.* consols, and to procure their removal from the trusteeship. The defendant W. A. Hunt, by his answer, alleged that the 8,000*l.* had been sold out in contemplation of a mortgage, but that the negotiations had been broken off, and that 3,253*l.* 0*s.* 6*d.* consols had been repurchased by him. By an order made in that cause, on the 11th of January 1849, the defendants Hunt and Cresswell were ordered, on or before the 15th of February then next, to transfer into the name of the Accountant General, in trust in that cause, 5,000*l.* reduced annuities and 3,253*l.* 0*s.* 6*d.* consols, admitted by the respective answers of those defendants to be standing in their names, subject to the further order of the Court, and without prejudice; and

in pursuance of this order they transferred into court, to the credit of the cause of *Thorndike v. Hunt*, a sum of 3,253*l.* 0*s.* 6*d.* consols.

By the decree in this suit, dated the 5th of June 1849, the defendants Hunt and Cresswell were ordered to transfer into court a sum of 4,746*l.* 19*s.* 6*d.* consols, and the dividends thereon, and on the 5,000*l.* reduced annuities, and 3,253*l.* 0*s.* 6*d.* consols already mentioned, were ordered to be paid to the plaintiff Mrs. Thorndike on her separate receipt. The defendants transferred the 4,746*l.* 19*s.* 6*d.* into court, and there was then standing in trust in the cause of *Thorndike v. Hunt* the sum of 8,000*l.* consols, of which 3,253*l.* 0*s.* 6*d.* was the same sum as was transferred from the names of W. A. Hunt and W. C. Browne to the names of the same W. A. Hunt and F. Cresswell, and it formed part of the funds subject to the trusts of the will of the testatrix Emily Linzee in favour of her daughters and their children.

W. A. Hunt became insolvent subsequently to this decree, and it was then discovered that he had made away with the whole of the sum of 5,160*l.* consols, so transferred into his name alone, and likewise with the whole of the said sum of 5,160*l.* like annuities transferred into the joint names of himself and W. C. Browne, excepting only the 3,253*l.* 0*s.* 6*d.* transferred into court, in the cause *Thorndike v. Hunt*. The family of W. A. Hunt, the elder, claimed to be exclusively entitled to the remaining third part, viz. the 5,160*l.* consols and 75*l.* reduced annuities, which, upon the marriage of W. A. Hunt with Emily Woolridge Linzee, had been settled, and which was then vested in J. Butter and C. Shea. The second-mentioned suit was hereupon instituted by the children of W. C. Browne and Susannah Inman his wife, and the family of Mr. and Mrs. Woolridge against the other persons interested in the estate of the testatrix Emily Linzee.

The decree was made on the 26th of March 1857, and it directed that Butter and Shea should transfer the 5,160*l.* consols and the 75*l.* reduced annuities into court, to the credit of the second cause, to an account, "The account of funds subject to the trusts of the will of Emily Linzee,

the testatrix," &c.; and inquiries were directed as to what sums of stock or money forming part of the estate of the said Emily Linzee had been received by the defendants W. A. Hunt and W. C. Browne, and by J. W. Woolridge, or any or either of them, and whether any, and what, proceedings should be taken as to the sums forming part of the testatrix's estate, which had been transferred to the credit of the cause *Thorndike v. Hunt*.

Mrs. Thorndike received the dividends as they became due on the said 3,253*l.* 0*s.* 6*d.* consols. The plaintiffs in the second-mentioned suit presented their petition on the 10th of December 1857, in both of the above suits, whereby, after submitting that they were entitled to follow and receive back the said 3,253*l.* 0*s.* 6*d.*, they prayed that the Accountant General might be ordered to transfer the same to the credit of the cause *Browne v. Butter*, to an account, "The account of funds subject to the trusts of the will of Emily Linzee, the testatrix," &c.; and that proper directions might be given for recouping to the said trust estate the dividends which had been paid to the plaintiff Mary Anne Thorndike, and that the amount thereof until recouped might be declared a charge upon the dividends of the other funds in trust in *Thorndike v. Hunt*.

The Master of the Rolls, on hearing the petition, was of opinion that the funds out of which restitution was made by Hunt to Vinnecombe's estate were clearly part of Mrs. Emily Linzee's trust estate, and that the transfer of the fund by one who unrighteously had controul over it could not destroy the trusts. He therefore made an order according to the prayer of the petition. From that order the plaintiffs in *Thorndike v. Hunt* appealed.

For the appellants, it was contended that the 3,253*l.* 0*s.* 6*d.* consols, which had been carried over to the credit of the cause *Thorndike v. Hunt*, was in the possession of the Court for the purposes of that suit, and could not now be disturbed. Mr. Hunt, the trustee, was a defaulting trustee, and had been ordered to transfer into court money he had wrongfully sold out, and having done so to the extent of the 3,253*l.* 0*s.* 6*d.* from funds at his disposal, the parties beneficially interested in the suit of

Thorndike v. Hunt had no knowledge of the source from whence the money so placed had been derived, and they being innocent parties, and the legal title to the fund having passed by the transfer, it was erroneous for the Master of the Rolls to make the order he had made. True, that the *cestuis que trust* under Mrs. Linzee's will would be the sufferers, inasmuch as the money was part of their fund which Mr. Hunt had transferred, under the order of the 11th of January 1849, yet, between parties equally innocent, if one must suffer, that party who had the legal title must prevail. The order of his Honour should be discharged.—On their behalf the following cases were referred to:—

Pitt v. Snowden, 3 Atk. 750.

Lloyd v. Attwood, Sugden's Vendor and Purchaser, 1182.

The Attorney General v. Magdalen College, 6 H.L. Cas. 189; s. c. 26 Law J. Rep. (n.s.) Chanc. 620.

Warburton v. Hill, Kay, 470; s. c. 23 Law J. Rep. (n.s.) Chanc. 633.

On behalf of the plaintiffs in the second suit, the parties interested under Mrs. Linzee's will, it was insisted that nothing could be more reasonable than that they should seek to have restored to them property which was undoubtedly theirs, and which their trustee had no right to transfer into the cause *Thorndike v. Hunt*. With respect to the legal title to the fund, it was to be observed that though it passed to the Accountant General of the Court by the transfer to him, it did so impressed with the trusts to which it was subject, namely, the trusts of Mrs. Linzee's will.

For Mrs. Hunt and her children it was argued that there had been no declaration of right by the Court further than a direction that Mrs. Thorndike should receive the dividends; and that a mere transfer of stock from one name to another, the identically same stock being all along in existence, could not alter the equities of the parties; and *The Athenæum Insurance Company v. Pooley* (1) was referred to.

In support of the case of Mrs. Woolridge and Mrs. Browne, it was urged that the transfer from Hunt and Browne to

(1) *Ante*, p. 119.

Hunt and Cresswell was for a nominal consideration only. The equities between the two estates were not equal, for the estate of Mrs. Linzee had an earlier title to the fund, and the Master of the Rolls was quite correct in deciding in favour of that estate.—The following authorities were relied on:—

Lewin on Trustees, 3rd edit. p. 757, and cases there cited.

Taylor v. Plumer, 3 M. & S. 562, 574 (2).

Mr. Roundell Palmer and *Mr. Francis Webb*, for the appellants.

Mr. Selwyn and *Mr. Southgate*, for the plaintiff in *Browne v. Butler*.

Mr. Fellett and *Mr. Rowcliffe*, for Mrs. Hunt and her children.

Mr. Grenside, for Mrs. Woolridge and Mrs. Browne.

Mr. Francis Webb was heard in reply.

LORD JUSTICE KNIGHT BRUCE said that in this case two persons, who were trustees (under the will of George Elliott Vinnecombe) for the family of Mrs. Thorndike, the plaintiff in the first-mentioned suit, were personally charged with a sum of stock invested for the benefit of that family, and were bound to have it forthcoming at all times. Some doubts having arisen as to its safety, the first suit was instituted by Mrs. Thorndike and her infant children for enforcing this liability of the trustees. They put in their answer to the bill, and thereby admitted their liability, and further admitted that they had the whole fund in their hands. Upon this an order was made by the Court directing them to pay the fund thus admitted to be in their hands into court, for the purposes of the cause of *Thorndike v. Hunt*, or, in other words, for the purposes of the Thorndike trust. The transfer was made by the trustees, and from that moment the fund transferred was treated as belonging to the Thorndike trust. The legal title to the fund had therefore become vested in the Accountant General for the purposes only of the cause

of *Thorndike v. Hunt*, which, as he had said, was the same thing as the Thorndike trust. But it now appeared that the defendants, the trustees against whom the order had been made, had provided themselves with the means of discharging themselves from their personal liability to pay the fund into court, by a new fraud, and that there were third parties whom they had cheated with that object. Therefore, the trustees, so far as they were alone concerned, had acted wrongfully. Nevertheless, the complete legal title in the fund transferred was, as his Lordship had already stated, already in the Accountant General, for the purposes solely of the suit of Mrs. Thorndike. The question that then arose was, whether any of the persons beneficially interested in the suit of *Thorndike v. Hunt*, or the solicitors of the plaintiffs, or their next friend, had notice of the circumstances, or of the want of title, or of the want of an equitable title or honest right in the trustees to make the transfer as they did? He (the Lord Justice) had waited in vain for the suggestion that the fact was so. For anything that appeared before the Court, neither the plaintiffs themselves nor their solicitors or next friend had any notice of the manner in which the trustees had become possessed of this money. Then, was the transfer a transfer for valuable consideration?—a question which must undoubtedly be answered in the affirmative. There was a debt due from the trustees; they were called upon to pay it, and if it was not paid they would have been liable to an execution upon their goods. If it had not been transferred into court, the property would have been obtained from them by other means. It would be impossible now to place the plaintiffs in the same position as if the trustees had not made this transfer of the fund. His Lordship was therefore of opinion that, however hardly it might operate on the persons on whom this fraud had been committed, it must be taken to be to all intents and purposes a purchase of property for a valuable consideration, without any notice as to the existence of any other title to it, and of which the purchaser (Mrs. Thorndike) had obtained the legal estate. It was, consequently, impossible to restore the fund to the original petitioners (the plaintiffs in

(2) The following cases were also in point:—*Hoare v. Parker*, 1 Bro. C.C. 578, and *Hartop v. Hoare*, 3 Atk. 44. *Ex relations Mr. Lee*, Q.C.

the second-mentioned suit); for justice and the rules of this court alike required that the property should remain as it was under the order of January 1849. His Lordship, upon these considerations, dissented respectfully from the view which had been taken of the case by his Honour the Master of the Rolls. His Lordship and his learned Brother had thought it right to dispose of the petition solely upon the merits; but if their opinion had been the other way, he himself was not sure that it would have been right to dispose of the case on petition, although it might have been adding misfortune to misfortune to order another suit to be instituted. He was, therefore, glad that there was quite sufficient upon the merits to dispose of the question.

LORD JUSTICE TURNER added that he also was unfortunately unable to agree with His Honour's decision. Whatever equity there might have been against Cresswell before the transfer, that equity had been destroyed by the transfer. As soon as the transfer had taken place the fund came into the possession of this Court, and the beneficial interest in the fund was in the Thorndike family. Therefore, the petitioners upon the original petition had to make out a title against the Court, which had appropriated the fund to a particular trust. His Lordship concurred in the view that it was the best course to decide this case upon the merits, because it involved a question of great importance, as no person would be safe if he could not get funds out of court which had been paid in for his benefit, without making inquiry to whom the fund had originally belonged. But the case appeared to his Lordship clear, looking at it as a matter of form, that the original application was irregular; for it amounted, in fact, to trying an adverse title upon petition, without a bill having been filed. Therefore, on the ground of form, as well as of the merits, the petition ought to have been dismissed. There would, however, be no costs of the appeal on either side, and the deposit would be returned to the appellants.

LORD JUSTICE KNIGHT BRUCE.—Upon the matters appearing upon this petition my learned Brother and myself are of

opinion that it is proper to call upon Mr. Warwick Augustus Hunt to shew cause on the first day of next term why he should not be struck off the Roll of Solicitors of the Court (3).

LORDS JUSTICES. } THE EARL OF MANSFIELD
March 25, 26. } v. OGLE.

Annuity—Arrears of—Interest on—Statutes, 3 & 4 Will. 4. c. 42. and 1 & 2 Vict. c. 110.

The chief clerk of one of the Vice Chancellors, in taking an account directed by the Court, certified that 1,002l. was due to J. P. in respect of the arrears of an annuity charged on real estate. The certificate was dated in November 1855. J. P. claimed interest on the debt from the date of the certificate being signed by the Judge, in November 1855, to the time of the hearing on further consideration, which a subsequent incumbrancer opposed:—Held (affirming a decision of the Vice Chancellor), that J. P. was not entitled as against a subsequent incumbrancer to such interest.

Whether, if the claim had been against the assets of the grantor, it would have prevailed—quære.

Interest on arrears of an annuity will not be given, except under special circumstances.

A certificate of the chief clerk finding money due is not "an order for payment," within the 18th section of the statute 1 & 2 Vict. c. 110.

This was an appeal from a decision of Stuart, V.C., made on the 5th of February 1859.

The petitioner, the appellant, John Pearce, carried in a claim before the Master, as an annuity creditor upon the estate in question in this cause; but such claim was disallowed by the Master. Exceptions were taken to the Master's report, and on the 14th of February 1855 Vice

(3) On the 16th of April, the first day their Lordships sat in Easter term, an order was made, on the motion of Mr. Taylor, for this gentleman's name to be removed from the Roll, he not appearing either in person or by counsel to shew cause.

Chancellor Stuart ordered that those exceptions should be allowed, and that an account should be taken of what was due to the appellant in respect of his annuity, and that the place in which the incumbrance of the appellant stood in relation to the other incumbrances affecting the estates in the pleadings named should be stated. The chief clerk of the Vice Chancellor, by his certificate, dated the 19th of November 1855, found that there was due to the appellant in respect of his annuity, less income-tax, the sum of 1,002*l.* 7*s.* 1*d.*, and that the value of his annuity was 500*l.*, and that the appellant was entitled to stand as an incumbrancer on all the estates in question in the cause next after the plaintiff's mortgage for 34,000*l.* and interest. The cause came on for further consideration on the 22nd of July 1858, and the minutes, as issued by the registrar, provided for the payment to the appellant of the sum of 1,502*l.* 7*s.* 1*d.*, found by the certificate of the chief clerk to be due to him, with interest thereon at the rate of 4*l.* per cent. per annum, from the 19th of November 1855, the date of the chief clerk's certificate. A dispute, however, arose between the appellant and Henry Wheeler, one of the defendants, who was an incumbrancer on the estates in question subsequent to the charge thereon in respect of the appellant's annuity, as to the right of the appellant to interest on the sum of 1,002*l.* 7*s.* 1*d.*; and as such dispute could not be settled before the closing of the offices for the long vacation, it was ultimately arranged that the order should provide for the payment to the appellant of the sum of 1,502*l.* 7*s.* 1*d.*, with interest on the sum of 500*l.*, the value of the annuity, from the date of the chief clerk's certificate, without prejudice to the appellant's right to interest from the same period on the sum of 1,002*l.* 7*s.* 1*d.*, and that such question should be brought before the Court. The order was thereupon passed and entered, and the appellant, Pearce, recovered the 1,502*l.* 7*s.* 1*d.* and interest on the 500*l.* He, however, claimed a further sum of 116*l.* 10*s.* 6*d.* as due to him for interest on the 1,002*l.* 7*s.* 1*d.* from the date of the signing of the certificate, and that it might be paid out of a fund standing in court to the credit of the cause. The defendant Wheeler opposed

this; and the Vice Chancellor decided against the claim (1).

Mr. Lee and *Mr. Fooks*, for the appellant, argued that the certificate of the chief clerk, when it had been signed by the Judge, was, in effect, and had the force of an order of the Court, by which the estates in question in the cause became charged with the amount of money which the

(1) In disposing of the case his Honour said that the petitioner asked that interest on the arrears of his annuity might now be computed and paid to him. The question was principally argued with reference to the statutes 3 & 4 Will. 4. c. 42. and 1 & 2 Vict. c. 110. Independently of the operation of those acts, it was settled that, unless under extraordinary circumstances, the Court would not give interest on the arrears of an annuity; but it was said to be in the discretion of the Court, if circumstances justified it, to order such payment, and an attempt had been made to shew that such special circumstances existed here; but there were no special circumstances to distinguish the case from *Booth v. Leycester* (1). Therefore, if the present case was to be disposed of independently of the recent statutes, there could be no doubt that the claim of the petitioner must fail. It was argued that the act 3 & 4 Will. 4. c. 42, which enacted that juries might in certain cases award interest, ought to induce this Court, by way of analogy, to award interest in this case; that contention, however, was concluded by authority, for in *Re Powell's Trust* (2) Vice Chancellor Turner decided that that statute had no such operation as to alter the law of the Court, which had been established with reference to questions of this kind. An appeal had been then made to the 1 & 2 Vict. c. 110, the 18th and 19th sections of which were as follows:—

Section 18.—“That all decrees and orders of Courts of equity, and all rules of Courts of common law, and all orders of the Lord Chancellor, or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies, or costs, charges or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the Judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by Courts of equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment-creditors are in like manner given to persons to whom any monies, or costs, charges or expenses, are by such orders or rules respectively directed to be paid.”

“Section 19. That no judgment of any of the

(1) *Ubi infra*.

(2) *Ibid*.

Court had by the signing of the certificate declared to be due to the appellant in respect of the arrears of his annuity. Independently of this consideration the certificate, when signed, was equivalent to a judgment debt, and as such carried interest like every judgment debt. As against Mr. Wheeler, who opposed the appellant's claim, registration was unnecessary under the 19th section of the statute 1 & 2 Vict. c. 110, he (Wheeler) being a party to the cause, and having full notice of the appellant's claim; besides, registration under that section was only required for the safety of mortgagees and purchasers, but under section 18. of that statute, the certificate was a judgment for a debt on which interest would accrue. There was also an analogy in this case to those instances in which, under the statute 3 & 4 Will. 4. c. 42, interest was given, at any rate, from the time at which the certificate of the chief clerk had been signed by the Judge. The respondent in the court below relied upon *Booth v. Leycester* (2) and *Re Powell's Trust* (3), but it was to be ob-

said superior Courts, nor any decree or order in any court of equity, nor any rule of a Court of common law, nor any order in bankruptcy or lunacy, shall by virtue of this act affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the court and the title of the cause or matter in which such judgment, decree, order or rule shall have been obtained or made, and the date of such judgment, decree, order or rule, and the amount of the debt, damages, costs or monies, thereby recovered or ordered to be paid shall be left with the senior Master of the Court of Common Pleas at Westminster, who shall forthwith enter the same," and so on.

So that by the 19th section the judgment or order of the Court, must, in order to bind lands, be registered. In the present case, there was neither registration, nor was there any order of the Court which could be registered; for there had been no order for payment. There was no other order made than that of August 1858. Thus there was wanting an order to which the provisions of the latter statute could apply, and the case was therefore thrown back on the old law. But finding that the law was settled by *Booth v. Leycester*, unless it could be shown that extraordinary circumstances existed to distinguish it from that case, the petition must fail. There were none, and the petition must be dismissed, with costs.

(2) 3 Myl. & Cr. 459; s. c. 5 Law J. Rep. (N.S.) Chanc. 278; 8 Ibid. 49.

(3) 10 Hare, 134.

served that the statute 1 & 2 Vict. c. 110. had been passed since the date of the former case, and in the latter that statute is not even mentioned. Under all the circumstances, even if the Court should be of opinion that the present case was not within the words of the statute, it would hold, that it was one in which it would be proper to allow interest. They cited also—

Hyde v. Price, 8 Sim. 578; s.c. nom.

Hart v. Cradock, 6 Law J. Rep. (N.S.) Chanc. 358.

Gawnt v. Taylor, 3 Myl. & K. 302; s.c. 3 Law J. Rep. (N.S.) Chanc. 135.

Mr. Wickens, for the defendant Wheeler, the subsequent incumbrancer, said that this was a case not between owner or grantor of an annuity and incumbrancer, but between second and third incumbrancers, and he relied upon *Booth v. Leycester* and *Re Powell's Trust*. He denied that the certificate of the chief clerk, even after it had been signed by the Judge, was an order of the Court in any sense. But even if it were to be so held, every order of the Court was, by section 19. of 1 & 2 Vict. c. 110, only equivalent to a judgment at law on being registered, which was not the case with this certificate, and therefore it had not the effect which had been attributed to it on behalf of the appellant. This case was governed by the general rules of law, and the appellant's claim for interest ought not to be allowed. He also cited *Jenkins v. Briant* (4).

Mr. Lee, in reply, referred to—

M'Clure v. Dunkin, 1 East, 436.

Batten v. Earnley, 2 P. Wms. 163.

De Havilland v. Bowerbank, 1 Camp. 50.

Anderson v. Dwyer, 1 Sch. & Lef. 301.

Gray v. the Newcastle Marine Insurance Company, not reported.

LORD JUSTICE KNIGHT BRUCE.—I abstain from saying what I should have thought of the present claim for interest if it had been made against the assets of Mr. Ogle the grantor of the annuity. The claim in this case is not so made, but it was made as against a subsequent incumbrancer, the benefit of whose security will

(4) 16 Sim. 272.

be affected if the claim be allowed. As against such subsequent incumbrancer there is not the slightest ground for the claim for interest, and I think that the application wholly fails, and that the petition was rightly dismissed by the Vice Chancellor. The question was reserved by arrangement, but the appeal from the Vice Chancellor's decision wholly and entirely fails.

LORD JUSTICE TURNER. — This is an appeal from an order of Vice Chancellor Sir John Stuart, dismissing a petition for payment of interest on the arrears of an annuity as ascertained by the certificate of the chief clerk. The question here was not as to the arrears of the annuity as they accrued due, but only on the aggregate amount of the arrears as ascertained by the chief clerk. The application is at variance with all the rules of the Court applicable to this subject. The question was very much discussed in the case of *Cress v. Hunter* (5), where the Lord Chancellor of that day, Lord Loughborough, considered the question in all its bearings. But it may be said that the Court is now more in the habit of acting liberally in giving interest than at that time. There is, however, a decision of Lord St. Leonards in Ireland so late as 1842 to the same effect, in the case of *Martyn v. Blake* (6). The marginal note of that report fully explains the nature of that case, and is as follows: — "The established rule of this Court (which, however, is only general and not inflexible) is, that interest cannot be recovered upon the arrears of an annuity. But interest will be given upon the arrears of an annuity where the person bound to pay it has been a party to the deed by which it was created, and his acts disclose a system of gross misconduct and opposition to the Court for the purpose of evading payment. Mere legal delay is not a sufficient ground to induce the Court to give interest; nor will a mere covenant to pay an annuity be sufficient to create an exception to the general rule. But if there is a covenant to indemnify an annuitant against the effect of incumbrances, and the perception of the annuity has been prevented by

the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, a case for damages under the covenant is clearly shewn, and this Court, in order to prevent circuitry of action, obtains jurisdiction to give interest upon the arrears of the annuity." That case clearly and very expressly lays down what I always understood to be the rule of the Court. But it was argued that that rule has been altered by the recent course of legislation on the subject, and two statutes have been referred to — the 3 & 4 Will. 4. c. 42. and 1 & 2 Vict. c. 110. The question as to the operation of the former statute had come before me in *Re Powell's Trust*. Of course, I place no reliance on my own judgment, but with *Booth v. Leycester* and *Martyn v. Blake* to guide me, I feel no difficulty. The latter of these cases disposes of the question which has been raised under the second statute. But, independently of *Martyn v. Blake*, I am of opinion that the certificate of the chief clerk is no order for payment within the 18th section of the 1 & 2 Vict. c. 110. I think, therefore, that neither statute applies; nor can I find any special circumstances to take the case out of the operation of the two last-named cases. There is nothing to stop payment of the arrears except the necessary delay in carrying out the proceedings in the suit in this court: and legal delay is not sufficient to authorize the Court to order payment of interest on arrears. If this claim were allowed, and interest on the arrears given, why should not interest be allowed on the arrears of interest due on a bond? Every man, when he purchases an annuity, has in view repayment by instalments, and I do not see any difference in this respect between an annuity and the repayment of mortgage money. In truth, the Court is being asked to give interest on arrears of interest which have been ascertained by the chief clerk's certificate. Upon the whole case, I am quite clear that his Honour has most correctly decided this question; and my opinion is, that the appeal must be dismissed, and dismissed with costs.

(5) 2 Ves. jun. 157.

(6) 3 Dru. & W. 125.

M.R.
1858. }
July 19, }
20, 21. }
SALTER v. BRADSHAW.
BRADSHAW v. SALTER.

Vendor and Purchaser—Reversion—Contract—Value—Evidence.

A young man of the age of twenty-two, being the owner of a reversionary interest in a freehold estate, contingent on his surviving his father and mother, whose respective ages were fifty-four and forty-seven, sold the same by private contract. There was a doubt whether the reversion was in fee or in tail, but no steps were taken to ascertain its market value. Upon the death of the surviving tenant for life, after a lapse of thirty-eight years, the vendor claimed payment of a charge upon the estate, unknown at the time of the purchase, and he instituted a suit to rescind the contract, on the ground of fraud and inadequacy of price, or otherwise to foreclose the equity of redemption:—Held, that a purchaser must, under such circumstances, satisfy the Court, by evidence taken at the time of purchase, that the purchase was bona fide and for full value; but that in the absence of such evidence the purchase must be set aside.

The suit of *Salter v. Bradshaw* was instituted on the 10th of May 1856 by the Rev. Henry George Salter, to set aside certain deeds dated the 20th and 21st of February 1818, and a fine levied thereon in pursuance of an agreement entered into with William Bradshaw, deceased, for the purchase of the plaintiff's reversionary interest in divers messuages, lands and hereditaments situate in the parish of St. Matthew, Bethnal Green, in the county of Middlesex. Should this fail, the bill in the alternative prayed for an account of certain charges on the estate and payment, or otherwise for a foreclosure. The suit of *Bradshaw v. Salter* was instituted on the 21st of January 1857, by Mary Ann Bradshaw and her children, to have the deeds which had been executed carried into effect, and for the specific performance of the contract.

By a deed, dated the 30th of December 1795, made in contemplation of a marriage between James Salter and Elizabeth King Busby, it was agreed that divers messu-

ages, lands and hereditaments situate in the parish of St. Matthew, Bethnal Green, in the county of Middlesex, to which Elizabeth Busby was entitled absolutely, should be conveyed to trustees, upon trust after the marriage to pay the rents to J. Salter for life, with remainder to Elizabeth Busby for life, and after the decease of the survivor to be equally divided between the issue of the marriage, if any, share and share alike.

The intended marriage was solemnized on the 31st of December 1795, and the plaintiff H. G. Salter was born on the 12th of October 1796, but there was never any other issue of the marriage.

By indentures of lease and release, dated respectively the 20th and 21st of November 1796, made between J. Salter and Elizabeth King, his wife, of the one part, Edward Augustus Butcher and George Jocelyn Robinson, of the other part, and by a fine *sur connissance de droit come eco*, the messuages, lands and hereditaments at Bethnal Green, the estate of Mrs. Salter, were limited and assured to the use of J. Salter for life, with remainder to the use of Elizabeth King for life, with remainder to trustees to preserve contingent remainders, with remainder to such uses and upon such trusts for the benefit of the issue of the marriage as expressed in the deed of the 30th of December 1795, to the intent that the issue of the body of J. Salter on the body of Elizabeth King, his wife, might have such estate therein as was therein agreed to be limited; and after the determination of the several estates, to the use of the child, if only one, and if more than one, then of all the children of J. Salter on the body of Elizabeth King Salter, his wife, to be equally divided between them, as tenants in common in tail, with cross-remainders between them in tail; and on failure of issue of all such children, to the use of the survivor of the said J. Salter and his wife in fee simple.

The messuages, lands and hereditaments in question formed part of larger estates which, under the 49 Geo. 3. cap. cx., were partitioned and divided between the parties entitled. It was now alleged that the share of Mrs. Salter was subject to a charge of 333*l.* 6*s.* 8*d.*, and also to a further charge of 336*l.* 2*s.* 8*d.*, the costs of the partition.

These two sums were said to have been paid by J. Salter out of his own money.

By an indenture, dated the 16th of May 1810, J. Salter, to the intent that the two sums of 333*l.* 6*s.* 8*d.* and 436*l.* 2*s.* 8*d.* might be kept on foot as subsisting charges, assigned the same to John Miers, in trust for J. Salter, his executors, administrators and assigns; and by the same indenture Lorenzo Stable, in whom the residue of two terms of 500 and 600 years in the estate were vested, declared that he, his executors, administrators and assigns would stand possessed of the premises during the terms for securing the payment of the said sums and interest.

On the 28th of January 1818, H. G. Salter, who was then in the twenty-second year of his age, and was studying the law under Mr. Serj. Manning, signed an agreement to sell to W. Bradshaw, for 1,200*l.*, the absolute reversion of all that freehold estate situate in the parish of Bethnal Green, consisting of divers messuages, &c. as described in the 3rd Schedule of 49 Geo. 3. cap. cx.; all of which W. Bradshaw was to become entitled to on the decease of the survivor of James Salter, aged fifty-four, and Eliza King, his wife, aged forty-seven, and H. G. Salter thereby engaged to make out, at his own expense, a perfect title to the reversion, and execute a proper conveyance thereof to W. Bradshaw and his heirs, as he or they should direct, and also to pay the expense of such conveyance, which was to be prepared by W. Bradshaw, who agreed to pay the purchase-money upon the execution of such conveyance.

By indentures of lease and release, dated the 20th and 21st of February 1818, which recited the title of the vendor, and that he was entitled either to an estate in tail or in fee, H. G. Salter, in consideration of 1,200*l.*, less 39*l.* 13*s.*, towards the expense of the conveyance, granted and released all the several messuages, lands and hereditaments, with their appurtenances, to W. Bradshaw, his heirs and assigns, for all the estate and interest which H. G. Salter had or could or might grant therein, subject to the estates for the lives of J. Salter and Eliza King, his wife, and the life of the survivor of them, and subject also to the contingency that there might

be other issue of the marriage, and subject to the land-tax thenceforth payable for the same, and subject to the leases and power of leasing given to the tenant for life by the act of parliament.

The deed then contained a covenant to levy a fine *sur conuzance*, &c., and also after the death of the surviving tenant for life to suffer a recovery to the use of W. Bradshaw, his heirs and assigns.

In Hilary Term, 58 Geo. 3, H. G. Salter accordingly levied a fine of the estate to the uses declared in the deed of release of the 21st of February 1818.

H. G. Salter, by his bill, now alleged, that at the time of entering into the contract he was in embarrassed circumstances, that he had pressing occasion for money, that several actions at law had been brought against him for the recovery of debts due from him; that he had then been twice recently arrested for debt, and that he was threatened by other creditors with legal proceedings for debts due from him; that with a view to extricate himself from his difficulties he applied to G. A. Hill, and that through him he was introduced to W. Bradshaw, and that being ignorant of such matters and trusting that W. Bradshaw, who was aware of his difficulties, would deal fairly with him, and being without any available advice or assistance, except that of G. A. Hill, he left the matter wholly to them, and that they accordingly prepared the agreement which he signed.

The bill also stated that H. G. Salter was wholly ignorant either of the rental or value of the property, or of his interest therein; that H. G. Salter subsequently met W. Bradshaw and G. A. Hill at the Grecian Coffee House, and then executed the deeds of the 20th and 21st of February 1818.

The bill then alleged that the deeds were prepared by W. Bradshaw or his solicitor, that no draft was ever perused by H. G. Salter or by any person on his behalf; that the deeds were never explained to him before their execution, but that, on the contrary, they were produced by Messrs. Hill and Bradshaw ready drawn and prepared for execution, and without the fact of the sale being known to J. Salter, from whom, at the request of Messrs. Bradshaw and Hill, it was carefully concealed.

At the execution of the deed W. Bradshaw paid G. A. Hill 1,200*l.*, less 800*l.*, which by arrangement previously entered into, G. A. Hill was to receive and apply in satisfaction of some of H. G. Salter's debts, but he neglected to discharge them, so that the plaintiff received out of the purchase-money 900*l.* only, and the sum of 6*l.* 19*s.* 10*d.*, the last sum being returned by W. Bradshaw out of 20*l.* retained by him to pay the bill of costs of his, W. Bradshaw's, solicitors.

The bill also alleged that the reversionary interest, whether calculated according to the tables or the market-price thereof, was of much larger value at the time of the execution of the deeds than the consideration-money paid, regard being had to the age of J. Salter and his wife, and to the fact that there had never been any issue of the marriage other than himself.

It was also alleged that the estates conveyed to W. Bradshaw were for the purposes of partition, as stated in the 3rd Schedule to the 49 Geo. 3. cap. cx., valued at 7,603*l.*; that William Bradshaw had estimated the difference in value between an absolute reversionary interest and a reversion subject to the contingency of there being any other child or children of James Salter and his wife at one-seventh part of the value of the reversion as an absolute reversion.

By an indenture, dated the 15th of March 1847, and duly registered in Middlesex, James Salter assigned the two sums of 333*l.* 6*s.* 8*d.* and the 436*l.* 2*s.* 8*d.*, and all interest thereon, to H. G. Salter, his executors, administrators and assigns.

Elizabeth King Salter died on the 25th of June 1839, and James Salter died on the 25th of January 1855.

The bill then charged that the deeds of the 20th and 21st of February 1818, and the fine levied thereon, were parts of one transaction, and that they ought to stand as a security only for the amount actually advanced by W. Bradshaw, with interest from the time of advance.

W. Bradshaw, by his will, dated the 22nd of January 1853, gave all his freehold, copyhold and leasehold estates unto and to the use of his wife Mary Ann Bradshaw, her heirs, executors, adminis-

trators and assigns, upon trust for the benefit of herself and her children, and he appointed his wife executrix of his will. The testator died on the 12th of July 1855.

The bill then charged that the 333*l.* 6*s.* 8*d.* and the 436*l.* 2*s.* 8*d.* were still due to H. G. Salter, with an arrear of interest, and submitted that he was entitled to an account of what was due in the event of the deeds of the 20th and 21st of February 1818 being upheld.

It also charged that Messrs. Miers and Stable were both dead, and that there was not now any legal personal representative of either of them.

The defendants by their answer stated, they believed that the terms of 500 and 600 years in the hereditaments had been assigned to Lorenzo Stable to attend the uses declared on the estates by the deeds of the 20th and 21st of November 1796; that at the time of the purchase of the reversion it was doubtful whether H. G. Salter was entitled to the estates in tail or in fee, but that they did not know whether the estates were subject to the payment of the 333*l.* 6*s.* 8*d.* and 436*l.* 2*s.* 8*d.*; that the facts relative to the purchase were drawn from documents; that the reversion was offered to W. Bradshaw through W. G. Williams, an auctioneer, who was instructed by H. G. Salter; that after several interviews with the plaintiff, who was accompanied by Mr. Davison, a solicitor, who either was or had been a clerk to Mr. Hill, Bradshaw agreed to become the purchaser; that the agreement was prepared and executed and witnessed by John Williams, a brother of the auctioneer; that abstracts of title were obtained from Messrs. Aldridge & Colley Smith, the solicitors of James Salter; that they were laid before counsel, with whom H. G. Salter himself had several interviews; that W. Bradshaw hesitated to complete the purchase in consequence of the difficulties and contingencies stated in counsel's opinion, but that, finally, W. Bradshaw agreed to complete the purchase, and he instructed Messrs. Robinson & Hine, his solicitors, to levy the fine; that fair copies of the conveyance and fine were sent to Mr. Hill to peruse, on behalf of H. G. Salter, and were returned by him signed

and approved on behalf of H. G. Salter; that the engrossments were prepared and subsequently sent to Mr. Hill for examination on behalf of the plaintiff, and that H. G. Salter afterwards attended the Judge, and passed the fine. The defendants also denied that W. Bradshaw had any knowledge of H. G. Salter's embarrassed circumstances, as alleged in the bill. They also denied that W. Bradshaw had, before purchasing the estate, any knowledge of the charge of the 16th of May 1810, and submitted that the plaintiff could not be permitted to set it up, as W. Bradshaw was a purchaser without notice. They also said that H. G. Salter had a copy of the act of parliament in his possession, and that he could not have been ignorant of the rental and value of the estate, as they were expressly stated therein.

The defendants, however, to put an end to litigation, offered to pay the two sums of 333*l.* 6*s.* 8*d.* and 436*l.* 2*s.* 8*d.*, with interest from the death of J. Salter, if the Court would sanction it, on behalf of the infant defendants, upon H. G. Salter executing a conveyance under the Act for the Abolition of Fines and Recoveries.

They then stated the fact, that the deeds of the 20th and 21st of February 1818 were executed at a special meeting, and that H. G. Salter was attended by G. A. Hill, his solicitor, and Mr. Bradshaw by William Hine, his solicitor; that a fair copy of the draft of the deed had been sent to Mr. Hill, and approved by him on behalf of Mr. Salter; that the engrossments had in like manner been sent and examined by him; and that the deeds were drawn by counsel. They also denied the allegation that the sale was made at the desire of G. A. Hill and W. Bradshaw, or either of them, or that it was carefully concealed from James Salter, or that any such desire was expressed; that the whole 1,200*l.*, less 39*l.* 13*s.* towards the expense of the fine and conveyance, was paid to the plaintiff, and that 6*l.* 19*s.* 10*d.* out of the 39*l.* 13*s.* was subsequently paid to H. G. Salter, as the sum payable at the King's Silver Office on account of the fine was less than contemplated; that the deeds were registered in Middlesex; and that notice was served on the trustees of the estate, and of the terms existing therein; that considering the contingencies existing,

the possibility of the estate being lost by H. G. Salter dying a bachelor, and of other children of his father and mother being born, the 1,200*l.* was the full value of the reversion depending on two lives of the respective ages of fifty-four and forty-seven years, and though the estate for partition had been valued at 7,603*l.*, still it was without reference to deductions for insurance, repairs, or rates, and land and other taxes; and, lastly, they submitted that H. G. Salter was not entitled to the relief asked, on account of the lapse of time, and his *laches* in filing the bill, as most of the persons concerned in the purchase were dead, and their evidence lost to the defendants.

The evidence given on behalf of the plaintiff was by the clerk of a surveyor and an auctioneer, who stated that, considering the nature of the reversionary interest and the condition of the premises in February 1818, so far as it could be ascertained, and the contingencies and other circumstances, the market value of the reversionary interest when purchased was 1,719*l.* The only other evidence was, that G. A. Hill was a solicitor much concerned in speculative money transactions.

From the evidence, on behalf of the defendants, it appeared that at the time of the partition the rental was estimated at 420*l.* a year, and that 277*l.* 10*s.* arose from tenancies at will. The several witnesses, who were either auctioneers or actuaries of insurance offices in the city of London, upon computations now made estimated the market value of the absolute reversion in fee, one at 1,573*l.*, which, for the doubt whether the plaintiff was tenant in fee or in tail, and on account of the contingency of there being other children, he reduced to 1,100*l.*; another at 1,520*l.*, which, with the doubt on the title, the contingency of another child and the leasing power, he reduced to 1,080*l.*; another at 1,600*l.*, which, for the same reasons, he reduced to 1,100*l.*; another at 1,360*l.*, which, with the doubts and contingencies, he reduced to 1,006*l.*; another at 1,365*l.*, which, for the same reasons, he reduced to 1,008*l.*; and these sums were again further reduced, if the reversion had been sold, subject to the 769*l.* 9*s.* 4*d.* now claimed. They all also said that the reversion would have been of a still less

value if the life of H. G. Salter was to have been insured against the lives of his father and mother.

Mr. Selwyn and Mr. W. H. Terrell, for H. G. Salter, insisted that the purchase had been made at an under value, and that in the absence of proof that the full market value had been paid, the transaction would be set aside, especially as the purchase was made from an expectant heir, a young man wholly dependent on his father, and in greatly embarrassed circumstances.

Edwards v. Burt, 2 De Gex, M. & G. 55; s. c. 22 Law J. Rep. (N.S.) Chanc. 215.

Bowes v. Heaps, 3 Ves. & B. 117.

Mr. R. Palmer, Mr. Follett and Mr. Sheffield, for the defendants.—This purchase was made *bond fide*; it was without fraud or imposition, which was not proved, and which could not be implied from inadequacy of price. If this transaction were set aside, it would render reversions nearly unsaleable. There was a fair doubt whether the vendor was entitled in tail or in fee; there was the chance of other issue of his father and mother being born, and being a bachelor, there was the chance of his never marrying and dying in the lifetime of his parents: all these circumstances would reduce the value. There were allegations in the bill that the whole purchase-money had not been paid; the proof, however, was directly the reverse. The evidence given by the plaintiff as to the value was altogether unsatisfactory and indefinite, but the testimony on behalf of the defendants was, that more than the value had been paid. The tenants for life had large powers of dealing with the property. They could alter its entire character; it was liable to become, not only dilapidated, but unproductive for long periods; it was also liable to insurance, rates and taxes, as well as to the costs of collecting the rents. The difficulty of proving the death of the tenants for life, as well as the probable chance of litigation to obtain the possession, was also to be considered. It was manifest, therefore, that the sum paid exceeded the market value of the reversion. These difficulties had been so much felt that Mr. Bradshaw had hesitated to complete the contract. It

was, however, completed, the risks had been run, thirty-eight years had elapsed since the transaction, and this suit was now most ungraciously instituted, when the purchaser and nearly all the parties to the transaction were dead. The *laches* of the plaintiff, therefore, would, alone, prevent his getting the relief asked. The bill must, therefore, be dismissed.—

Headen v. Rosher, M'Cle. & Y. 89.

Sugden's Vend. and Pur. 235, ed. 13.

Potts v. Curtis, Younge, 543.

Hadwen v. Hadwen, 23 Beav. 551.

Thompson v. Simpson, 1 Dru. & W. 459.

Roche v. Roche, 2 Jo. & Lat. 561.

Rochfort v. Fitzmaurice, 2 Dru. & W. 1, 21.

Meure v. Meure, 2 Atk. 265.

THE MASTER OF THE ROLLS.—My impression is, that the contract cannot stand. I assume that there were doubts existing as to whether the vendor was entitled in fee or in tail, and the purchaser has the right to all the benefits arising upon them, and my impression is, that the vendor was tenant in tail; but still the purchaser, when called upon at any time, must shew that he gave full value for the reversion. The plaintiff was not required to go into evidence to shew the value of the reversion. It is impossible for me to say that the sum paid was the full value; no estimate of the value appears to have been made, though the value of the estate was stated in the act of parliament nine years before this transaction. I cannot, however, act upon the presumption that the property was of a given value forty years ago. In *Edwards v. Burt* the property was small; an actuary had there been employed; the Lords Justices, however, were of opinion that there was no proof that the full market value of the property had been given, and they set the transaction aside. In this case no estimate was made by any competent person at the time. I will, however, look at the papers, to see what notes were made by W. Bradshaw himself at the time, and give my judgment to-morrow.

July 21.—THE MASTER OF THE ROLLS.—It is established by modern decisions that the purchaser of a reversionary interest must satisfy the Court that he at the time

bona fide gave full value for the interest purchased. In order, therefore, to maintain the validity of the transaction, it is essential that he should preserve abundant evidence that at the time of the purchase the price paid was the full value, and that the reversion purchased was of no greater value than that which he gave for it. In the present case not only has he not preserved any such evidence, but he has made it impossible to obtain any such evidence. It is out of the question to suppose that the Court can arrive at a satisfactory conclusion by any speculative opinions upon what the probable value of the reversion was at the time; it is not what the value of this particular property was nine years before, or what it is at the present time, that is to be considered. It is a perfectly *bona fide* case, but the purchaser has thought fit not to preserve any evidence of the value, nor to ascertain at the time what the value of it was; that is very clearly shewn; and circumstances, now that it has fallen in, have made it impossible now to ascertain what the value was. I think, also, that the time since the purchase was made cannot be reckoned at all, although I should feel disposed to give the purchaser every advantage that could be derived from the great length of time that has elapsed, viz., forty-one years, since the transaction took place; but, then, the reversion did not fall into possession until the 25th of January 1855, and the bill was filed a year after. If it could have been shewn that great pains had been taken to ascertain what was the value at the time of purchase, that a person had been employed to value the reversion, but that by reason of death, or other circumstances, that evidence had been lost and could not now be ascertained, it would have been a matter of great importance, but it is proved that the value was not ascertained; and the result is, that the transaction complained of in the suit of *Salter v. Bradshaw* must be set aside, but I shall not give costs on either side. The suit of *Bradshaw v. Salter* must be dismissed, but without costs.

M.R. }
Jan. 27. } WHITBREAD v. ROBERTS.

Mortgage—Foreclosure—Subsequent Incumbrancers—Sale.

*A first mortgagee filed a bill of foreclosure, and asked for a decree. Subsequent incumbrancers asked, under the 15 & 16 Vict. c. 86. s. 48, for a sale of the mortgaged estates. The plaintiff not consenting, the Court directed the subsequent incumbrancers to deposit a sum of 200*l.* to cover the expense of any ineffectual attempt to sell, and also directed a reserved bidding to be fixed sufficient to cover the amount due to the plaintiff, and made an order for sale of the estates within a given time, and foreclosure in default.*

The plaintiff, as first mortgagee, instituted a suit to obtain a foreclosure of divers freehold estates, which had been conveyed to him in fee to secure the payment of 7,000*l.*, which was due, together with an arrear of interest.

Mr. R. Palmer and *Mr. Renshaw*, for the plaintiff, asked for the usual decree of foreclosure.

Mr. Osborne Morgan, for subsequent incumbrancers, asked the Court to exercise the discretion given to it by the 15 & 16 Vict. c. 86. s. 48, and to direct a sale of the estate.—

Bellamy v. Cockle, 23 Law J. Rep. (N.S.) Chanc. 456.

Boydell v. Manby, 9 Hare, App. liii.

THE MASTER OF THE ROLLS.—When a first mortgagee withholds his consent to the sale of the estate, not only have I usually required a deposit sufficient to cover the expense of an abortive attempt to sell, but I have also directed a reserved bidding to be fixed, that there may be sufficient to pay the amount which may be ultimately found due upon the first mortgage. If, therefore, the incumbrancer who desires the sale deposits a sum of 200*l.* within a week after the chief clerk shall have fixed a reserved bidding and given his certificate, I will order a sale of the estate; but if it should not be sold within six months, all the parties must stand foreclosed.

WOOD, V.C. }
Feb. 26. } FULLER v. INGRAM.

Will—Probate Act, 20 & 21 Vict. c. 77.
—Discovery in Aid of Proceedings in the
Court of Probate—Injunction.

The old rule that the Court would not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court is not applicable to the case of a bill for discovery in aid of proceedings in the Probate Court, that Court not having the same power of compelling discovery as the Ecclesiastical Court had.

An heir-at-law having been cited to see proceedings commenced in the Probate Court for the purpose of proving the testator's will in solemn form, filed several pleas denying the validity of the will, and filed a bill of discovery in aid of his pleas, and moved for an injunction to stay proceedings until answer. Interrogatories not having been filed, the motion was refused, with costs, but leave was given to move on a future day, after the interrogatories should have been filed.

This was a motion to stay proceedings in a suit in the Probate Court, promoted by the defendant, to prove in solemn form *per testes* the will of Hugh Fuller, dated the 1st of March 1851 (whereby the defendant was constituted sole executor and residuary legatee and devisee), until the defendant should have put in a full and perfect answer to the plaintiff's bill. The testator died on the 5th of September 1858, and on the 9th of November the defendant commenced a suit in the Court of Probate against Eleanor Fuller, one of the next-of-kin, for the purpose of proving the will in solemn form of law, and on the 23rd of November the plaintiff was served, as the heir-at-law, with a citation to see the proceedings in the suit, and duly appeared. On the 16th of December the defendant filed his declaration, propounding the will, and on the 11th of January 1859 the plaintiff filed the following pleas:—First, that the alleged will was not executed according to the provisions of the Wills Act (1 Vict. c. 26); secondly, that the deceased, at the date of the alleged will, was not of perfect sound mind, memory and understanding; thirdly, that at, and for many years previous to

the date of the alleged will, the deceased had been in a condition of mental imbecility, and had fallen, and at the time aforesaid was under the entire controul and guidance of the plaintiff Ingram and of one Henry Hudson, named as a legatee and devisee in the alleged will, and that the alleged will was signed by the deceased while in such state of mental imbecility, and by means of and under the influence and controul of the plaintiff Ingram and Hudson and their agents. On the 14th of January, replication was filed, and issue was joined on the 22nd of January, and the cause was set down for hearing in the Court of Probate. The bill in the present suit was filed on the 22nd of February. After stating the above facts, it proceeded to charge various matters tending to prove the insanity of the testator and undue influence, and prayed for a discovery of the same matters, and an injunction to restrain the proceedings in the Probate Court until answer.

At the time of bringing on the motion interrogatories had not been filed.

Mr. Roll and Mr. Cracknall, in support of the motion.

Mr. James and Mr. Hislop Clarke, for the defendant, objected that the motion could not be made until interrogatories had been filed—*Lovell v. Galloway* (1), *Lloyd v. Adams* (2). No discovery could be obtained in this Court in aid of the jurisdiction of the Ecclesiastical Court, because that Court was fully capable of coming at the discovery itself—*Dun v. Coates* (3), *The Earl of Derby v. the Duke of Athol* (4); and the Court of Probate had, by the 24th section of the 20 & 21 Vict. c. 77, full power to compel discovery. They referred also to the 4th and 29th sections of the act.

WOOD, V.C.—It is impossible to proceed without the interrogatories, or that the injunction can be moved for until they are filed, and upon that part of the case I shall dismiss this motion, with costs; but I shall give the plaintiff leave to serve a fresh

- (1) 17 Beav. 1.
- (2) 4 Kay & J. 467.
- (3) 1 Atk. 288.
- (4) 1 Ves. sen. 202, 205.

notice of motion for Monday. With regard to the other part of the case, I am satisfied that the Court of Probate has not, under the recent act, the same power which the old Court possessed as to wills of personal estate; but clearly it has not a similar power as to real estate in a contest between the devisee and the heir-at-law. The powers given by the act are certainly no more than the old powers of the Ecclesiastical Court as to wills of personal estate. The power given by the 61st section of citing the heir to see proceedings is an entirely new power, and, of course, the act does not touch the question of the right of the heir to have the will of real estate proved. But, even if it were so, and such power as to wills of real estate were given by the act, the proceedings must be according to the rules laid down, and in those rules there is nothing analogous to the old process by allegation and counter-allegation and responsive allegation in the nature of a bill and cross-bill. Therefore, the defence cannot be made to rest upon the process of the old court, for the old rules do not apply to the new course of proceeding, and accordingly, though I agree with Mr. James, that this Court would not interfere with the old Ecclesiastical Court, it cannot be said that it will not interfere, because the Court of Probate has power to compel discovery, for the question must rest upon the new powers. But the powers of this Court are not abrogated by the powers conferred upon another Court, and fortunately so, for those powers do not seem to me to be sufficient.—[His Honour read the 24th section.]—The first part of that section seems certainly to refer to the examination of witnesses. It is possible the Court of Probate may examine witnesses upon interrogatories, but a question might arise whether, when you have the answer to the interrogatory as to documents, you could enforce the production of those documents, as you can in equity. When you come to look at the Rules and Orders, there is a clause (81.) relating to applications for the production of instruments purporting to be testamentary, but I find nothing relating to any other documents. Then, all the directions as to the trial are in the common form applicable to ordinary trials at common law, and nothing else.

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I very much fear that if the powers given by this act to the Court of Probate were required to be put in force, there would be the same difficulty as has been found in the courts of common law as to obtaining discovery. No one would rejoice more than I should to find that entire jurisdiction was vested in that Court, but I can see nothing in the act which satisfies me that the Court of Probate has such full powers. It has been objected that this application has been made for the purposes of delay, but the defendant, being in possession, will be no sufferer by the delay; but if he is allowed to proceed and prove the will in solemn form, the plaintiff will be precluded for ever. No doubt, in some cases, that would be very useful, but it is a very serious proceeding, and would affect the plaintiff far more seriously than this injunction can affect the defendant. It is very important for the heir to collect such facts as he can from the evidence of others. He must get his facts well together before he comes to a conclusion upon the case, and, after all, the delay will not be very great. I cannot conceive, under these circumstances, that the heir is to be concluded before discovery made. As I said before, the motion must be refused, with costs, on the ground that interrogatories have not been filed, but I shall give leave to serve notice of motion for Monday on filing interrogatories.

LORDS JUSTICES.

Feb. 24;
March 3.

MARRIAGE v. SKIGGS.

Administration of Estate—Injunction—Judgment by Creditor before Probate—Sale before Decree—Bills of Exchange Act.

A testator died indebted on bills of exchange. The creditor, before the executors proved the will, issued a writ under the Bills of Exchange Act (18 & 19 Vict. c. 67.), and, the executors not appearing, the creditor signed judgment and levied on the goods of the testator in the hands of the executors, and the sheriff sold. Specialty creditors of the testator afterwards took out an administration summons and obtained a decree at the Rolls,

and moved to restrain the sheriff from parting with the money arising from the sale, and that the money should be paid into court, and the same was ordered by the Master of the Rolls:—Held, upon appeal (reversing his Honour's order), that as the money was in the hands of the sheriff at the suit of the creditor on the bills of exchange before the decree in the administration suit, the motion must be refused, with costs.

This was an appeal from an order of the Master of the Rolls, granting an injunction and ordering money to be paid into court on motion in a suit instituted by summons by Mr. Marriage and others, specialty creditors of Robert Skiggs, against Charles John Skiggs and Frederick Kent, the executors of his will, for the administration of his estate. The facts were these:—The plaintiffs (the specialty creditors) moved that the Sheriff of Essex might be restrained by injunction from further proceeding under a writ of execution against the goods and chattels of Robert Skiggs, deceased, in the hands of the defendants Skiggs and Kent, obtained in an action at law, by the London and County Bank, against the above-named defendants, as executors of Robert Skiggs, and from paying the monies levied under such execution to the London and County Bank; and that the London and County Bank might be restrained from receiving such monies; and that such monies might be paid into court, to the credit of this matter and cause.

It appeared that Robert Skiggs died on the 4th of October 1858, indebted to the London and County Bank, in respect of four bills of exchange for 414*l.* 1*s.* altogether, and on the 30th of December 1858 they issued a writ of summons, under the Summary Procedure on Bills of Exchange Act, 1855, (18 & 19 Vict. c. 67), against the defendants Charles John Skiggs and Frederick Kent, who were appointed executors of the will, and on the 1st of January 1859 served the same on them, and on the 15th of January judgment was signed thereon, for want of appearance by the defendants; and the London and County Bank immediately issued and lodged with the Sheriff of Essex a writ of *fi. fa.* for 418*l.* 19*s.* for debt and costs, and on the

17th of January the sheriff executed the writ by levying goods and chattels of Robert Skiggs in the hands of the executors, and on the 27th of January sold a portion of the goods and chattels, which produced the amount of the debt and costs, except about 47*l.* On the 4th of February the sheriff sold a further portion of the goods and chattels, and thereby realized the remainder of the debt and costs.

It further appeared, that on the 22nd of January, the defendants obtained grant of probate of the will of the testator Robert Skiggs; and on the same day the plaintiffs (the specialty creditors) took out an administration summons in the chambers of the Master of the Rolls, and on the 5th of February the usual order was made for the administration of the testator's estate.

On the 29th of January, the plaintiffs served the sheriff with notice of the administration summons, and that the plaintiffs were specialty creditors of the testator, and entitled to be paid in priority to the debt of the London and County Bank, and requiring him to retain the monies produced by the sale of the testator's goods under the said levy. The London and County Bank denied that they had notice of any specialty debts of the testator until the service of the notice on the sheriff.

The motion was heard, before the Master of the Rolls, on the 8th of February, when his Honour said:—"I am of opinion that I must grant the injunction, but without prejudice to the rights of the creditor under the execution. The question is new, and is one of great importance. No doubt, if a party obtains possession of goods of a testator before probate, he may be sued as executor *de son tort*. But has probate relation back, so as to make everything good that has been done before? I think that may be doubtful, and whether this Court cannot, before the money has been parted with by the sheriff, and whilst the rights of the parties remain unchanged, interfere to stay the proceedings at law. If the money were in the hands of the creditor, he might be entitled to retain it; but whether, where the money has not been paid over to the creditor, he is entitled to it, I express no opinion; but if he is, then the practice of this Court in appointing a receiver of the estate of a testator pending proceedings

in the ecclesiastical courts with reference to the grant of probate, which proceeds upon the assumption that until probate is granted you cannot tell who to sue, is certainly wrong; and it is clear that a party named executor may, by collusion, allow the simple contract creditors of a testator to sweep away the estate; whilst, on the other hand, in this court, it is also certain that you cannot obtain a decree against a person for administration before probate is granted. I shall grant the motion, without prejudice to any question as to the right of the creditor to the money the produce of the sale. The money must be paid into a separate account, to mark it."

From this order the London and County Bank appealed.

Mr. Roundell Palmer and *Mr. H. Stevens*, for the appellants, said it was to be observed, that the London and County Bank had no notice whatever of the existence of any specialty debts of the testator until some time after they had commenced their action on the bills of exchange, and the first notice of any allegation of there being such debts was the notice served upon them by the plaintiffs in this suit, on the 29th of January 1859. They contended that the sale of the goods in satisfaction of the judgment obtained by them under the proceedings in the action they had brought under the Bills of Exchange Act, and the proceeds of the sale, became the moment it reached the hands of the sheriff the absolute property of the bank, and it was then too late to ask the Court to interfere to prevent their obtaining the benefit of their diligence. In support of these propositions, they cited—

Giles v. Grover, 9 Bing. 128.

Ranken v. Harwood, 5 Hare, 215; s.c. 15 Law J. Rep. (N.S.) Chanc. 496.

Williams on Executors, 5th edit. p. 1730, et seq., and the cases there cited.

From the law as laid down at page 255 of the same treatise, it was plain that the probate when obtained had relation back to the time of the death of the testator, and vested the property in the executor, and for that reason a judgment obtained against

the executor before probate was perfectly good against all the world—*Vincent v. Godson* (1). They confidently trusted the Court would not restrain execution to the full extent on a judgment obtained, and in all other respects perfected before decree, and would reverse the order of the Master of the Rolls.

Mr. Selwyn and *Mr. Nalder*, in support of the order of the Master of the Rolls, contended that after decree in a suit for administration, this Court will restrain proceedings on a judgment at law by creditors *de bonis testatoris*—*Clarke v. the Earl of Ormonde* (2) and *Drewry v. Thacker* (3), though judgment had been obtained in an action before the decree—*Egan v. Baldwin* (4). Even a sale by the sheriff of the goods levied under an execution issued on a judgment obtained before probate would not enable the creditor to intercept the administration of the estate of a testator under a decree of this Court—*Kent v. Pickering* (5), *Burles v. Popplewell* (6) and *Kirby v. Barton* (7).

Mr. Wickens, for the Sheriff of Essex, submitted to any order the Court might please to make.

Mr. Southgate, for the executors, did the same.

Mr. Roundell Palmer was heard in reply.

LORD JUSTICE KNIGHT BRUCE said, that money was in the hands of the Sheriff of Essex at the suit of the creditor, before the decree in the administration suit; therefore, in his Lordship's opinion, the decree could not affect the rights of the creditor, for the fact that he was actually a creditor was not in dispute. The only question for consideration, therefore, was, whether there had been any irregularity in the proceedings at law. There might possibly be a question whether an executor could properly be made a defendant under the Bills of Exchange Act; and although his Lordship would give no opinion whether the

(1) 24 Law J. Rep. (N.S.) Chanc. 121.

(2) Jac. 108, 115.

(3) 3 Swanst. 529.

(4) 2 Moll. 532.

(5) 5 Sim. 569.

(6) 10 Ibid. 383.

(7) 8 Beav. 45.

executor in the present case might have objected to that proceeding, still, as between themselves and the general creditors of the testator, he was of opinion that they were not obliged to take that line of defence. He thought that the injunction must be refused, and that the plaintiffs must pay all the costs, both before his Honour the Master of the Rolls and in this court.

LORD JUSTICE TURNER concurred.—He was not aware of any authority—and none had been cited in the argument—which would sanction this Court in restraining a creditor to the extent contended for by the plaintiffs. After commenting on the judgment of Lord Eldon in *Clarke v. the Earl of Ormonde*, and referring to *Ranken v. Harwood*, he expressed his opinion to be also that the order of his Honour the Master of the Rolls must be reversed, with costs.

LORDS JUSTICES. }
 March 3. } *GANDEE v. STANSFELD.*

Production of Documents—Privilege—Examination of Plaintiffs in Bankruptcy—Evidence for Defendants.

A. and B. had dealings together. B. afterwards became bankrupt, and A. filed a bill against B.'s assignees to establish the dealings. The defendants admitted the possession of copies of the examination of A. before the Commissioners, but refused to produce them, on the ground of privilege, as being evidence given in support of the defence. The Court (overruling a decision of the Master of the Rolls) discharged an order for their production, considering that they ought not to be produced until the hearing of the cause.

This suit was instituted against the assignees in bankruptcy of one Christal, to establish the validity of a security obtained by the plaintiff from the bankrupt before his bankruptcy for monies advanced to him.

The assignees had disputed the security in the Court of Bankruptcy, and the plaintiff and other witnesses had been examined before the Commissioner with respect to the transaction referred to.

The bill having been filed, a summons at chambers was taken out by the plaintiff for production of documents by the defendants, who admitted the possession of certain documents, and amongst them of copies of the depositions of the plaintiff and the other witnesses in the bankruptcy, but refused to produce the depositions, contending that they were privileged as forming part of their case, and as parts of the evidence which the defendants were getting up with reference to the dispute which was the subject-matter of the suit.

At the hearing, before the Master of the Rolls, his Honour said the documents were not privileged. All the examinations relating to the subject-matter of the suit must be produced. He concurred generally, that as to all documents for getting up the defendants' case, the plaintiff was not entitled to see them; but proceedings in the same matter, either before a Court of law or a Commissioner in Bankruptcy, the plaintiff might require to be produced. Take a case of disputed boundaries, where the defendant was in possession of the depositions of the plaintiff or other parties before the Inclosure Commissioners; was the plaintiff not entitled to see them? Were they privileged, though very important to the defendant's case? He was of opinion that production must be ordered.

From this order, so far as related to the production of the office copies of the examination of the plaintiff before the Commissioner in Bankruptcy, the defendants appealed, but they submitted to produce the other documents embraced by the order at the Rolls.

Mr. Selwyn and Mr. Speed argued that the documents required to be produced contained evidence in support of the defendants' case, which, if obtained in any other way than through the examination of the plaintiff before the Commissioner, would have been privileged; and what, they asked, could be the difference as to the defendants' privilege, that the matter had been disclosed in the plaintiff's examination? They argued that so much of the order ought to be discharged.

Mr. Roundell Palmer and Mr. Beavan,

in support of the order, referred to the following cases :—

Goodall v. Little, 1 Sim. N.S. 155; s.c. 20 Law J. Rep. (N.S.) Chanc. 132.

Glyn v. Caulfeild, 3 Mac. & G. 463.

Lafone v. the Falkland Islands Company, 4 K. & Jo. 34; s.c. 27 Law J. Rep. (N.S.) Chanc. 25.

Holmes v. Baddeley, 1 Phill. 476; s.c. 14 Law J. Rep. (N.S.) Chanc. 113.

Betts v. Menzies, 29 Law Times, 325; s.c. 26 Law J. Rep. (N.S.) Chanc. 528.

Mr. Selwyn was not called on to reply.

Their LORDSHIPS were of opinion that, considering the particular nature of the two documents in dispute, they ought not to be ordered to be produced until the hearing of the cause. The order, therefore, so far as related to them (and no other part of it was in dispute), would be discharged.

STUART, V.C. }
March 5, 7, 8. } PAYNE v. MORTIMER.

Voluntary Bond—Marriage Settlement—Debtor and Creditor.

A father, having given a voluntary bond to trustees, conditioned for the payment after his death of a sum of money to them for the benefit of his two sons, afterwards, upon the marriages of the sons, assented to such bond being settled upon trust for the benefit of the said sons and their respective wives and children. The marriages having taken place upon the faith of the provision thus assented to :—Held, that the trustees of the marriage settlements of the sons were entitled to claim as specially creditors for value in a suit instituted after the father's decease for the administration of his estate.

Edward Horlock Mortimer, by his bond, dated in September 1842, became bound in the penal sum of 57,200*l.* to the trustees therein named. The bond was conditioned to be void on payment to the said trustees by the executors of the obligor of the sum

of 28,600*l.* within six months after his death, it being declared by the said bond that the trustees, on receiving the said sum of 28,600*l.*, should forthwith pay over the same in the following proportions to six of his children by his first marriage, for whom he was desirous of settling and assuring some certain provision in the event of his death, viz., to Thomas Richard Bythesea Mortimer the sum of 4,350*l.*, to John Lewis Mortimer the sum of 5,250*l.*, to John Baskerville Mortimer the sum of 6,000*l.*, to Edmund Bythesea Mortimer the sum of 6,000*l.*, to Elizabeth Caroline Payne the sum of 1,000*l.* for her separate use, and to Rosina Laura Mortimer the sum of 6,000*l.* for her separate use; and in case either of his said sons and daughters should die before the said sums should become payable to him or her, then upon trust to pay the said sum which he or she would have been entitled to by virtue of the said bond, to the survivors or survivor of them, in like proportions as the said sum of 28,600*l.* was directed to be paid to them respectively.

In 1843 two of the above-named sons of the obligor, viz., T. R. B. Mortimer and J. B. Mortimer, intermarried with two of the daughters of Charles Payne; and prior to such marriages they executed settlements, each of which was dated the 20th of October 1843, assigning all their respective interests under the above-mentioned bond of September 1842 to the trustees therein respectively named, for the benefit of their respective wives and the issue of such marriages respectively.

In the course of the negotiations on the subject of these settlements, E. H. Mortimer, the obligor, wrote in answer to an application made to him by the mother of the intended brides the following letter, dated in August 1843 :—

“Madame,—I have been in communication with my solicitor, which has prevented my writing you before. As I informed you, I gave a bond to trustees during my illness last year, which was for the benefit of my children, . . . but it is therein specified that should either die before myself, their portion would fall among the survivors. The bond, I find, cannot under any circumstances be altered, but

my sons could give a bond, which I trust will be satisfactory."

On the 30th of August 1843 Mr. Payne's solicitor wrote to the testator's solicitor a letter, which, after referring to the bond of September 1842, contained the following passage:—"The sums to which the two intended husbands will become entitled under the above bond are intended to form part of the settlements, and I will therefore thank you to furnish me with a copy of the bond without delay."

In compliance with this request a copy of the bond was shortly afterwards sent to Mr. Payne's solicitor.

Edward Horlock Mortimer, the obligor of the bond, died in November 1857, and the present suit was shortly afterwards instituted for the administration of his estate, the usual decree being made in it in May 1858.

The testator's estate, which consisted wholly of personalty, turned out to be insufficient for the payment of his specialty debts for value, exclusive of the said two sums made payable by the said bond of September 1842, and afterwards settled by the marriage settlements of October 1843.

The trustees of these settlements, however, claimed the sums so respectively settled, as specialty debts for value against the estate of the testator, but the chief clerk disallowed such claims, holding the sums so claimed to be merely voluntary debts.

From this decision the plaintiffs appealed by summons to vary the chief clerk's certificate.

Mr. Bacon, Mr. Freeling and Mr. Fooks, in support of the claims disallowed by the certificate, cited—

Prodgers v. Langham, 1 Sid. 133.

Kirk v. Clark, Prec. in Chanc. 275; s. c. 2 Eq. Ca. Abr. 165.

George v. Milbanke, 9 Ves. 190.

Tanner v. Byne, 1 Sim. 160; s. c. 5 Law J. Rep. Chanc. 125.

Ashley v. Ashley, 3 Ibid. 139.

Crofton v. Ormsby, 2 Sch. & Lef. 183.

Meggison v. Foster, 2 You. & Col. C.C. 336; s. c. 12 Law J. Rep. (N.S.) Chanc. 415.

Martyn v. M'Namara, 4 Dru. & W. 411.

Mr. Malins and Mr. Schomberg, contra, referred to—

Maunsell v. White, 4 H.L. Cas. 1039.

The East India Company v. Clavell, Prec. in Chanc. 377; s. c. Gilb. Rep. 37.

Mr. Bacon replied.

STUART, V.C. said that the bond of September 1842, though undoubtedly a mere voluntary obligation, while in the ownership of the obligor's sons or the trustees for the sons, the only obligees named in it, had ceased to be so situated. The claims now made under it were not advanced by the obligees named in the bond or their *cestuis que trust*, but by the trustees of the settlements made on the marriages of the obligor's two sons, marriages which had been contracted in the reliance that those claims would be provided for. Thus there had been imported into the bond, in respect of those claims, the consideration of marriage, a consideration as valuable as if money had been paid for the bond. That being so, the case fell clearly within and was governed by the doctrine laid down in the words following, by Lord Eldon, in *George v. Milbanke*:—"If the doctrine is rightly collected from the authorities, it imports all this; that if a man is indebted, and makes a provision for his child by a pure voluntary settlement, and that child afterwards marries, the circumstance of its leading to the marriage makes the settlement good against the creditors; though it would have been bad if no marriage had taken place." making those observations, Lord Eldon did not point to any distinction in principle as existing between a settlement by voluntary grant or assignment of property and a settlement by mere voluntary obligation, nor did he (the Vice Chancellor) think that such a distinction could be maintained as affecting the question of the effect of the subsequent importation of a valuable consideration into the transaction. There had been, moreover, in the present case, a representation by the obligor to the mother of the intended brides of his two sons, the obligees, that this bond existed as a provision, though a contingent one, for

such sons. The bond was thereupon sent by the solicitor of the obligor to the solicitor of the mother, who, acting upon that representation, prepared settlements for the daughters, between whom and the two sons the marriages were, on the faith of the truth of such representations, accordingly solemnized. It was impossible to say that such a transaction did not involve a representation amounting to a contract, and on this ground also, as well as upon that of a subsequent importation of valuable consideration into the bond, it was impossible to treat the claims now made under the bond as those merely of volunteers. The names of the present claimants should, therefore, be inserted in the schedule as creditors who held a specialty obligation, not as volunteers, but as purchasers for value.

The costs of the summons to be costs in the cause.

WOOD, V.C. } EYRE v. SANDERS,
March 21, 22. } *ex parte* YEO.

Settlement—Leases and Sales of Settled Estates Act (19 & 20 Vict. c. 120.)—Authority of conveying Parties—Legal Estate acquired subsequently to the Order for Sale.

Real estate subject to a mortgage was devised in strict settlement, and a power of sale given to the trustees; a suit was instituted, and the Court ordered the estate to be sold, and E, S. and V. were appointed to execute the conveyance, and it was declared that the mortgagees should be bound by the order. The legal estate having been afterwards reconveyed to the trustees of the settlement,—Held, that E, S. and V. had power to convey it, and that the trustees of the settlement were not necessary parties to the deed.

By deeds of lease and release, dated the 4th and 5th of September 1822, Col. Henry Samuel Eyre mortgaged part of the St. John's Wood Estate to Messrs. Pole & Thornton for 40,000*l.*, and by his will, dated in 1837, devised the equity of redemption in strict settlement, giving a

power of sale to his trustees. The testator died in 1851, and in 1857 a suit was instituted for the purpose of having the trusts of a term of years created by the will declared, and for raising the sums charged on the estates. In this suit, and in the matter of the settled estates of Col. Eyre, and of the Settled Estates Act, an order was made on the 20th of March 1858, for the sale of a portion of the estates, and George John Eyre, George Williams Sanders and Edward Urch Vidal were appointed as the persons, pursuant to the statutes, to execute the deeds of conveyance of the premises directed to be sold, and it was ordered that all proper parties should join in and execute proper conveyances to be settled by the Judge. Pole & Thornton, in whom the legal estate was vested under the mortgage, were not parties to this order; but an order was made on the 24th of July following, whereby the Court declared, that they and the trustees, and other specified persons, were bound by such former order, and the sales under the same, in the same manner as if they had been parties thereto, and had consented to be bound thereby in respect of their several charges.

The sale, at which Mr. Yeo purchased a portion of the property, took place on the day previous to the latter order. The legal estate remained outstanding in the mortgagees, until some day between the 17th of September and the 7th of October, when a deed, dated the 17th of July 1858, was executed, and the legal estate thereby conveyed to the trustees of Col. Eyre's will in fee, to the uses of the will. Mr. Yeo, the purchaser, accepted the title, and paid his purchase-money into court; but upon the draft of the conveyance being submitted to him, he insisted that a conveyance by the nominees of the Court only did not pass the legal estate, and he required, as the shortest way of acquiring such legal estate, that the trustees of the will should join, and execute the power of sale given by the will. The vendors, on the other hand, contended that the conveyance was sufficient without their concurrence; and the question being raised before the chief clerk on the settlement of the conveyance, was adjourned by him into court.

Mr. G. L. Russell, for the vendors, contended that the persons appointed by the Court had full power to convey the legal estate, the reconveyance being a dedication of the legal estate to the uses of the will. The 15th section of the 19 & 20 Vict. c. 120. gave power to the Court to bind the legal as well as the equitable estate.

Mr. Bowring, for the purchaser, objected that the order of the Court could only operate on the interests of the persons bound by it, and the order of the 20th of March did not affect the legal estate, and the order of July did not authorize the conveyance of it. He referred to the interpretation of the word "settlement" in the 1st section of the act, and also to section 41:—"the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession, or to the receipt of the rents and profits as aforesaid, unless they shall concur therein."

Mr. Amphlett appeared for other parties.

Mr. Russell replied.

March 22.—WOOD, V.C.—This is a question of conveyancing which appears to have divided the opinions of conveyancers. The argument on behalf of the purchaser is, that the legal estate, which was outstanding in a mortgagee, could not be reconveyed by the order of the Court directing that the reconveyance should be made by the persons named in the order, the mortgagees not being parties to that order. The 15th section of the act enacts, that "the Court may direct what person or persons shall execute the deed of conveyance, and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate, (if necessary) by way of revocation and appointment of the use, or otherwise as the Court shall direct." There was first an order made, to which the mortgagees were no parties, ordering a conveyance to be made by the persons named in the order; and then the Court made another order, by which all persons were unquestionably

bound, and which passed every estate and interest to which they were entitled under the settlement. The 1st section of the act defines the words "settled estates" to signify "all hereditaments of any tenure, and all estates or interests in any such hereditaments which are the subject of a settlement." I apprehend you are to convey every estate and interest to which you are entitled under the settlement; and the question is, whether if, between the date of the order and the execution of the conveyance, a person acquires the legal estate, the words of the 15th section are not large enough to take in a conveyance passing the legal estate. It seems to me that in such a case the legal estate will be effectually conveyed. The argument against that is, that the settlement is not now by virtue of the will, but by virtue of the conveyance from the mortgagees. That is perfectly absurd. The testator settles the estate; he conveys the equity of redemption and all the right to call for the legal estate. That is a right which existed at the date of the order, and which would, whenever the mortgage was paid off, become vested in the persons interested under the settlement. The subsequent order does not, I think, materially alter the case. The mortgagees were not bound by the order, but the legal estate became vested afterwards in those who were bound by it, and thereupon the equitable interest was merged. The order binds all the estates and interests which the parties have, and every interest they can acquire before they make the conveyance. The purchaser takes everything that the parties are ordered to convey, and those who make the conveyance are absolutely authorized to make it. The parties interested under the will have an interest in the legal estate, and that being acquired by virtue of the settlement is bound by the order. Therefore, I think the persons appointed to convey are alone capable of making a good conveyance, and the draft will be approved.

KINDERSLEY, V.C. }
Feb. 17. } WALLIS v. WALLIS.

Practice—Right of Defendant to dismiss Bill without Costs.

A defendant is not entitled to dismiss a bill, upon conceding all that the plaintiff demands, without paying the costs, and the Court will not upon a motion for such dismissal go into the merits of the case.

In consequence of the doubtful expressions in the authorities, the costs of the motion were reserved to the hearing.

This was a suit instituted for the specific performance of a contract to exchange certain property, and to restrain an action of ejectment. No replication having been filed, the cause was set down by the plaintiff, who then moved for a decree, and filed affidavits to establish his rights. The defendant had also filed affidavits. A motion was now made on behalf of the defendant that, on the defendant's executing a conveyance to the plaintiff of the property mentioned in the bill, in exchange for the land and buildings mentioned in the bill belonging to the plaintiff, and on the defendant undertaking to abandon all further proceedings in the action at law, in the said bill also mentioned, the bill in this suit might be dismissed without costs, or that such order might be made as to the payment of, or otherwise as to the costs of this suit, and of the said action at law, as to the Court should seem fit.

Mr. Glasse and Mr. Nalder, in support of the motion, submitted that the Court should refuse to allow the plaintiff to go on incurring expenses after the defendant had offered to give him all that he asked. This had been decided in many cases, and the only question was as to costs. This must be decided by the Court going into the merits of the case, which it could do upon the affidavits already filed.

KINDERSLEY, V.C.—If a defendant offers to give the plaintiff what he demands, and then it comes out that the plaintiff had no right to make the demand, in that case, no doubt, I should make him pay the costs; but it appears the time for completing the evidence as to the merits has

not yet arrived, and the parties have a right to produce further evidence. When the defendant made the offer to satisfy the plaintiff, what ought the plaintiff to have done?

Mr. Glasse.—He ought to have brought on his motion for a decree, and that would have decided the question of costs. Such a motion as this has been allowed by the Court in similar cases. The great object of the Court always is to prevent further expenses, and there is no reason why the question of costs should not now be decided upon the merits. They cited—

Sivell v. Abraham, 8 Beav. 598.

Langham v. the Great Northern Railway Company, 16 Sim. 173; s. c. 17 Law J. Rep. (n.s.) Chanc. 436.

Winter v. Vixitelli, 36 Leg. Obs. for 1848, p. 53.

The Sutton Harbour Company v. Hitchens, 15 Beav. 161; s. c. 21 Law J. Rep. (n.s.) Chanc. 568.

The London and North-Western Railway Company v. Smith, 1 Hall & Tw. 364; s. c. 1 Mac. & G. 216; 19 Law J. Rep. (n.s.) Chanc. 193.

Woodard v. the Eastern Counties Railway Company, 1 Jur. N.S. 899.

Knox v. Brown, 1 Cox, 359.

Tapp v. Tanner, 20 Law J. Rep. (n.s.) Chanc. 559.

Wright v. Barlow, 5 De Gex & Sm. 43.

Mr. Baily and Mr. Elderton resisted the motion, on the ground that the defendant had no right to have the bill dismissed without paying all the costs. It would be different if the plaintiff was not justified in making his demand, but the defendant had admitted the demand to be just by offering to concede all that was asked; and there had been no case decided in which, at such a period of the cause, the Court had gone into the merits of the suit. This was a motion to prevent the cause coming to a hearing, but it was only at the hearing that the merits could be considered.

Mr. Glasse, in reply.

KINDERSLEY, V.C.—This is a question of some importance, as a number of motions founded on the same principle might be made. It comes to this, that at any

stage of the proceedings in a case, the defendant may say, I will give you all you want except the costs, and we will dismiss the bill without going into the merits. In the first place, no doubt, the defendant may, at any time, without leave, come to the Court, and as a matter of course may have an order on motion for a decree to the effect of what the plaintiff asks. He may stop the proceedings by giving the plaintiff all he asks, together with his costs; a defendant may do that at any time, and then he pays all the costs, and the costs of the motion. Then we come to a case where the defendant does not say, I am ready to give you all you ask, but I will give you all but the costs of the suit, that is, I dispute your claim, and think you ought not to have filed the bill; still it is more to my interest to give you what you ask, but I will give it without costs. And then the defendant says, he has a right so to dismiss the matter. Now, it appears to me the distinction in these cases is this: where the application turns on the ground of trying the case upon the merits, there such a motion may be made, but not on the ground that on entering into the merits then the costs ought not to be paid by the defendant. I will mention some instances in which a party may come, sometimes the plaintiff and sometimes the defendant, to stop the suit, without offering to pay all the costs of the suit. I need not say that the Court has always an object in stopping unnecessary costs, and to dispose of the question in some way to prevent the parties going on to no purpose to incur additional costs; and on that principle it is that the cases have gone of allowing the defendant to come and say, "I will give you all the costs, and you shall go on no further." On the other hand, we must bear this in mind, that if the defendant has put the plaintiff to unnecessary costs, it should not be allowed that he should come and say, "Now, stop the suit, and still I will not pay the costs"; therefore, the Court must steer between the two objects, one being not to allow the parties to go on vexing one another, and the other not to let one party put another to expense, and then stop the proceedings. Now, I will give an instance in which it

might be proper, either for the plaintiff or the defendant, to make such a request. Suppose the plaintiff filed his bill to enforce the demand. If the defendant, after the bill being filed, concedes the claim of the plaintiff, I think it would not lie in the mouth of the defendant to say, "Although I concede the demand, I dispute it." But admitting himself to be wrong, he may come with a motion to dismiss the bill, with costs; that is, the Court will prevent the plaintiff from going on, upon this footing: that the defendant, having conceded the plaintiff's demand, it must be taken on such an application that the demand was a just one, and on that footing only will the Court entertain it; and on the application of the plaintiff the Court will take the same view of the case, and will stop the suit, not making the defendant go into the merits of it, but on the footing that the defendant has admitted the justice of the plaintiff's claim; and it does not lie in his mouth to say that the claim was not a just one. There might be a case of that sort; but might there not be a case of this sort?—where the defendant knows he is wrong, and has been staving off the claim, and then comes to say, "I will agree to your claim, but I will not pay the costs; I will now come, and ask to dismiss the suit, without costs." This is a case in which either the defendant or the plaintiff might come to stop further proceedings, namely, where the defendant has conceded the claim of the plaintiff to give him what he asks, and he is not entitled to go into the merits. Now in another case, it might be proper to make the plaintiff pay costs, such as this—suppose the plaintiff files a bill, having an equitable right against the defendant, without any dispute on the part of the defendant, that he would not do what he is asked. The defendant might say, "I never disputed your claim, but yet you filed the bill for the purpose of making costs"; surely in such a case the Court will entertain an application of the defendant to stop proceedings, without costs; not, however, on the ground of merits, but, admitting the claim, it would be on the question whether the plaintiff was justified in filing such a bill. That, then, is a case in which the defendant might come with an application

to stay proceedings, without costs; but on a footing distinct from the merits—that the plaintiff was not justified in filing the bill. Another case is such a one as *The Sutton Harbour Company v. Hitchens*, which was founded upon the decision of Lord Cottenham in *The London and North-Western Railway Company v. Smith*. There several bills were filed, and the plaintiffs, at the time of filing them, were justified in doing so; and if the decision of Lord Cottenham had remained unreversed, the parties would have got their decrees; but a case of the same kind came before Lord Truro, and he took a different view of the law, and overruled the decision of the previous Lord Chancellor; so that the plaintiffs would not have been entitled to their decrees. Then, what were the plaintiffs to do in these suits which had been put out of court? They might, of course, have dismissed their bills and paid their costs; but that would have created great injustice to them, as it was no fault of theirs that Lord Cottenham had laid down a view of the law which was afterwards found to be erroneous. In these cases, then, the Court held, that the question could be decided irrespective of merits. The plaintiffs might come and say, “We are wrong, because the law is altered; therefore, stay the proceedings without our being obliged to pay costs.” The Court granted the applications, quite extrinsic of the merits of the case. Having mentioned these cases, in which applications of this nature might be made, let us now see what would be the effect of what is contended for by the defendant in this case, in holding that an application while the case is going on may be made by the defendant to try the case on its merits. What would be the consequence of such a proceeding? Suppose the case were taken just after filing the bill—I mean where the plaintiff has properly filed his bill—and after that no steps have been taken, why should the defendant come and say, “Now try the merits of the case, and stop the suit on my conceding what the plaintiff has demanded, but without costs”? Just see what a position we should have. There is nothing but the bill. Is the bill to be taken to be true, or are we to have evidence given in the

case? In other words, you must go into evidence on both sides, to try on that motion, what should be tried at the hearing, whether the plaintiff is entitled to what he asks by his bill. There would be nothing gained by that; there would be witnesses examined and cross-examined, and it would be the same as a motion for a decree.

Suppose, then, in such a case, the defendant has made the offer to give the plaintiff all he asks, without costs. Is the defendant then to come with such an application, that is, in fact, an application for the plaintiff to pay the costs? Besides the defendant in that case might say, I must file my answer, first, because that would decide the question of costs? If, then, after the answer, it is done, the defendant may say, “Now, in my answer, I have shewn that I am right; therefore, stop the suit, but I will not pay costs.” In such a case, it might be that the answer is full of misrepresentations, and if it came to a hearing, the plaintiff might prove it to be false, and that the defendant ought to pay the costs. I only put these cases to shew that at any stage of the proceedings, if you go into the merits, you must do that which involves the question of costs and expenses, which it is the professed object of the parties to avoid.

Now, take the present case, and I think if ever there was a stage of the proceedings in which it ought not to be done, it is in the present stage of this case. The defendant has resisted the plaintiff's claim; the plaintiff, in the usual way, moves for a decree, and files certain affidavits to establish his rights. If the defendant had at once conceded his claim, it might have been different; but he has allowed the case to go on, and the defendant is now actually cross-examining the witnesses of the plaintiff. There have been affidavits filed on the merits, on both sides, so the defendant has evidence in the cause, which he has now to go into and to read; at all events, the evidence thus far is incomplete; but if this motion is to be entertained, I must allow each party to bring forward on the merits any evidence he pleases. I cannot refuse this to either party. Then, what do I gain by it? Here is a motion for a

decree pending, in which the whole evidence will be gone into, which will not be more expensive than trying the question now. But, however, I do not put it on that footing, because I think, in any stage of the cause, although there may be cases in which the stay of proceedings might be asked, still it is contrary to all principle, and also, I think, contrary to all the authorities, except perhaps some particular dicta, to allow that to be done. I will refer to that case of *Sivell v. Abraham*. It was a case in which the plaintiff had filed a bill for the purpose of compelling the vendor to give a conveyance, and he contended, that the heir-at-law of the testator ought to join. That was the whole question. Then, the bill having been filed in October 1841, the defendant prevailed on the heir to execute the conveyance—evidence was taken, and notice given to the plaintiff that the conveyance had been executed, and then the defendant wanted to have the bill dismissed, without costs. The plaintiff refused. That is something like this case. Then the plaintiff brought on the cause to a hearing, and the Master of the Rolls said, "Surely, the plaintiff ought not to have gone on incurring further expenses." Before that case there was no authority in which, on the application of the plaintiff, the Court had given costs to a plaintiff and dismissed the bill. The Master of the Rolls said, "The Court will not permit the plaintiff to go on incurring useless expense." I wish to observe upon this, that I think in that case there is an inconsistency in the judgment; the defendant gave notice to the plaintiff that the deed had been executed, and proposed that the bill should be dismissed, without costs, which the Master of the Rolls says was substantially a correct notice to give. We should not then expect him to make the defendant pay the costs, but we find he did. Now, Lord Langdale affirmed by that decision, that the plaintiff had no right to give notice to dismiss, without costs, but that he ought to have made an application to the Court respecting the costs. That could only be founded on this ground, that the plaintiff's case might be assumed to be right on the merits, and then after that he made him pay costs,

that is to say, he would not allow the plaintiff any costs subsequent to the notice given by the defendant, and made the defendant pay the costs up to that time, shewing that the plaintiff was entitled to move to dismiss, without costs. That case, therefore, I think inconsistent, and I cannot draw any conclusion from it. I cannot think that Lord Langdale would have allowed the parties to go into the merits of the case. I cannot understand that the Court should allow the merits to be gone into on such a motion.

In the case of *The Sutton Harbour Company v. Hitchens*, the Master of the Rolls thought that a motion to dismiss might be made, but not upon the merits of the case. There it was useless to go on with the suit, because of the adverse decision on the law. Upon appeal, in that case, the Lords Justices considered that the order of the Master of the Rolls was right, except that the defendant ought to have the costs of his motion to dismiss.

Now, this is a motion in which the defendant says, he has a right to stay the suit without costs being paid on either side, and for that purpose he contends he has a right to go into the merits. I cannot grant the motion, and the only question is, whether I am to refuse it with or without costs, or whether I ought to reserve the costs. Now, it appears to me, the justice of the case requires this: I think there are in the cases cited an indication of some more or less clearly expressed opinions, and particularly in that case of *Sivell v. Abraham*, there are expressions which might fairly lead the parties to come to this court with such an application as this. In that view, I think I ought to refuse the motion and not allow the defendant his costs, which he must not have under any circumstances, but direct the costs to be costs in the cause, so that if the plaintiff succeeds he will get costs, and if he fails he will not get costs, but will not have to pay the defendant his costs. I think justice requires this course from the indications which I have alluded to in the cases cited.

KINDERSLEY, V.C. }
 Feb. 21. } **BOYD v. BARKER.**

*Clergy—Gilbert's Act, 17 Geo. 3. c. 53.
 —Repairs and Additions to the Parsonage House.*

An incumbent may borrow money upon mortgage under the provisions of the act 17 Geo. 3. c. 53, for the purpose of enlarging and adding to the parsonage-house, as well as for "building, rebuilding and repairing," if such additions are considered necessary; and there is no objection to the incumbent advancing the money himself upon mortgage for such a purpose.

The bill in this case stated, that in the year 1854 the plaintiff, the Rev. Frederick Boyd, was presented by the Bishop of Rochester to the rectory and parish church of Woldham, in the county of Kent, on the resignation of the defendant the Rev. Alleyne Higgs Barker, who had previously held the living for a period of twenty years and upwards. After the plaintiff had been inducted to the living, the defendant informed the plaintiff that he had a charge upon the living for the amount laid out by him in improving and repairing the rectory-house, and that he had taken a mortgage for such amount, and the defendant claimed to be entitled to receive from the plaintiff a year's instalment of the amount charged upon the glebe, tithes, rents and other profits and emoluments arising from the said living, together with a year's interest on the amount due on such mortgage. The plaintiff objected to pay these sums. The defendant John Burmester had since made application to the plaintiff for payment of such instalment, and also of subsequent instalments and interest, alleging that he was the mortgagee and person entitled to receive the same; nevertheless he admitted that no money was in point of fact advanced by him, and that his name was inserted in the mortgage-deed as trustee only for the defendant Barker. The defendant Barker had forwarded to the plaintiff a deed purporting to be the counterpart of an indenture, dated the 12th of April 1845, and made between the said defendant A. H. Barker of the one part and J. Burmester of the other part, whereby, after reciting that the said A. H. Barker had

obtained the consent of the ordinary of the diocese and patron of the church and living to borrow 300*l.* under the act of 17 Geo. 3. c. 53, to be laid out and expended in enlarging the parsonage-house and other necessary offices belonging to the church, it was witnessed that the said A. H. Barker, in consideration of the sum of 300*l.*, paid to the Rev. Samuel Drew, a person nominated by the ordinary to receive the same pursuant to the directions of the act, had granted, bargained, sold and demised unto J. Burmester, his executors, administrators and assigns, all the glebe lands, tithes, rents, rent-charges, moduses, compositions for tithes, salaries, stipends, fees, gratuities and other emoluments and profits payable to the rector of the said living in respect thereof, to hold the same to the said J. Burmester, his executors, administrators and assigns, for thirty-five years. And the defendant A. H. Barker thereby covenanted to pay to the defendant J. Burmester, so long as he should continue rector of the parish, interest for the said sum of 300*l.*, or so much as should remain due at the end of every year, after the rate of 3*l.* 10*s.* per cent. per annum, by yearly payments, and also in each and every year during such term, one equal thirtieth part of the principal sum of 300*l.*

It appeared that the net income of the living was 260*l.*, and Mr. Barker, when appointed to it, found the parsonage house in a ruinous and uninhabitable condition, and considerable repairs were executed by him at his own expense. In the year 1845, Mr. Barker was desirous of further improving the house and of enlarging it, and he then applied to the bishop of the diocese for his sanction to enable him to borrow 300*l.* to effect such improvements. The whole expense of the repairs was to be 500*l.*, but he only wished to borrow 300*l.* The bishop appointed a commission of two clergymen to examine the premises, and to report to him as to the propriety of the outlay, in conformity with the act; and upon the report of the commission, the bishop nominated Mr. Drew to be the person to receive the money, and effect such proper contracts for the work as might be necessary. Mr. Barker, upon this, advanced the money himself which was to

be laid out, instead of borrowing it from a third person, and the before-mentioned mortgage was then executed, and Mr. Burmester was made a party to it, as if he, and not Mr. Barker, had advanced the money; Mr. Burmester being, in fact, a trustee for Mr. Barker. The amount was in consequence paid to Mr. Drew, and was expended in repairs and additions to the parsonage house.

The plaintiff insisted by his bill, that the repairs effected by Mr. Barker were not such as were warranted by the terms of the act of parliament, since the money was expended in additions to the house, and not in building, rebuilding or repairing; that these repairs were unnecessary; and also that Mr. Barker ought not to have advanced the money himself, but to have borrowed it from a disinterested party. The bill, therefore, prayed that the mortgage-deed might be set aside, and ordered to be delivered up to be cancelled; or at all events that it might, under the circumstances, be declared void as against the plaintiff and his successors, rectors of the rectory and parish church of Woldham. The bill also prayed an injunction to restrain the defendants Barker and Burmester from enforcing the claim by sequestration or otherwise against the plaintiff's living.

The portions of the act referred to were as follows. The act was entitled 'An Act to promote the residence of the parochial clergy by making provision for the more speedy and effectual building, rebuilding, repairing or purchasing houses and other necessary buildings and tenements for the use of their benefices.'

"Whereas many of the parochial clergy, for want of proper habitations, are induced to reside at a distance from their benefices, by which means the parishioners lose the advantage of their instruction and hospitality, which were great objects in the original distribution of tythes and glebes for the endowment of churches, for remedy whereof may it please your Majesty that it may be enacted, and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal and Commons, &c., that from and after the 24th day of June 1777, whenever the parson, vicar, or other

incumbent of any ecclesiastical living, parochial benefice, chapelry, or perpetual curacy, being under the jurisdiction of the bishop or other ecclesiastical ordinary, whereon there is no house of habitation, or such house is become so ruinous and decayed, or is so mean that one year's net income and produce of such living will not be sufficient to build, rebuild, or put the same, with the necessary offices belonging thereto, in sufficient repair, shall think fit to apply for the aid and assistance intended to be given by this act, it shall and may be lawful for every such parson, vicar or incumbent (after having procured from some skilful and experienced workman or surveyor a certificate containing a state of the condition of the buildings on their respective glebes, and of the value of the timber and other materials thereupon fit to be employed in such buildings or repairs, or to be sold, and also a plan and estimate of the work proposed to be done—such state and estimate to be verified upon oath taken before some Justice of the Peace, or Master in Chancery ordinary or extraordinary—and laid the same, together with a just and particular account in writing signed by him and verified upon oath, taken as aforesaid, of the annual profits of such living, before the ordinary and patron of the living, and obtained their consent to such proposed new buildings or repairs, by writing under their respective hands in the form for that purpose contained in the Schedule hereunto annexed), to borrow and take up at interest, in the manner hereafter mentioned, such sum or sums of money as the said estimate shall amount unto, after deducting the value of timber or other materials which may be thought proper to be sold, not exceeding two years net income and produce of such living, after deducting all rents, stipends, taxes and other outgoings, excepting only the salaries to the assistant curate, where such a curate is necessary; and as a security for the money so to be borrowed, to mortgage the glebe, tithes, rents and other profits and emoluments arising, or to arise, from such living, to such person or persons who shall advance the same, by one or more deed or deeds, for the term of twenty-five years, or until the money so to be borrowed, with interest for the same, and such

costs and charges as may attend the recovery thereof, shall be fully paid and satisfied according to the terms, conditions, true intent and meaning of this act; which mortgage deed or deeds shall be made in the forms or to the effect for that purpose contained in the said Schedule, and shall bind every succeeding parson, vicar or incumbent of such living, until the principal and interest, costs and charges, shall be paid off and discharged as fully and effectually as if such successor had executed the same." Section 3. "Provided always, and be it further enacted, that whenever the principal and interest directed to be paid to the mortgagee, under the several provisions of this act, shall be in arrear and unpaid for the space of forty days after the same shall become due, it shall and may be lawful for such mortgagee, his executors, administrators or assigns, to recover the same and the costs and charges attending the recovery thereof, by distress and sale, in such manner as rents may be recovered by landlords or lessors from their tenants by the laws in being." Section 4. "And be it further enacted, that the money so to be borrowed shall be paid into the hands of such person or persons as shall be nominated and appointed to receive and apply the same for the purposes aforesaid, by the ordinary patron and incumbent, by writing, under their respective hands, in the form for that purpose contained in the said Schedule, after such nominee shall have given a bond to the ordinary, with sufficient surety in double the sum so to be borrowed and raised, with condition for his duly applying and accounting for the same, according to the directions of this act; and the receipt of the person or persons so to be nominated shall be a sufficient discharge to the person or persons who shall advance and pay the money," &c.

The act then provided that the person so appointed to receive the money should enter into all proper contracts relating to the repairs.

Mr. Greene and *Mr. Morris*, for the plaintiff, contended that under the above act of parliament the defendant *Mr. Barker* had no right to borrow money for the purpose of making additions to the parsonage house. He could do no more than "build,

rebuild or repair" the house. The necessity for restricting the alterations to this extent was obvious, because it was clear that a clergyman ought not to be allowed to enlarge his house to suit his particular family, when the next incumbent might have a smaller family, and would object to the expense of a house that was too large for him. This house was quite large enough before the defendant commenced his additions, and the present incumbent did not think it at all necessary for him to have the butler's pantry or the extra rooms which had been added by *Mr. Barker*. A drawing-room might be requisite for the purpose of giving entertainments, but could not be required for a country clergyman whose living did not exceed 260*l.* a year. If money had been raised sufficient only to repair the house in the terms of the act, there would have been no objection to the expenditure. Then, the money was lent by *Mr. Barker* himself, instead of by a third person. This was taking away that protection which must have existed if the money had been lent by a disinterested party, whose business it would have been to see that the money was properly expended according to the terms of the act. They cited—

Grover v. Hugell, 3 Russ. 428.

Sanders v. Franks, 2 Madd. 147.

Greenlaw v. King, 3 Beav. 49; s. c. 9 Law J. Rep. (N.S.) Chanc. 377.

Mr. Glasse and *Mr. Pole* appeared for the defendant, but were not called upon to address the Court.

KINDERSLEY, V.C. — I do not think there is any ground for this bill, and I cannot help regretting that it should have been filed. It appears that the plaintiff succeeded to the income of this living in the year 1854, and the state of the facts is this:—The defendant, *Mr. Barker*, became the incumbent many years ago, and when he took possession of the house, he found that as it was close upon the river, and was not properly built for keeping out the water, it was very damp, and liable to be inundated. The house consisted at that time of two kitchens, two cellars, a small room for servants, and a staircase, and on the upper floor there were three bed-

rooms. Now, no doubt, in the times of Parson Adams, the rector might have been contented with such an humble residence as this, but things have very much changed since then, and Mr. Barker not being satisfied with the house in its then state, set about repairing it at his own expense. He prevented the water from coming in, and he built a new room, that is, a sitting-room. This was several years before 1845, and in that year he thought it desirable to have a second sitting-room built and a butler's pantry, and bed-rooms above. Still there was no more than a ground-floor and first-floor. The building of these extra rooms was to cost something under 500*l.*, but it was only 300*l.* of this amount that he wished to charge upon the living. Probably his whole outlay upon the house, from the first, was not less than 1,000*l.* When the plaintiff became incumbent, there was then 230*l.* left unpaid of this sum of 300*l.*, the rest having been cleared off by payment of instalments from the time of the mortgage, and Mr. Boyd then files this bill impeaching the transaction. I cannot but regret that Mr. Boyd should even wish to succeed in such a case as this, but still I must not prevent his right, if it exists, to set aside the transaction. The grounds upon which he relies are these:—First, he says, what has been done was not sanctioned by the act of parliament, because in this case, there was a question of adding to a building, and not simply building, rebuilding or repairing:—that certain additional rooms had been added, and the act did not authorize an addition. That, as I conceive, is the only important point for consideration. If the plaintiff's contention is just, the result would be that at least nineteen out of every twenty charges that have been effected under Gilbert's Act would be liable to be set aside; and if the arguments were worth anything, they would go to this, that even if you are rebuilding a house you have no right to make it even a yard larger than it was before—you must not enlarge, though you may rebuild. Now, the words of the act are these.—[His Honour read the passages already referred to.]—It is contended that these words give no power to add, under any circumstances, anything whatever to the existing building. I cannot help say-

ing, that if I were obliged to put this construction upon the words, I should be so narrowing the meaning of the act as to defeat the intention of the legislature; because, if you look at the preamble, you will find that the act was passed with a view to induce the parochial clergy to reside upon their benefices, by providing proper habitations. Here, then, is the very point: the object is to hold out an inducement to clergymen as much as possible to reside in their parishes, in order that the parishioners may have the benefit of their instruction and hospitality. It is true that other acts of parliament have been since passed, requiring clergymen to reside in their parishes, but at that time they had great facilities for escaping a continuous residence; and the object of the legislature was to enable them to have such an amount of comfort in their houses as would induce them to reside. Now, we have, probably, all of us, seen specimens of remarkable parsonage-houses in olden times, no better than hovels; and the argument of the plaintiff must go to this, that you cannot hold out the inducement to the clergy to reside, as set out in the act, by adding to the house. So, if I am driven to decide in that way, I should be deciding in the narrowest manner, and the act would be nearly valueless. There are three cases supposed: one is where there is no habitation for the clergyman, and in that case it is admitted you may build to any extent the bishop thinks right. In that case a man may get a comfortable and convenient building erected for himself, and charge the expense of it upon the living under this act; but if you have got a house utterly unfit for a decent person to reside in, you may repair it, or you may pull it down and rebuild it, but you must on no account make it larger than it was originally. I cannot help saying that I should listen to such an argument with great reluctance. The second case is this: where there is a house, but such house is become so ruinous and decayed that one year's income will not be sufficient to repair it, still, bad as the house may be, you must not go beyond the original limits of the building. The next point is—where the existing building is so mean that one year's net income will not be enough to

repair it. What does that word "mean" signify? It is argued that that expression has nothing to do with the size of the house, but the material of which it is built; so that if it happens to be built of bad materials, it may be rebuilt with brick and mortar, but still it must not be enlarged. It appears to me that cannot be the meaning of the act. The act says, the object was to make such improvements in the houses as to induce the clergy to reside in the parishes, and then it provides for the case of a house being *mean*. Now, surely, if the house is so mean as not to be a fit habitation for a clergyman, it cannot be intended only to rebuild it by altering the materials of which it is built. I think the act does justify the bishop and patron and the parties concerned here in doing as they have done. If they thought it was not a house which was reasonably comfortable for the house of a clergyman, they were justified in sanctioning the improvement of the existing building by authorizing an enlargement of it. That being the construction I put upon the act, it is asked what proceedings are to be taken. The act points out the steps to be gone through, and it appears there was some slight irregularity with respect to them, but not any of importance. A gentleman was first employed to make a certificate of the condition of the building, and there is no concealment or suggestion that, under the plea of repairing, they were enlarging; but it is openly stated to be for enlarging the house. Then this certificate is laid before the bishop. In the first place, he sends down a commission of two clergymen to consider what is the condition of the building, and whether there is any dilapidation, and whether there was any sum paid by the last incumbent. The report is favourable, and the bishop thereupon gives his consent. Then, I have to consider whether, supposing the proceedings to have been regular, what was done was unreasonable or unnecessary; whether, therefore, there was a violation of the act. We have here a parsonage-house where the income of the living is 260*l.* per annum. Now that is not by any means a small living, but then it is an object for the parishioners to have a resident clergyman, and

for that purpose it is necessary there should be a comfortable residence, and this is quite as necessary where the living is small as where it is a rich living. Clergymen are brought up as gentlemen, and ought to have a decent and comfortable house to live in in their parishes. As to what is reasonable, I will take the common and ordinary average case of a clergyman with an ordinary family, and having to keep himself in the position of a gentleman; say that he requires accommodation for himself, his wife and children. Surely no one can say that one sitting-room is necessarily quite sufficient for the house. He has to attend to parochial duties, and to read and write his sermons, and also to exercise a certain amount of hospitality; then there are the requirements of his wife and children, and all to go on in one sitting-room. I must say, I do not think it was unreasonable that Mr. Barker should desire to have a second sitting-room; and my opinion is, that it was quite expedient that this additional accommodation should be made. It may be said that he did not want a drawing-room for the purpose of entertaining society; but it comes to this: that any one having two sitting-rooms calls one a drawing-room and the other a dining-room. Under these circumstances, I can see no ground whatever for holding this deed to be void, either on the construction of the act of parliament, or on the ground of its being an unreasonable addition.

Other minor matters are contended for, and the plaintiff tries to make out every technical point he can to set aside this deed. He says, that under the terms of the act the lender and borrower of the money should be different persons. Now, in most cases it would not be likely that a clergyman would be able to advance the money himself, but if he has got the money why should he not lend it? It is argued that one important check is taken away. My opinion is, that such is not the case. I cannot see that the proposed mortgagee can have any check; he cannot check the matter in the least degree. The bishop and ordinary are the real check. Then where is the harm of his lending the money himself? It is said that the power is not well executed unless the formality is strictly observed, and that it was not so

observed here, because the lender and borrower are not different persons. Here the money is borrowed at only 3*l.* 10*s.* per cent. In the case referred to of *Sanders v. Franks*, it appeared that the incumbent was the purchaser of the land, but that case does not arise here. What benefit to himself can Mr. Barker obtain by lending this money? I admit that he has an advantage by getting a better house to live in, but there can be no other advantage for lending the money. He might have got as much as 5*l.* per cent. upon mortgage, or 3*l.* 10*s.* per cent. in the funds; now, here he gets only 3*l.* 10*s.* per cent., and the money is tied up for thirty-five years. And in the case of *Greenlaw v. King*, it was the bishop standing in an adverse character; but even then he did not lose the money, but it was paid back, with interest, and there was the extra sum for an annuity of which he was deprived. Here, it is proposed, that this gentleman should not only lose the advantage of what was done with the money, but should also pay back the money. Under all these circumstances, I am of opinion that there is no ground for saying, that the defendant has gone beyond the scheme of the act, and that everything has been done with fairness. I must, therefore, dismiss the bill, with costs.

FULL COURT
OF
APPEAL.
Jan. 22.

MADDISON v. CHAPMAN.

Will—Construction—Minority—Limitation over.

A testator directed that, when the youngest of his two daughters had attained twenty-one, his real and personal estate and effects should be divided into three equal parts: one part to be for his wife, and one of the remaining two for each daughter; at his wife's decease her share to be equally divided between his two daughters; and, provided either of his two daughters should die before a division of the property should have been made, and having no surviving issue, then the part of the deceased to be given to her surviving sister. By a codicil, the testator provided that "should both his children die in their minority, and leave no issue, then

in such case, and in such case only property should go to his widow for life then over. One daughter attained one, and died without having been married, and afterwards the other daughter under age and without having been married—Held, (affirming the decision of the Vice Chancellors) that the gift codicil to the widow for life, and the will had failed.

This was an appeal by the defendant, Eve Chapman and James Cooke, from the decision of Wood, V.C. upon the construction of the will and codicil of John Chapman. The testator by his will, dated in 1850, devised as follows:—my funeral and testamentary expenses are paid by my executrix hereinafter named, my will is that all my houses, tenements and real and personal property, situate at Binbrooke and elsewhere, and of what nature or kind (except household furniture and effects) shall, at the time my youngest child attained the age of twenty-one years, be valued and divided into three equal parts, which division shall be made without selling the land; one part to be for my dear wife, Eve Chapman, one for my daughter Mary Ann, and one for my daughter Maria; and provided my daughter Mary Ann wishes to leave her property when she has attained the age of twenty-one years, she shall have the same given to her, without paying interest on the same, but which shall be accounted for as part of her share at the time the general division is made. Any money paid in as principal, either from the proceeds of the sale of the land, or from notes or from any other source, shall be put out to interest at the discretion of the trustees hereinafter named, so that the property may not be diminished; and my wife's decease her share of the property shall be equally divided between my two children above named, share and share alike. And provided either of my two children above named shall die before a division of the property shall have been made as above directed, and having no surviving issue, then the part of the deceased shall be given to her surviving sister; but if either of them shall die and leave surviving issue, the

part of her so dying shall be equally divided amongst her surviving children in equal shares and proportions. All interest of money, rents of lands, houses or tenements, shall be applied to the support of my wife and to the support of my children, and their education during their minority or the minority of either of them: and likewise that each of my daughters shall have 10*l.* a year for their own pocket-money during their minority, or until such division of the property is made as above described."

The testator then bequeathed an annuity to his sister, and appointed the defendants Benn and Cooke trustees of his property.

By a codicil, without date, the testator directed as follows:—"Should both my children die in their minority and leave no issue, then in such case, and in such case only, I give to my wife, Eve Chapman, the whole of my property for the term of her natural life, or so long only as she shall remain my widow; and at my wife's decease, or marriage, which shall first happen, I then give to James Cooke all my lands and houses situate at Binbrooke, but to be chargeable with the payment of the annuity to my sister, as above stated, and the remainder of my property shall be at my wife's disposal."

The testator died in 1850, leaving two children only, Mary Ann (who attained twenty-one, and died in 1854, without having been married) and Maria (who died in 1857, under age, and without having been married). It was suggested, but not proved, that the elder daughter left a will.

The suit was instituted by the testator's heiress-at-law, who claimed to be entitled, in the events which had happened, to an equitable estate in fee simple in possession in two-thirds of the testator's real estate, and to an equitable estate in fee simple in remainder expectant on the death of Eve Chapman, in the remaining third part of the said real estate.

The defendant Eve Chapman claimed to have the real estate for her life, and, subject thereto, the defendant Cooke claimed to be entitled under the gift over contained in the codicil.

The Vice Chancellor, however, held that the gift over, under the codicil, had failed—4 *Kay & J.* 709.

The Solicitor General and Mr. W. D. Lewis, for Mrs. Chapman; and

Mr. W. M. James and Mr. Little, for Mr. Cooke.—The question for decision was, whether the words "die in minority" used in the codicil were to be interpreted as applicable to each child, as the Court below had held, or whether, according to the appellants' contention, it was during the minority before mentioned, that is, during the minority of either of the children. The expression in the codicil must be considered as referring to a class, and must apply to the time of the youngest being in minority. Each child would, for the purposes of the will, be considered a minor while either of them continued to be a minor. The rule in such cases as the present, was to lean to that construction which would include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument.—

Bouverie v. Bouverie, 2 Phil. 349; s. c. 16 Law J. Rep. (N.S.) Chanc. 411.

Anonymous, 2 Vent. 363.

Pearsall v. Simpson, 15 Ves. 29.

Key v. Key, 4 De Gex, M. & G. 73; s. c. 22 Law J. Rep. (N.S.) Chanc. 641.

Hart v. Tulk, 2 Ibid. 300; s. c. 22 Law J. Rep. (N.S.) Chanc. 649.

Grey v. Pearson, 6 H.L. Cas. 78; s. c. 26 Law J. Rep. (N.S.) Chanc. 473.

Weddell v. Mundy, 6 Ves. 341.

Milroy v. Milroy, 14 Sim. 48; s. c. 13 Law J. Rep. (N.S.) Chanc. 266.

Mr. Rolt and Mr. Faber, for the respondent, were not called upon.

The LORD CHANCELLOR said that the sole question upon the appeal was, whether the gift over, in the event of both the children of the testator dying in their minority and leaving no issue, had failed; and although his inclination was to construe it in favour of the widow, the words used by the testator were much too strong, and the conjectural interpretation much too weak to enable him to do so. The will itself was clear as to the objects to be benefited, but the events which had happened were not provided for. The division was to take place upon the

youngest of the children attaining twenty-one, and the testator had contemplated one dying before that time and leaving no issue, but not the possibility of both so dying. It was clear that the word "minority" was used by the testator in his will in its ordinary sense; and then by the codicil he provided for events not contemplated in the will, and made the gift over. Taking the words in the codicil in their ordinary sense, the ulterior gift could not arise unless both the children died in their minority leaving no issue. It was argued that the word "minority" was in the codicil applied to a class, and meant the minority of each of the class; and it was competent to the testator to have used the word in that sense, but he had not shewn that such was his intention. It could not be conjectured what the testator would have done if the state of things which had since happened had been present to his mind, and the words which he had used must be taken to have been used in their ordinary sense. As illustrating his Lordship's view on such points of construction, he referred to the language of Wilde, C.J. in the case of *Boote v. Scarisbrick* (1), where he said, "The language of the clause is not ambiguous, but is such as is in ordinary use and bears a well-known meaning. But it is contended that, upon reference to the other parts of the will, an intention may be inferred on the part of the testator which will not be fully carried into effect by reading the clause in question in the ordinary sense attached to the language. Such imputed intentions are in most respects speculative and uncertain, and where any are to be found which the construction of the clause in question, according to its ordinary meaning, will not carry into effect, or may defeat, it is more probable that such failure will arise from the testator not having contemplated or provided for the very many events which may be supposed as possible to arise in the family, than that he used such expressions in any other than the ordinary meaning. The clause being plain and simple in its language, we do not think the rules of construction now considered as settled, will warrant the clause receiving a construction other than accord-

ing to its ordinary meaning, without its appearing satisfactorily from other parts of the will that the language was used by the testator in some other sense." The appeal, in the present case, must be dismissed; the costs to be costs in the cause.

LORD JUSTICE KNIGHT BRUCE said, that adhering, as he did, to the decisions in *Hart v. Tulk* and *Key v. Key*, he found himself unable to dissent from the Lord Chancellor in dismissing this appeal.

LORD JUSTICE TURNER concurred.

WOOD, V.C. }
March 8, 9. } SCHOLEFIELD v. TEMPLER.

Principal and Surety—Fraud—Innocent Misrepresentation—Release.

An innocent party to a fraud committed by another will not be allowed to derive any benefit from that fraud, unless there has been a consideration moving from himself. Therefore, where a surety innocently joined with his principal in persuading the creditor to accept a transfer of a pretended mortgage, which turned out to have no existence, and to release the surety from his liability—Held, that such a release was inoperative.

The friends of a surety advanced money to satisfy his private debts, stipulating, however, as a condition of such advance, that he should be released from his liability as surety. The surety having been released under the circumstances above mentioned,—Held, that the creditor was not entitled to set aside the release without repaying to the friends the money advanced by them.

Observations on Ex parte Wilson (1).

The bill stated, that in 1850 the plaintiff discounted for William Bell, one of the defendants, who had since absconded, two joint and several promissory notes for 150*l.* each, signed by Bell, and also by the defendant Templer, and later in the same year he agreed to advance to Bell a further sum, if the defendants would give two joint and several promissory notes for 500*l.* to secure the two sums of 150*l.* and the further sum required, and upon condi-

(1) 1 H.L. Cas. 167, 188.

(1) 11 Ves. 410.

tion that the plaintiff should be at liberty to retain and negotiate the two bills for 150*l.*, and hold the amount when received in part satisfaction of the amount to be secured on the 500*l.* notes. The plaintiff accordingly advanced the sum required, and received from Bell two joint and several promissory notes for 500*l.* each, signed by both defendants.

In February 1851 the plaintiff advanced to Bell a further sum upon a bill of exchange for 600*l.*, drawn by Bell and accepted by Templer. This bill was presented at maturity and dishonoured.

The plaintiff was afterwards applied to to make a further advance of 500*l.* on the security of a bill or note signed by both defendants, but declined to do so.

It was then proposed that the plaintiff should take a transfer of a mortgage for 5,000*l.*, to which Bell represented that he was entitled, upon the estate of Mr. Mirehouse in Wales, stating that the money had been lent by his father, who held the mortgage and title-deeds on his behalf, and Templer strongly urged the plaintiff to do so, alleging all would be right, and that he would have a better security for his money than he then possessed.

To this arrangement the plaintiff agreed, on condition that the original mortgage and the title-deeds were to be given up to him when Bell got them out of his father's possession. Accordingly a deed of transfer was prepared, which, after reciting the alleged mortgage from Mirehouse, purported to transfer the same to the plaintiff.

The deed of transfer was dated the 13th of June 1851, and was executed by Bell and attested by Templer. Bell then requested that the promissory notes and bill of exchange might be delivered up, but the plaintiff declined to give them up until he received the title-deeds of the mortgaged premises.

In the autumn of 1851 Templer compromised with some of his creditors, the arrangement for payment of the composition extending over several years, and his relations rendering some assistance. Previously to doing so he called on the plaintiff, and told him his friends would not assist him in arranging with his own private creditors, unless he was released from his liability on the promissory notes

and bill, and he also intimated that, unless he was so released, bankruptcy or insolvency would be the consequence. He also alleged, that the plaintiff would be quite safe in so releasing him, as the mortgage was a sufficient security. The plaintiff, therefore, relying on the transfer of the mortgage, and in the belief that it was a valid mortgage security, was induced to give the defendant Templer a letter as follows:—

“Leeds, 24th July 1851.

“My dear Sir,—Mr. Bell having arranged with me for repayment of the 1,600*l.* which I advanced to him, with lawful interest thereon, I beg to state, for the satisfaction of your friends and relatives, as well as yourself, that I do not hold you in any way responsible to me for the above sum.”

Shortly after this Templer called on the plaintiff, and stated that his friends were not satisfied with the letter, inasmuch as the plaintiff might indorse the notes and bill to some other person, and the plaintiff was induced, by the defendant still assuring him that the transfer was a perfectly good security, to add a postscript to the letter, as follows:—“P.S. Of course, I have struck your name out of the securities.” And he did thereupon strike Templer's name out of the two 500*l.* notes and the acceptance of the bill of exchange.

The bill further stated that the plaintiff afterwards made many applications to Bell and Templer for the mortgage and title-deeds, but could not obtain them, and upon applying to Bell's father for the deeds, he discovered that no such mortgage existed; that all the representations made by Bell as to the pretended mortgage were untrue; that the pretended transfer was prepared when Bell well knew that he had no interest in the pretended mortgage; and that Templer had no reason to believe that Bell was entitled to the said pretended mortgage, or that it existed, or that the said pretended transfer which he had assisted in preparing was not utterly worthless.

In December 1852 the plaintiff wrote to Templer, reminding him that he was induced to take the pretended security without the title-deeds, entirely on the representations made by Bell and himself, and

youngest of the children attaining twenty-one, and the testator had contemplated one dying before that time and leaving no issue, but not the possibility of both so dying. It was clear that the word "minority" was used by the testator in his will in its ordinary sense; and then by the codicil he provided for events not contemplated in the will, and made the gift over. Taking the words in the codicil in their ordinary sense, the ulterior gift could not arise unless both the children died in their minority leaving no issue. It was argued that the word "minority" was in the codicil applied to a class, and meant the minority of each of the class; and it was competent to the testator to have used the word in that sense, but he had not shewn that such was his intention. It could not be conjectured what the testator would have done if the state of things which had since happened had been present to his mind, and the words which he had used must be taken to have been used in their ordinary sense. As illustrating his Lordship's view on such points of construction, he referred to the language of Wilde, C.J. in the case of *Booth v. Scarisbrick* (1), where he said, "The language of the clause is not ambiguous, but is such as is in ordinary use and bears a well-known meaning. But it is contended that, upon reference to the other parts of the will, an intention may be inferred on the part of the testator which will not be fully carried into effect by reading the clause in question in the ordinary sense attached to the language. Such imputed intentions are in most respects speculative and uncertain, and where any are to be found which the construction of the clause in question, according to its ordinary meaning, will not carry into effect, or may defeat, it is more probable that such failure will arise from the testator not having contemplated or provided for the very many events which may be supposed as possible to arise in the family, than that he used such expressions in any other than the ordinary meaning. The clause being plain and simple in its language, we do not think the rules of construction now considered as settled, will warrant the clause receiving a construction other than accord-

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LORD JUSTICE KNIGHT BRUCE said, that adhering, as he did, to the decisions in *Hart v. Tulk* and *Key v. Key*, he found himself unable to dissent from the Lord Chancellor in dismissing this appeal.

LORD JUSTICE TURNER concurred.

WOOD, V.C. }
March 8, 9. } SCHOLEFIELD v. TEMPLER.

Principal and Surety—Fraud—Innocent Misrepresentation—Release.

An innocent party to a fraud committed by another will not be allowed to derive any benefit from that fraud, unless there has been a consideration moving from himself. Therefore, where a surety innocently joined with his principal in persuading the creditor to accept a transfer of a pretended mortgage, which turned out to have no existence, and to release the surety from his liability—Held, that such a release was inoperative.

The friends of a surety advanced money to satisfy his private debts, stipulating, however, as a condition of such advance, that he should be released from his liability as surety. The surety having been released under the circumstances above mentioned,—Held, that the creditor was not entitled to set aside the release without repaying to the friends the money advanced by them.

Observations on Ex parte Wilson (1).

The bill stated, that in 1850 the plaintiff discounted for William Bell, one of the defendants, who had since absconded, two joint and several promissory notes for 150*l.* each, signed by Bell, and also by the defendant Templer, and later in the same year he agreed to advance to Bell a further sum, if the defendants would give two joint and several promissory notes for 500*l.* to secure the two sums of 150*l.* and the further sum required, and upon condi-

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In February 1851 the plaintiff advanced to Bell a further sum upon a bill of exchange for 600*l.*, drawn by Bell and accepted by Templer. This bill was presented at maturity and dishonoured.

The plaintiff was afterwards applied to to make a further advance of 500*l.* on the security of a bill or note signed by both defendants, but declined to do so.

It was then proposed that the plaintiff should take a transfer of a mortgage for 5,000*l.*, to which Bell represented that he was entitled, upon the estate of Mr. Mirehouse in Wales, stating that the money had been lent by his father, who held the mortgage and title-deeds on his behalf, and Templer strongly urged the plaintiff to do so, alleging all would be right, and that he would have a better security for his money than he then possessed.

To this arrangement the plaintiff agreed, on condition that the original mortgage and the title-deeds were to be given up to him when Bell got them out of his father's possession. Accordingly a deed of transfer was prepared, which, after reciting the alleged mortgage from Mirehouse, purported to transfer the same to the plaintiff.

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In the autumn of 1851 Templer compromised with some of his creditors, the arrangement for payment of the composition extending over several years, and his relations rendering some assistance. Previously to doing so he called on the plaintiff, and told him his friends would not assist him in arranging with his own private creditors, unless he was released from his liability on the promissory notes

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The bill further stated that the plaintiff afterwards made many applications to Bell and Templer for the mortgage and title-deeds, but could not obtain them, and upon applying to Bell's father for the deeds, he discovered that no such mortgage existed; that all the representations made by Bell as to the pretended mortgage were untrue; that the pretended transfer was prepared when Bell well knew that he had no interest in the pretended mortgage; and that Templer had no reason to believe that Bell was entitled to the said pretended mortgage, or that it existed, or that the said pretended transfer which he had assisted in preparing was not utterly worthless.

In December 1852 the plaintiff wrote to Templer, reminding him that he was induced to take the pretended security without the title-deeds, entirely on the representations made by Bell and himself, and

stating that he could not under the circumstances expect to be wholly released from the 1,600*l.* and interest.

In November 1856, the plaintiff having ascertained that he had omitted to strike Templer's name out of the 150*l.* bills, and considering that neither of the defendants was released in equity or at law from his liability, indorsed one of the 150*l.* notes for value, and the indorsee had commenced an action against Templer for the amount.

The bill then charged that, notwithstanding the said transfer, letter, and the erasure of the name of the defendant Templer, the defendants were still jointly and severally liable in equity to pay the amount of the two promissory notes and bill, amounting to 1,600*l.*, with interest, after deducting what might be paid on the 150*l.* note so indorsed, and on the plaintiff delivering up the other 150*l.* note. The bill then proceeded to deny an allegation by Templer, that the plaintiff was induced to accept the transfer, and to write the letter of the 24th of July, in consequence of Templer, in the spring of 1841, owing many private debts, and amongst others about 100*l.* to the plaintiff, and the friends of the defendant having resolved not to assist him to pay his private debts, unless he was released from the debts contracted by him as surety for Bell; but stated that the 100*l.* was paid by instalments under threat of legal proceedings.

The prayer of the bill was:—1. That it might be declared that the plaintiff was induced to accept the said pretended transfer of the 13th of June 1851 by the fraudulent representation of Bell, and that such pretended transfer was void and ought to be cancelled. 2. That it might be declared that the plaintiff was induced to write the letter of the 24th of July 1851, and to erase Templer's name from the notes and bill, in consequence of the execution of the said pretended transfer, and in the belief that such transfer was a valid security, but that, inasmuch as such pretended transfer was void, and notwithstanding such letter and erasure, the defendants were jointly and severally liable to pay the plaintiff the amount of the notes and bill, making together 1,600*l.*, with interest at 5*l.* per cent. from the time when the same became, or but for

such erasure would have become, due, after deducting what should be paid in respect of the 150*l.* note so indorsed as aforesaid, and for consequential relief.

Mr. W. M. James and Mr. E. F. Smith, for the plaintiff, cited—

Rawlins v. Wickham, ante, p. 188.

Edwards v. M'Leay, 2 Swanst. 287.

Lovell v. Hicks, 2 You. & C. 46, 472; s.c. 6 Law J. Rep. (n.s.) Ex. Eq. 85.

Onions v. Tyrer, 1 P. Wms. 343.

Ramsbottom v. Gosden, 1 Ves. & B. 165, 168.

Brooksbank v. Smith, 2 You. & C. 58; s.c. 6 Law J. Rep. (n.s.) Ex. Eq. 34.

Eastabrook v. Scott, 3 Ves. 456.

Bridgman v. Green, 2 Ves. 627; s.c. Wilm. 58.

Mr. Rolt, Mr. G. M. Giffard and Mr. Templer, for the defendant Templer, urged that he had acted *bonâ fide* in the matter, being deceived by the misrepresentations of Bell. There was, therefore, no equity against him, as he was innocent of fraud. The plaintiff also had been guilty of laches.—

Ex parte Wilson, 11 Ves. 410.

Huguenin v. Baseley, 14 Ibid. 273.

Cecil v. Plaistow, Anst. 202.

Davis v. Stainbank, 6 De Gex, M. & G. 679.

WOOD, V.C.—I think this case is brought within the large and general principle, that no one can profit himself by a fraud; that when a fraud is committed, as in that case of *Huguenin v. Baseley* and other cases, neither can the person who commits that fraud himself benefit by it, nor can anybody derive any advantage from that fraud so committed without consideration moving from himself; though, if the consideration moves from himself, and he is ignorant of the fraud, then he stands in the ordinary position of a purchaser without notice. The case stands thus:—You have Mr. Bell liable to Mr. Scholefield. Mr. Templer is surety. Then you have a negotiation passing between Mr. Bell and Mr. Scholefield; Mr. Templer concurring with Mr. Bell in suggesting to Mr. Scholefield a better security for his money. That must have been done, and I take it to hav

been done for Mr. Templer's benefit, because the surety is the person to be principally benefited in the matter, at all events, as much as the creditor himself; and it was intended by Mr. Templer that it should be for his benefit, he, of course, conceiving, as appears from the facts now before me, that it was a perfectly honest transaction, and he was quite justified in having it so negotiated as much for his benefit as for the benefit of Mr. Scholefield. It is true, in the deed itself, there is no release of Mr. Templer, although it is suggested that the deed merged the debt. I think the right answer to that is, that Mr. Templer being a concurring party in this, there was no immediate release; but no doubt it was better for Mr. Templer's position that it should be put in this way. Now, Mr. Rolt supposed Mr. Templer contemplated the very thing that afterwards occurred, that is, that he was to get the release in consequence of this transfer of the mortgage being made. Then the case would exactly be brought within the case which was before the Lords Justices, of *Davis v. Stainbank*.

In this case Mr. Templer does, unquestionably with perfect innocence, join in all the representations that were made about the property; and those representations turned out to be wholly untrue. If that had been all, the case would have been too clear for argument. Then, is the case materially different, Mr. Templer afterwards availing himself of this without any other consideration? He comes in as a volunteer in this respect, because part of the argument addressed to me was this: suppose Mr. Scholefield had written a letter, and said, out of good nature, "Being perfectly satisfied with the security I now hold, I release you." Of course a man may make a gift of his own property in any way that he pleases; that probably would be the correct answer to make to such a state of things as that. But what occurs is this: Mr. Templer, desirous of being discharged, avails himself of this fraud, not knowing it to be a fraud, but which is a gross fraud, and without which fraud he cannot get any benefit whatever. He goes to the plaintiff, and says—and this is admitted in the cross-examination—"Now, having this deed, will you not

release me?" He distinctly avails himself of the deed, and comes in as a volunteer, and procures, in consequence of that deed, this particular benefit to himself. That the release was given in respect of the deed I cannot doubt, because the note he procured is this:—"My dear Sir, Mr. Bell having arranged with me for repayment of the 1,600*l.* which I advanced to him, with lawful interest thereon, I beg to state, for the satisfaction of your friends and relatives as well as yourself, that I do not hold you in any way responsible to me for the above sum." That might have been said to be voluntary, if it had not been for the cross-examination. The cross-examination shews that it was on Mr. Templer's solicitation. Mr. Templer, therefore, solicited to have from Mr. Scholefield the benefit of this deed, which had been thus improperly executed by Mr. Bell; and if I gave to Mr. Templer the benefit of the result of these solicitations, I should be giving him directly the benefit of a fraud which has been committed by Mr. Bell. In truth, the real suggestion in all these cases is, where there is an innocent party concerned, it is no fraud in him so long as he does not insist upon a benefit from it; but if he insists upon deriving a benefit from it, he becomes a party to it. I am not using the term offensively, but Mr. Giffard was quite right to argue the legal question; it took that shape, and in equity that must be regarded as the case. You are no party to the fraud, it is true, unless you have obtained a consideration in respect of it. If you avail yourself of that fraud in order to obtain for yourself any benefit, then you become *particeps criminis*, and you ask the Court to give you the benefit of the fraud which has been so committed. Now, if any other consideration moved from him, the case would have been extremely different. The consideration for this release is fairly and simply that which is here stated in Mr. Scholefield's letter; that is to say, the moving cause, which is the more common expression, for this release was the representation to him that "you have a good security in your hand; therefore excuse me, and pass over my suretyship." Then, Mr. Rolt reasoned it in this way; he said, "By doing this you altered my position."

That a man should be allowed to say, you altered my position ; in other words, you put me in a position in which I could not sue the principal, at my request, and at my solicitation, and on my representation of that which turns out to be entirely erroneous, and therefore I am to be excused as surety,—it seems to me, is pressing the right of a surety to an extent which I never heard of or expected to have had urged before me. Now, upon this part of the case, independently of the fraud, in the absence of consideration, if you bring it down to the simple ground of mistake, I have yet to learn that the surety is to be free from the charge of making a false representation, and then to turn round and say, “At my solicitation, at my request, and upon my representation that you had got something which rendered it perfectly safe, you have—not released the principal, nothing of the kind—but you have made me believe that I may rest content, and not file a bill to have the debt paid. You made me believe that, because I made you believe something else.” It is a clear case of common mistake, as it appears to me. It seems to me it is impossible that the person who is the moving cause of the mistake, the person who originates the blunder and suggests everything that occasioned the mistake, can turn round and say, “you have altered my position by adopting my representation”; that would be pushing the rights to an extent that I cannot conceive any Court will possibly give any effect to; even taking it on the simple ground of mistake, there would be no such right as is supposed on the part of the surety. I cannot see that Lord Eldon's observations in *Ex parte Wilson* exactly fit the facts. There is no doubt of the accuracy of his Lordship's judgment, but there is something or other which occurred there with regard to the position of the parties which does not occur here. The words of the judgment do not exactly fit the facts. A principal became bankrupt at Hamburg, and the sureties said, “we want our debt diminished as much as possible; go and prove at Hamburg first, and then come in.” The creditor agrees, and he sends instructions to some agent to act accordingly. What those instructions were does not distinctly appear,

because the case is stated very shortly ; but what the agent does is something different from proving against the bankrupt's estate at Hamburg ; he releases the party who is not a bankrupt. All that appears is, that he was an insolvent. All his after-acquired property was subject and liable to be seized, and he does that which irretrievably prejudices the surety, and which the surety never asked him to do. The surety says, Go and prove against the bankrupt's estate ; and if a man is a bankrupt there is nothing more to be got. Frequently bankrupts have the means of paying, but you cannot prove against future assets ; there is an end of it. You go and get all you can out of the bankrupt's estate, but when you sign a composition deed it is different ; you release the man entirely, who may otherwise have ample means of payment, which the surety never intended should be the case. Lord Eldon says, “In the case of a common mistake the party who does the act under mistake must suffer.” But what he must have done, as far as the facts go, is this ; he did an act which a mistake would not authorize. The mistake was in saying there was a bankruptcy, and when that was found out to be a mistake, the course would be to come back and say, “I find I can do nothing in it ; there is a blunder, and nothing more can be done in the matter.” The case might have been different if there was a representation that there was the same law of bankruptcy in Hamburg as in England, and it had turned out that there was a material difference in the law. I do not see how the facts fit the reasons for the judgment. There is something which the surety never agreed to. The difference between the two cases is this :—the surety, in truth, throughout the whole matter is the moving party. There is no reason whatever suggested why Mr. Scholefield should dream of releasing this gentleman, except the fact of having that deed, which this gentleman suggested to him as the ground for conferring upon him this indulgence. He has obtained that indulgence on representing to him the effect and the result of the deed, and it is a case of simple mistake. Mr. Scholefield would have a right to be replaced where he was. No injury is

done to this gentleman by believing all this time that he was released, he having believed the person who made the representation which led to the result.

Then comes the question as to the friends' right to be reimbursed to the extent of their 1,000*l.*; my notion is, that Mr. Scholefield should satisfy these persons and stand in their place, and that he should only get his relief upon those terms.

Mr. James suggested, that the Court could not regularly make such an order in this suit. The friends had had notice of the suit, and had not come in to seek any remedy themselves, and it was not for the debtor to set up the *jus tertii*.

Wood, V.C.—I have proceeded to dispose of the case so far, as it appeared to me, that Mr. Templer could not in any way insist upon that transaction that had taken place as a release of his liability. Whether it be taken upon the higher ground of fraud, in which case it appears to me it would be fraudulent to give him the benefit of this transaction; or upon the simple ground of mistake; in either case the Court would replace things between him and the plaintiff in the same position in which they were before the arrangement had been made. In other words, the plaintiff would have a right to proceed against him as a surety. Then, with regard to what I was about to say with respect to the friends, it appears to me to be plain that the plaintiff could not, as against them, insist upon any remedy against Mr. Templer, without taking care to place them also back in the same position in which they were at the time the representation was made. Now Mr. Giffard said, that I could not put the friends in the position in which they were before they consented to advance the 1,000*l.* upon the ground of that clearing this gentleman of his debt. We know it is a common transaction in families, and a very natural and reasonable one. They say, "If we believe him to be wholly free and clear of debt, we will find the money to relieve him; but we will not waste our money by bestowing it on a certain set of creditors, to find out afterwards that all we wished to secure is not to be secured by this outlay of money." Then the question arises,

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whether in truth in a transaction of this kind the parties could not be completely replaced; because, if they could not, the thing ought not to have been done. There might have been possibly some more difficulty if it had been the case of actual gift. Possibly there is not very much in that; but the case does not even come to that; it is not a gift by the friends, it is a loan. If you replace to the friends every farthing they have advanced, there does not seem to me any possible ground on their account for saying that the transaction is not to be set aside. But then, Mr. James says, the debtor could have no interest in that, and the friends have taken no steps to bring themselves in our position; but I cannot take it for granted that they have had notice of this suit. There must be a declaration according to the first and second paragraphs of the prayer. Then a declaration that the plaintiff ought to be restored to all his rights as against the defendant Templer, the surety for Bell, in the same manner as if the letter of the 24th of July 1851 had not been written, and as if the name of Templer had not been erased from the notes, but subject to his making good, as between him and the persons advancing the sum of 1,000*l.* in the bill mentioned, for the purpose of relieving the defendant Templer from all his liabilities the amount of such advances, if any, now remaining unpaid by Templer, and with the right of standing in the place of any person so repaid as against the defendant. Then, as to the costs, the plaintiff would clearly have to pay them up to the coming in of the answer. On amending the bill there still remains the allegation, that Templer had no reason to believe that such security was a valid mortgage security; whereas the said pretended transfer, which had been prepared, and given in manner hereinbefore mentioned, was utterly worthless. I agree with Mr. James, that a man cannot be said to have reason to believe that upon which he is uninformed, and ought not to concur in making any representation about; yet, on the other hand, it bears very much the aspect of still adhering to a certain charge. At least, this gentleman had as much reason to believe it as the plaintiff had; they both trusted Bell, therefore there is a por-

tion of the case left with a certain degree of stigma.

With regard to the 150*l.* bill, I do not understand how the plaintiff could feel himself justified, when he had received this money, in negotiating that. The bill must be delivered up to be cancelled, or taken off the amount of the debt.

I think that, up to the hearing, there ought to be no costs at all, because if I went strictly into it there would be certain costs to be set off against each other (2).

KINDERSLEY, V.C. } *In re* CURTIS.
May 7.

Infants, Custody of—Paternal Rights—Jurisdiction of the Court.

The Court of Chancery cannot decide upon the custody of infants simply with reference to what is most for their benefit, and cannot interfere with the rights of a father, unless he so conducts himself as to render it essential to the safety and welfare of the children in some serious and important respect, either physically, intellectually or morally, that they should be removed from his custody.

Upon petition by a wife for the custody of her children, after having obtained a decree of judicial separation against her husband in the Matrimonial Court on the ground of cruelty, this Court held, upon the affidavits and circumstances brought forward, that there were no grounds for attributing such undue harshness, severity or cruelty to the husband, with regard to his children, as to render him unfit to have the management of them, and dismissed the petition.

This was a petition presented by Frances Henrietta Curtis (the wife of John George Cockburn Curtis, civil engineer, from whom she had been, on her own application, judicially separated by a decree of the Court for Divorce and Matrimonial Causes), and also of Mary Curtis, John Curtis, and Frances

(2) June 24, 25. Upon an appeal by the defendant this decree was affirmed by the full Court of Appeal, excepting as to the repayment by the plaintiff of the sums obtained from the defendant's friends, the decree being in this respect varied by a declaration that it was to be without prejudice to any right of the friends.

Adelaide Maria Curtis (the infant children of John G. Cockburn Curtis and Frances Henrietta Curtis), by Frederick Solly Flood, barrister-at-law, their next friend; and it prayed that the petitioner Frances Henrietta Curtis might be appointed to act as guardian of the three infant petitioners, and to have the care of their maintenance and education during their respective minorities, or until the further order of the Court; and that the said infant petitioners might remain in the care and custody of their mother until the further order of the Court; and that J. G. C. Curtis and his agents might be restrained, until the further order of the Court, from changing the present custody of the said infant petitioners, or disturbing or interfering with the same in any manner whatsoever; and that proper inquiries might be made whether there was a sufficient provision for the maintenance and education of the said infant petitioners during their respective minorities, and that if necessary an order of the Court, dated the 8th of July 1851 (which was an order restraining the said J. G. C. Curtis from taking his infant children out of the jurisdiction of the Court), might be continued; and that such other order might be made as to the Court should seem meet.

The decree for a judicial separation between Mr. and Mrs. Curtis was pronounced by the Judge Ordinary of the Court for Divorce and Matrimonial Causes on the 21st of June 1858, and is fully reported 27 *Law J. Rep.* (N.S.) Prob. & M. 73. The Judge Ordinary also made an order that the custody of the children should be given to the mother, Mrs. Curtis, for three months from that date, in order that an application might be made in the meantime to the Court of Chancery as to the permanent custody of the children.

Mr. Curtis then appealed against the decision of the Judge Ordinary, and an interim order was made by this Court, by consent, that the children should remain in the custody of their mother until the further order of the Court.

On the 8th of January 1859 the appeal in the Divorce Court was heard, and the decree of the Judge Ordinary was confirmed (reported 28 *Law J. Rep.* (N.S.) Prob. & M. 55).

The present petition was supported by

a number of affidavits, and on the part of the respondent there were also numerous affidavits filed. The material facts, both in the petition and the affidavits, will be found referred to at length by the Vice Chancellor in his judgment.

Mr. Forsyth and *Mr. Prendergast* appeared in support of the petition, and cited the following authorities:—

Warde v. Warde, 2 Ph. 786.

Lyons v. Blenkin, Jac. 245.

In re Spence, 2 Ph. 247; s. c. 16

Law J. Rep. (N.S.) Chanc. 309.

Whitfield v. Hales, 12 Ves. 492.

Ball v. Ball, 2 Sim. 35.

Oliver v. Oliver, 1 Consis. Rep. 361.

Mr. Curtis, the respondent, argued his case in person, and cited

Vansittart v. Vansittart, 2 De Gex & Jo. 249; s. c. 27 Law J. Rep. (N.S.) Chanc. 289.

Mr. Forsyth was heard in reply.

KINDERSLEY, V.C.—As this petition relates to a question affecting the welfare of infants, I have done what probably I should not have thought it necessary to do if it had been a mere question of property between man and man; for if a question of the latter kind merely had been brought before me, with no better foundation for the relief asked than is here presented, I much doubt whether I should have called upon the respondent. As it is, however, I have thought it best to hear the whole matter through, in order that nothing might be left out which could in any way guide me in exercising the jurisdiction of the Court; and I may also in the outset state this, that having regard to the nature of the question, I should certainly have taken time to look into the cases and the affidavits before I expressed my opinion about it, had not the time that has elapsed since the case was first opened afforded me the opportunity of doing so. I need not say that I have looked into the authorities upon the subject, and also carefully read over all the affidavits that have been brought before me, and it is not necessary, therefore, that I should delay my opinion upon the case.—His Honour having read the prayer of the petition, said—Now the

relief asked by that prayer is a relief founded entirely upon this proposition, that *Mr. Curtis*, the father, is a person who has so conducted himself, or is in such circumstances that he is not fit to be entrusted with the care and custody of his own children, and that he ought to be restrained from interfering in their management altogether. The petition is entirely based on that proposition; and, therefore, the question that I have to consider is, whether it is made out that this is the state of circumstances. I may at once observe that, whatever may be the jurisdiction with regard to the custody of children which the recent act of parliament has given to the Court for Divorce and Matrimonial Causes (upon which I express no opinion whatever), it does not in the smallest degree affect the jurisdiction of this Court, or the principles on which that jurisdiction is habitually exercised by the Court. If it be the case, as I believe has been suggested, that the Judge of the Court for Divorce and Matrimonial Causes, when he decrees a judicial separation is armed with the authority to determine what the custody of the children of the marriage shall be, simply with reference to what is most for their interests, I can only say that there is no such jurisdiction in this Court. This Court has not the right simply to consider that. This Court does not exercise the jurisdiction in merely considering whether it would be for the benefit of the children that their custody should be with the father or with the mother, or with some other relative, or with strangers, simply because, upon the whole, it would be most for the benefit of the children that there should be that custody. I repudiate all such jurisdiction as belonging to this Court. If such a jurisdiction existed, I suspect that the peace of half the families in this country would be disturbed by applications shewing, or attempting to shew, what, I am afraid, might be shewn in a great many cases, that it was most for the interest of the children that they should be removed from the custody both of the father and of the mother; but happily there is no such jurisdiction. I need not cite cases upon this subject, but I will refer to one which has not been mentioned, with reference to the interference with a father's au-

thority and parental rights as regards his children. I mean the case of *Re Fynn* (1), and I cite it merely for the purpose of shewing how the learned Judge who decided that case (the present Lord Justice Knight Bruce, then Vice Chancellor) expressed what was the ground of the jurisdiction, the manner of exercising, and the principles on which the Court does exercise, that jurisdiction. After making some general observations in the outset applicable to the case, he says this: "Of the present case I may say, that were I at liberty, as I am not, to act on the view which out of court I should as a private person, take of the course likely to be most beneficial for the infants, I should have no doubt whatever upon the question of interfering with the father's power. Without any hesitation—I should do so, to what extent and in what manner I do not say. But there may and must be many cases of conduct, many cases of family differences, family difficulties and family misfortunes, in which though interposition would be for the interest and advantage of minor children, Courts of justice have not the means of interfering usefully, or, if they have the means, ought not to interfere; and the jurisdiction to which the present petition is addressed is one that, infinitely various as are the possible circumstances in which it is applicable, is yet restricted, and I believe wisely restricted, by certain principles and rules from which there can with propriety be in its exercise no departure. The acknowledged rights of a father with respect to the custody and guardianship of his infant children are conferred by the law, it may be with a view to the performance by him of duties towards the children, and, in a sense, on condition of performing those duties; but there is great difficulty in closely defining them. It is substantially impossible to ascertain or watch over their full performance, nor could a Court of justice usefully attempt it. A man may be in narrow circumstances; he may be negligent, injudicious and faulty as the father of minors; he may be a person from whom the discreet, the intelligent and the well-disposed, exercising a private judgment, would wish his children to be, for their

sakes and his own, removed; he may be all this without rendering himself liable to judicial interference, and in the main it is for obvious reasons well that it should be so. Before this jurisdiction can be called into action between them, the Court must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with. If the word 'essential' is too strong an expression, it is not much too strong."

I have read these observations, because they appear to me to enunciate in most admirable terms, in terms in which I entirely concur, and which I believe are in accordance with all the authorities on the subject, the principle on which this Court acts with regard to exercising its jurisdiction in interfering with the rights of a father; and when we recollect how very serious a matter it is to interfere with the rights of a father, in respect of his own children, it appears to me that the Court ought never so to interfere unless, as the Lord Justice expresses it in that case, in some very material and important respect it is essential to the welfare and well-being of the children, either physically, intellectually or morally, that it should do so.

Now, that this Court will exercise the jurisdiction is beyond all controversy. The cases which have most frequently occurred of the Court exercising it, have been cases where the father, being of a perverted condition of mind in respect of religious and moral views or habits, is inculcating such habits or such views and opinions upon his children, in such a way that it will be most grievously and seriously detrimental to them in after-life, as members of society. There, no doubt, the Court has interfered. The Court will also interfere unquestionably where the father, although he may not in the smallest degree tend by his teaching or his example to demoralise the children, does treat them with such a degree of violence, or harshness and cruelty, as that he appears utterly unfit to have

(1) 2 De Gex & S. 457.

the conduct and management of children. I quite agree with the observation that was made by the counsel for the petitioner, that a man may be very fond of his children; may have that natural affection in a strongly developed degree, which is an instinct not only in human beings but in brute animals; and yet be a person of a depraved condition of mind, subject to violent fits of excitement, treating them habitually (I will not say systematically) with a degree of violence that amounts to cruelty, to such an extent as to be likely to be seriously detrimental to their interests; and really the question is, whether the latter is now the case before me? because as to anything like a tendency to demoralize the children, to give them bad habits or bad opinions, or even to neglect them in respect of their religious and moral education, it appears to me, not only that there has been no suggestion of the kind, but that there is not the smallest ground for any such suggestion. It appears to me, the evidence tends to shew that whatever question there may be as to the soundness of the opinions, or some of the opinions, on religious questions or moral discipline entertained by Mr. Curtis—whether in these opinions he is right or wrong,—this at any rate is clear, that his object is the well-being of his children and the bringing them up in a moral and religious condition; indeed, I think, unusually so; whether it is carried to an excess, I will not pretend to say, but it appears to me that the manner in which Mr. Curtis is, upon the evidence, clearly proved to have behaved towards his children, as far as that matter is concerned, is unexceptionable. Mr. Curtis entertains certain opinions which are truly called “peculiar”—for example, upon the question of religious denominations or sects or parties into which the religious world, and perhaps all mankind, are more or less divided. It appears that Mr. Curtis is a member of the Church of England in this sense: that he attends the services of the Church of England, adopts the Liturgy of the Church, goes to a place of worship of the Church of England, uses in his family some of its prayers—at all events, one prayer I recollect was mentioned, which is a prayer taken from our Prayer-book; and, in fact, he adopts to all intents and purposes the

opinions and the views of the Church of England, except as to some particular matters from which he dissents, and the most important one is, his opinion that infant baptism is wrong, and in that sense (although in no other) he is an Anabaptist or an Antipædobaptist. I may think that opinion erroneous, but whatever opinion of that sort Mr. Curtis may entertain, or may instil in his children, it is no ground for saying, that he is in any respect an unfit person to have the care of his children. I am bound, however, to say this, that that sort of peculiarity of opinion, namely, a person's adhering to the Church of England in all its main doctrines except that of infant baptism, may be such a peculiar state of opinion in certain cases as that, combined with a variety of other circumstances, may tend as one circumstance towards the conclusion that he is a man of morbid or irregular and eccentric condition of mind. I do not, of course, say, that it is so in this case, or that in itself it is objectionable; and yet that instance is brought forward by Mrs. Curtis as a matter of special complaint upon this petition.

Another thing suggested by Mrs. Curtis, and made a subject of special ground, upon which the Court ought to interfere with the parental rights of Mr. Curtis, is this: that he (as she says) repudiates and abhors—or “denounces” is the expression, I think—all churches and all creeds. Now one thing is pretty evident, namely, that during the period of the married intercourse between these two parties, there have been differences of opinion upon religious questions, the most unfortunate sort of differences that can arise, I apprehend, between husband and wife, especially when neither the husband nor the wife seems much disposed to submit his or her opinion to the opinion of the other. But Mrs. Curtis may consider, as a denunciation of all creeds, that which really, when it comes to be considered, is not so. However, if it were so, supposing that Mr. Curtis entertains the opinion which, I believe, is entertained by a certain section of individuals in this country, called “Separatists,” who deny that they belong either to the Church of England, the Church of Rome, the Baptists, the Anabaptists, the Antipædobaptists, the Independents, the Wesleyans, or to any denomination

whatever, who call themselves Christians, assert and believe in all the truths of the Bible, but insist that there should be no church; that every man should be his own high priest, having his own place of worship, and that there should be no creed whatever by which persons might express their religious opinions. There are persons of respectability who bring up their children with those opinions, but nobody would suggest that they are not fit to have the care of their children; and am I to say, supposing even that Mr. Curtis entertains those opinions, that I ought to interfere with his parental rights? This, however, is brought forward seriously as a special ground of complaint, upon which I ought to interfere. As I have said already, with regard to the other matters, if he entertained such an opinion, and if that were combined with a great variety of circumstances to bring me to the conclusion that his state of mind is altogether depraved and morbid, so as to render him unfit to have the management of children, that might be considered as a ground for interference; but that does not appear to me to be the case here. Then, with regard to the suggestion that Mr. Curtis positively denounces all churches and creeds: why, so far from denouncing all churches, it appears that he goes regularly to church; that Mrs. Curtis, when they lived together, accompanied him, not only in this country, but in America, where there is an Episcopal church, holding, as nearly as possible, the same tenets as the Church of England; and that, going there, he took the children with him, or, at any rate, those that were old enough to go; and yet, in the face of all this, Mrs. Curtis says he denounces all churches, not merely the fabric, but all church government and all church worship. There is really no foundation for the suggestion; and I may now, in passing, observe, upon this part of the case, what I shall have to observe in several other parts of it, that we have here a sort of question arising, which really makes the difficulty in all such cases, and particularly in a case similar to this, namely, a question of degree. Mr. Curtis may, and I dare say does, entertain some opinions which are not precisely the opinions of this church or that church, or the other; for example, if he holds all the tenets of the Church of Eng-

land, except the doctrine of Infant Baptism, what church does he belong to? Strictly, you will say, he does not belong to the Church of England; and it might also be said that he does not belong to the Anabaptists, or the Antipædobaptists, because in some things he holds to the doctrines of the Church of England. And in some expression of opinion that fell from Mr. Curtis, in the discussions that took place between him and Mrs. Curtis, he, no doubt, said something or other (whether rightly or wrongly is no concern of mine) which she has construed to mean a denunciation and repudiation of every church and of every creed whatever. It is a question of degree. How am I, when parties represent to me that this or that is what passed in their family quarrels, to determine which of them is speaking the truth, when there is no third person as witness, and nobody to corroborate either the one or the other? But I have what I think is a complete answer to the allegation of Mrs. Curtis in this instance. She says, he denounces all churches and creeds, and yet it is clear that she was constantly in the habit of going with him to the Church of England whenever she was living with him. This is one instance, and I will, hereafter, point out more, in which it is clear to my mind, —without saying that Mrs. Curtis is fabricating facts—that she is relating facts in a manner, not only exaggerated, but falsely, in the sense that the truth is not represented by what she puts in her affidavit.

The peculiar opinions which are alleged against Mr. Curtis, I have already dealt with, and they appear to me to form no ground whatever for interfering with his parental rights, unless there were such a case as I have suggested of their being merely items or ingredients in an aggregation of circumstances, shewing a perfectly disturbed, and disordered and morbid condition of mind.

It is further said that the circumstances of Mr. Curtis are straitened. I suppose they are straitened in this sense—that he is not a wealthy man; but I have nothing before me to shew that he is in such a condition as that he is unable to maintain his children in the position of life in which they were born, or in which they may be expected to move. He seems to have been considered a very efficient engineer.

It has been assumed by the petitioner's counsel, that Mr. Curtis is a man of considerable ability and skill, and experience in his profession, and I have no reason to doubt that that is true. Although he may not be able to maintain his children in wealth, or in that position of life in which Mr. Flood, perhaps, may be able to maintain them, I have no right to come to the conclusion that he is in that abject, destitute condition of life that he ought not to be allowed to take possession of his children. I can only say that, subject to such exceptions as occurred in the case of *Lyons v. Blenkins*, poverty is not a ground for removing a man's children from him.

But I now come to consider the ground which is, after all, the main ground, and as I may almost express it, the only ground on which there can be suggested any case upon which I ought to enjoin Mr. Curtis against the exercise of his parental authority, in having the custody of his children; and that is, the allegations which are made of acts of violence and cruelty, habitually exercised by Mr. Curtis as regards his children. Of necessity the discussion on this petition has been mixed up with the case as between Mr. and Mrs. Curtis, in the Divorce Court, and it was impossible that it should be otherwise. The petitioner's counsel, in opening the case, adverted necessarily to it. The respondent did the same, and, of course, that led to a very long argument on the part of the respondent. It is in vain to say that a great deal of it is utterly irrelevant, because it was impossible to proceed without adverting to it, and I shall myself advert to it, necessarily, to a certain extent, although, of course, I will endeavour to do it only so far as I think it fairly bears on the case which I have to consider.

Now, the case as between Mr. and Mrs. Curtis, which was a question of cruelty by the husband to his wife, was a case that has been decided by the Court of competent jurisdiction, not only by the Judge Ordinary, but by the Appeal Court exercising that jurisdiction. It would, therefore, be presumption in me (even if I felt any doubt) to allow myself to express any doubt as to the soundness of the conclu-

sion at which the Court arrived; but I am quite satisfied that the conclusion of that Court was perfectly sound and correct. What, then, according to the fair view of the judgment pronounced by Sir C. Cresswell in that case, ought I to consider was the ground upon which he came to that conclusion? There was brought before him the evidence, contradictory in many respects, of persons asserting on the one side and denying on the other, a number of acts of alleged violence practised by Mr. Curtis towards his wife. Now, bearing in mind that they married in the year 1846, and, with a very trifling exception, have not seen each other since the middle of 1852, the acts of violence deposed to by Mrs. Curtis must have occurred within that time. Some of them Mr. Curtis denied; others of them he did not entirely deny; and the result altogether was, that the learned Judge, not immediately, off-hand, but after mature deliberation, came rightly to a conclusion—and when I say “rightly” it is presumption in me to use the term, for I not only assume technically that it is right, but I do not see the slightest reason for differing from it—which I conceive may be thus expressed: that although there must be made a great deal of allowance for exaggeration on the one side and on the other, and although some of the acts alleged, if the case stood upon those acts alone, would not be a sufficient cause for separation, yet, looking at the whole case, it did appear to him that there had been such a degree of harshness, of unkindness and of violence as amounted to what that Court was bound to consider as cruelty, or, as the Civilians call it, “*sævitia*,” so as to justify the Court in decreeing a judicial separation. That was the view that he took; and without reading through the judgment I may advert to one or two passages. I happen to have used *Tristram and Swabey's Reports*, and, therefore, I adhere to them, although I am not aware that there is any material discrepancy between that report and the report of the same case in the *Law Journal*. After referring to the dicta of learned Judges as to the grounds and extent of the jurisdiction with regard to cruelty or “*sævitia*,” he says, “The first question to be determined is, whether the respondent is proved to

have been guilty of acts constituting cruelty, judging of the question by those rules," that is, the rules which he had just drawn from the dicta of prior Judges. "In order to do that, it is necessary to examine with care the evidence given in the cause, and to make allowance for the exaggerations which may be expected in the accounts given by parties whose feelings are much interested and excited, more especially when they are deposing to transactions which occurred several years ago. The necessity for caution, if not suspicion, on such occasions was pointed out by Lord Stowell in *Oliver v. Oliver*," and then he goes on to comment on the circumstances of the case. I consider the observation, that the learned Judge thought it necessary to make great allowance for the exaggeration which was to be expected under such circumstances, as a monition to my mind to make (as I think I am bound to make) large grains of allowance for exaggeration on the one side and on the other. He then goes on to observe upon the case in particular, and comes to this conclusion:—"Believing then, as I do, that before the petitioner and her husband left England for America she had been treated with cruelty by him; that his conduct in New York was such that, bearing in mind his former acts, danger was to be reasonably apprehended from it, and that his more recent behaviour in Ireland proves that such danger still exists,—I feel bound to grant the prayer of the petitioner, and decree a separation between her and her husband."

The learned Judge came to the conclusion that, upon the whole of the evidence,—although there might be, and was, no doubt, exaggeration on both sides; and although some of the acts might not be sufficiently proved, to constitute a ground in themselves,—there was that degree of cruelty which justified the decree for separation. I think also that the learned Judge took this view: that cruelty is not justified by the circumstance that the wife is not herself free from blame, and that he came to the conclusion that in this case Mrs. Curtis was by no means free from blame. I am afraid that that is only saying that human beings in general are not free from blame; for I believe it is the common case

that very few wives do consider sufficiently their solemn obligation of obedience and submission to their husband's wishes, even though they be capricious, if they are not mischievous and wrong; and that there is an unfortunate habit of giving way to temper, and answering in such a manner as to lead to a replication more harsh, and to other unpleasant words. As appears from Mr. Curtis's own evidence there were constant instances of this sort—high words between the husband and wife; not merely high, harsh or fierce words used by the husband to the wife, but between the husband and the wife. I am not of course preaching a sermon, but I need not say that such a state of circumstances ought not to exist. However harsh, however cruel, the husband may be, it does not justify the wife's want of that due submission to the husband which is her duty both by the law of God and by the law of man. On the other hand, want of temper on the part of the wife does not justify cruelty on the part of the husband. That there has been fault on both sides in this case I am perfectly persuaded, and I adopt from Mr. Curtis the best excuse which can be made for Mrs. Curtis, which he volunteers, and which I confess, if he had not volunteered, I am not quite sure that it would have occurred to my mind; for he fairly and candidly said that great allowance ought to be made for her, considering the very trying circumstances under which she was placed, living with a husband who unfortunately during a considerable period of time was only able to place her in such a position that she could hardly be expected to conduct herself with perfect propriety as regards her husband. That excuse for Mrs. Curtis was suggested by Mr. Curtis, and I adopt it as the best excuse that can be made for her. At the same time (as the learned Judge says) I am satisfied that this was the cause of it all; that there was, in the first place, a reluctance on the part of the family of Mrs. Curtis to the marriage taking place at all. It was a consent reluctantly given; unfortunately the family—and when I say "the family" I mean Mr. and Mrs. Flood, to whom I confine the observation, for I do not know that the other members of the family did so, but Mr. and Mrs. Flood throughout assumed

demeanour to Mr. Curtis that was certainly not a frank, cordial reception of him in their family; but treating and regarding him, and shewing that they regarded him, as a person of inferior position, and that their daughter had lowered and demeaned herself to some extent by marrying him. I need not advert to particulars, but there are statements indicating their condition of mind towards Mr. Curtis, and, undoubtedly as regards Mr. Flood, there seems to have been generated a considerable degree of animosity (as Sir C. Cresswell expresses it) towards Mr. Curtis. I do not say that it was Mr. Flood's fault entirely. It was, perhaps, reciprocated by Mr. Curtis; but owing to that state of circumstances Mrs. Curtis was discontented and dissatisfied with her position: this is beyond all doubt. It appears beyond contradiction, that she said to Mr. Curtis on one occasion, that he had injured her by marrying her and bringing her into an inferior position, especially when Mr. Flood became a man of increased fortune, and that the only amends or compensation he could make her would be by dying. In whatever sense that was used, whether more or less jocular, it clearly shewed the condition of her mind as to dissatisfaction or discontent with her position.

It appears, moreover, that there were constant quarrels between them, not in the early part of their career, but during a considerable portion of the period of their living together, in which it does appear to me, as far as I can judge, that Mrs. Curtis took her part, and I only mention it as an illustration to shew that I am not bringing this forward for the purpose of saying anything unkind towards Mrs. Curtis. Again, on the occasion of one of those quarrels, she suggested a doubt (and whether jocularly or not it shews she was taking her part in the quarrel) whether he or some other person or persons was or were the father or fathers of her children. It shews at any rate that it was not the case of a harsh husband and a submissive wife, where the woman was trying to perform the duties of a wife, and submitting patiently to his wishes unless they became absolutely wrong; but it was a case of connubial quarrels constant and frequent, and, unfortunately, the conduct of the wife's family

did not assist in reconciling their differences, but tended (I do not say intentionally) to foment them. That is the view the learned Judge took in the Court of Divorce, and that is the view which I take of it here.

I will, however, just mention one other instance. A good deal of quarrelling took place about the suggestion of going to Australia. I am not at all meaning to say it was wise or right of Mr. Curtis to wish to go there; but this I do say, that if the husband thinks it is for the benefit of the family to emigrate to Australia, unless there were some pressing reasons to the contrary, it would be the duty of the wife (whatever her wishes might be) not to refrain from discussing the subject, but if he adhered to his opinion, to submit to his wishes. At the same time, I feel this, that if she thought he was in such a condition of mind that neither she nor the children would be safe in being trusted with him, it might have justified her in resisting such a desire; but still it seems to have been the subject of constant quarrels. Well, that was the state of circumstances contemplated as existing by the learned Judge in the Divorce Court, which he appears justly to have entertained; and I entertain precisely the same view myself.

Now, in that state of things, I am to pick out from the evidence what the conduct of Mr. Curtis towards the children has been. It is impossible to avoid seeing that the state of circumstances existing between the husband and the wife would necessarily very much influence the conduct of either the one or the other with regard to the children. It is impossible that it should be otherwise, and I can quite conceive (although, of course, I do not assert it as a fact) that, if there had not been this unfortunate state of violent animosity which at last existed between Mr. and Mrs. Curtis, in all probability there would have been no sort of harshness even, or severity practised by Mr. Curtis towards his children. But one cannot help seeing that the state of aggravation, very likely brought on partly and even mainly by his own fault, in which the parents lived when they were constantly quarrelling, as the husband and wife here seem to have been, acts of violence committed on the wife, recriminations passing

between them, and so on, would of necessity influence the conduct of the one or the other towards the children. Now one point of difference between them (and of course I do not say which was right) seems to have been, as to the manner in which the children should be treated. Mr. Curtis thought it desirable to give his children early and decided religious impressions, with a knowledge of the incidents in the life of our Saviour, and was in the habit of doing so. It appears that Mrs. Curtis objected, and said, "You will make them Catholics." I do not say whether he was right or whether she was right, or whether he was wrong or she was wrong, or which was the most right or the most wrong; but there was a difference of opinion. Then, differing as they did as to the mode of bringing up, teaching and dealing with their children, we may surely expect that Mr. Curtis would more firmly assert his right to do as he thought fit with regard to the children because his wife was opposing him, than he would have done if they had not differed in their opinion; and he might even be led (I do not say rightly led), owing to the infirmity of the human mind, to exercise acts of harshness even towards the children, which otherwise he would not be guilty of. It must not in the least be understood that I mean to say cruelty would be justified, far from it; but I am looking to see what there is to sustain such a charge of cruelty as will shew that Mr. Curtis is upon that ground in a position not to be entrusted with the custody of his children, because that is the practical question that I have to determine.

Now, it is necessary that I should carefully go through the acts which are alleged by Mrs. Curtis as acts of cruelty, and I may observe that they rest entirely upon the allegations of Mrs. Curtis, utterly unsupported by any other evidence (although I do not say they are untrue), except that Mr. Flood, the father, a person, as the learned Judge in the Divorce Court observes, strongly prejudiced against Mr. Curtis, mentions three instances which he witnessed of what he calls "violent treatment" of the children in America. The instances alleged by Mrs. Curtis I will, as far as I can, take in the order of

date in which they are alleged. Many of them have no date, and as to some it would be impossible to assign a date, because if there was a daily habitual exercise of violence it would be impossible to give particular dates to acts of that kind; but some acts are special and specific, and attributed to a particular period.

His Honour then adverted to an act of cruelty alleged against Mr. Curtis, in having treated one of his children (a year-and-a-half old) with great harshness upon the occasion of its crying one night in bed, and said the act imputed to him could not have happened unless he was in a paroxysm of fierce insanity, or he was an utterly depraved brute. This instance is more particularly referred to by the Judge in the Divorce Court. His Honour would not say that there was no foundation for the representation—that the thing was a pure fabrication, or that something did not occur, but it was obvious to his mind that that was a very gross exaggeration; but Mr. Curtis gave his representation of it, and utterly denied the cruelty laid to his charge. His Honour said that there was no corroborative evidence on either side, and it was impossible to say which spoke the truth. There was, probably, exaggeration on both sides, but he considered the version given by Mr. Curtis to be the most probable story. He did not believe that in that particular instance there was any cruelty whatever practised by Mr. Curtis. The next allegation made by Mrs. Curtis was, that her husband was in the habit of striking her children if they happened to make any movement at prayers; and if they indicated symptoms of weariness or impatience, he would beat the children severely, and generally gave them violent blows on the face, and inflicted blows of great severity, with the back of his hand that he was in the habit both before and after meals of using a very long grace, and if the children became weary and moved their position, he punished them severely. Now, Mr. Curtis had stated in his affidavit in answer to this charge, that the grace used by him was the short form with which every one was familiar, and this was not denied by Mrs. Curtis. This would in some measure test her representations, there being no third person as a witness;

and no one would imagine that such a grace as that, was so unnecessarily long that no little child could be expected to sit through it. His Honour would assume that Mr. Curtis carried his opinion about the necessity of a strict and severe enforcement of implicit obedience on the part of a child to any command of the parent to a length beyond what would be considered right or reasonable; but he did not carry it to so great a length, that it amounted to such a degree of harshness and cruelty as to render him unfit as a father to have the custody of his children. In this statement of Mrs. Curtis, regarding the conduct of her husband to the children at grace, he considered Mrs. Curtis had failed, and he considered himself justified in assuming, that probably there was a similar tendency to exaggerate in other instances of the same nature. Another act of cruelty towards the children was alleged by Mrs. Curtis, but it was so utterly improbable, so unnatural, and so contrary to every thing that appeared with regard to Mr. Curtis's character among his friends and acquaintances, that he could not come to the conclusion that these acts were perpetrated by him. It must, however, be understood that he was not at all concluding in any of these instances, that Mr. Curtis, if the children did not do as he bid, never struck them, for that was not the question. The question was, whether there were blows of such violence and ferocity as to be injurious to the health of the children.

There were other charges of a similar nature, but which were all denied by Mr. Curtis, and explained by him in a very different manner. How, then, could the Court determine between the parties except on the balance of probabilities, by weighing their evidence against each other, and by seeing whether there was anything corroborative elsewhere? It was all a question of degree—a question whether Mr. Curtis carried that severity or harshness to a degree that amounted to habitual cruelty. He might have occasionally struck one of his children with a degree of severity; but was it that degree of severity which would justify the Court taking his children from him? The same observations might be repeated with

regard to every one of the alleged instances of cruelty. His Honour then adverted to several other instances, by way of a test as to how far he could trust to the accuracy of the one party or the other. Most of these instances of cruelty were said by Mrs. Curtis to have taken place at New York, in the months of January, February and March 1852. Now, there was a letter written by Mrs. Curtis to her mother, on the 17th of the same month of March, a letter of a most confidential character, in which Mrs. Curtis spoke of the behaviour of her husband, and in which she canvassed the possibility of a separation on account of his conduct towards herself; but in that letter she used this expression, "I would to God I could tell what to do; but he seems so wrapped up in the children that I do not like to take them away, in spite of anything I may suffer, and I do not see that they are at present threatened." There was no doubt she intended by this sentence to express, in as strong language as perhaps could be expressed, the intense fatherly affection he felt towards the children. He was so wrapped up in them that, notwithstanding the suffering she underwent, she could not bring herself to separate the father from the children to whom he was so attached. This expression was quite inconsistent with the allegation, that at this time there was not only a recollection in her mind of harshness, and even cruelty, towards herself, but of harshness and cruelty towards the children; and, if in the months of January and February, and in March, when she was writing this letter, Mr. Curtis had been guilty of the habitual cruelty, harshness and violence alleged by her affidavit to have taken place, it was impossible to suppose she could have written this letter and not at all have adverted to it, or have used the language contained in it. Upon these facts, he could not come to any other conclusion than that Mrs. Curtis, when she was stating what took place in these months was, to some extent, stating what was not the truth; and he was satisfied that these acts could not have taken place without their being referred to in some way in that letter. His Honour then referred to a part of Mrs. Curtis's affidavit, in which she accused her husband of habitually

denouncing and almost entirely refusing medical assistance to his children on occasions of sickness and disease, and particularly at one period, when one of the children was suffering under the chicken-pox. Mr. Curtis entirely denied the charge made against him, and alleged also that what was supposed by Mrs. Curtis to be the chicken-pox turned out not to be that complaint at all. The act of which Mrs. Curtis accused her husband was, of plunging the child while it had the chicken-pox into a tub of iced water, and this was in February, the month before the letter already adverted to was written; and yet in that letter, although nothing could be a more striking instance either of aberration of mind or of the most cruel, ferocious disposition than such an act, Mrs. Curtis never mentioned or alluded to it at all. Mr. Curtis might very likely have had his own opinions as to the manner in which the child should be treated, and he might not have been desirous of calling in a physician, but that was a mere matrimonial difference of opinion, and was no indication of cruelty in the father.

He then adverted to the affidavit of Mr. Flood, which was the only corroborative evidence of these acts of violence. The date that Mr. Flood assigned to these acts was between the 16th of May and the 12th of June; and in the month of June he himself caused Mr. Curtis to be placed in a lunatic asylum; but that was not a ground for saying that Mr. Curtis was not now in a fit state to be trusted with his children. Then, Mr. Flood was a person who must be regarded as giving his evidence with a feeling of bitter animosity towards Mr. Curtis, and of course endeavouring to make out the case against him. To prove this more clearly, he would advert to the conduct of Mr. Flood upon a more recent occasion, when he went to the Admiralty, and announced to persons there that Mr. Curtis was at that time of unsound mind and unfit to be employed. He must certainly receive the evidence of a person so acting to the party against whom he was giving his evidence, with a considerable degree of suspicion and jealousy. Then, as to any corroborative evidence on behalf of Mr. Curtis, it appeared that some of these alleged acts of violence towards the

children took place while Mr. and Mrs. Curtis were residing at Blenheim Terrace. Previously to that, and down to the month of March 1849, a period of nearly three years, they had been residing at Mrs. Carberry's, at Charing Cross, and Mrs. Carberry said in her affidavit, that if Mr. Curtis had been in the habit of acting cruelly and harshly towards his children, or towards Mrs. Curtis, it must have been observed by her, or known to her through the servants; and then there was the evidence of Miss Elliot, the daughter of the person who kept the house at Blenheim Terrace, who said that prior to the time when Mr. Curtis was afflicted with his malady, she never saw any of the alleged cruel treatment on the part of Mr. Curtis either towards the children or towards Mrs. Curtis; and that if anything of the kind had taken place during the time they were in the house, it must have come to her knowledge. This lady, in another affidavit, stated that, subsequently to Mr. Curtis's attack of brain fever, he was most imperious and harsh towards his wife. His conduct was changed, and she did not think that when he quitted that house he was in a fit state to be trusted with the care of his children. These affidavits were quite consistent with the supposition, that if there were specific acts of harshness or violence, and of cruelty towards the children during the latter part of the time, they were acts to be explained and accounted for by the state in which Mr. Curtis was. There was also the corroborative evidence of seven persons, apparently in a most respectable position of life, who had known Mr. Curtis, some of them from his early youth, and who were competent to form a judgment of him generally; and all these witnesses deposed that, so far from being a person such as he must be if all the accusations against him were true, he was a person of kind, gentle, friendly, self-controlling habit, and that there was not the slightest ground for suggesting either that he was habitually subject to fits or paroxysms of violence, or uncontrollable temper, or a person of an unkind or harsh disposition, but quite the contrary. All that, so far as it went, was corroborative of Mr. Curtis's representation; and, so far as these acts went, if Mr. Curtis

was not now in the condition in which he was during the period, or during any period from the time when he had the attack, until he was placed in the lunatic asylum in New York, in June 1852, it appeared to His Honour that he had no ground for assuming that he was not entirely fit to have the custody and conduct of his children; and that opened this question. The learned Judge in the Court of Divorce very truly observed this—"If, indeed, an act of violence was committed under the influence of an acute disorder, such as brain fever, and it was made clear that, the disorder having been subdued, there was no danger of a recurrence of such acts, the case would be different. But if the result of such a disease has been a new condition of the brain, rendering the party liable to fits of ungovernable passion which would be dangerous to a wife, then, undoubtedly, this Court is bound to emancipate her from such peril." He said, very truly, that if that be the case he ought not to be allowed to have the controul of his wife's actions, or to compel her to reside with him; and His Honour would be disposed to apply the same principle to the case of the children. If he was really brought, not by any fault of his, but by his ailment, into such a changed condition of mind as that he was liable to these insane, phrenzied exhibitions of violence and cruelty, then it might be that he was not fit to be entrusted with the exclusive government and custody of the children. His Honour then continued:—

Now, the question resolves itself into this—What ground have I for assuming that, at this time, Mr. Curtis is in that condition of mind, that is, that the condition of the brain has been altered by his illness? In the first place, there is no evidence whatever to lead me to that assumption, unless I can draw such a conclusion from his conduct since the separation in July 1852; and it does not appear to me that I can draw any such inference from his conduct. The worst that is alleged against Mr. Curtis seems to be this—that he went to Broomley, which is the residence of Mr. Flood, in Ireland, where Mrs. Curtis was residing, with a view of having an interview with his wife, for the purpose of persuading her to join him again, in order that

they might be reconciled, and that the early condition of their married life might be restored. It ended in an altercation; that is to say, she refused. I am not saying whether there were sufficient grounds to justify that refusal or not. My own opinion of the duty of a wife is that there were not, but that I must consider as a private opinion, for I have no right, judicially, to assume that she was wrong in coming to the conclusion that she would not join him; but just consider what would be the feeling of a husband who, after a separation of five years, goes with a view to reconciliation, and finds that his wife declines to be reconciled. Whether it was his fault entirely, or partly, that the state of separation had been brought about or not, he must have been very much mortified; and she intimated something to the effect that both her father and herself had taken steps in order that the children might never be with him again; and his answer was, that if that was the determination or the feeling of herself and father he wished God might curse them both. Of course, I should be the last person to justify, under any aggravation, such an expression on the part of Mr. Curtis. At the same time, is that a sufficient indication, either alone or in connexion with other circumstances, to lead to the conclusion that he was in such a changed condition of the brain that the ebullition of violence and violent expressions which were then exhibited were occasioned by his brain being then in an altered and morbid condition? I confess I cannot draw that inference. I do not justify what Mr. Curtis then did, by any means; quite the contrary. It is not necessary for me to censure it, as it is obvious that it deserves censure, and as he himself now admits; nor am I assuming that Mrs. Curtis might not have sufficient grounds for desiring not to be reconciled with him; but I cannot come to the conclusion that that, or anything else that has been brought forward in evidence, is an indication of such a changed condition of the brain, producing a continued and fixed state of mind, of such a nature as to render it probable that to-morrow, the next day, within a week or a month, or some short time, he will be in such a condition of

mind as to render it necessary to place him again under restraint.

Then, again, the other principal circumstance that has been mentioned, and almost the only one, is the circulating of the handbill; and there again I confess I wish it had not been done, for Mr. Curtis's sake. [This handbill is more particularly referred to by the Judge of the Divorce Court.] It was not done in a judicious or wise manner, and the word "absconded," which is used in it, had certainly better not have been put in; but I must make allowance for the state of things which then existed, considering what had been done by Mrs. Curtis. She had not only refused to live with him; but, in order that he might not have access to the children, had carried them to England, changed her name and the name of her children, and kept them in concealment, in order that the father might not know where they were to be found. I do say, that was a state of things likely to irritate even a less irritable mind than perchance Mr. Curtis may possess; and what does he do? He circulates this advertisement, and my impression is that he may have done so partly with a view of vexing Mr. Flood as well as Mrs. Curtis; but I must bear in mind the irritation under which it was done. It may have been done, however, really with a view of discovering his children, for it appears that Mr. Curtis did make great efforts with that object; and by the employment of the police, and by spending his money, he did ultimately find out the place of residence of these children at Hornsey. Is this act in that respect, either by itself or combined with other acts, sufficient to lead me to the conclusion that he is in such a condition as not to be fit to have the government of his children? I can only say that, so far as I can draw any inference as to Mr. Curtis's state of mind, from what has been the specimen before me during this discussion, his demeanour has been in every respect most exemplary.

It has been said that he is capable of assuming all that, and that even when he is in a state of great violence and irritation he can suddenly, when it suits his purpose, assume a calm and restrained demeanour. I do not very well understand how that

comports with the allegation that he is a man of ungovernable temper and subject to uncontrollable fits of violence. I do not understand how a man who falls into such a fit of violence and passion that he is unable to control himself, is able at the same time so to control and regulate his conduct as to assume perfect calmness and gentleness. It may, perhaps, be reconciled by putting a particular construction on some of the words used; but I confess I did—not with reference merely to Mr. Curtis himself, but with regard to the general bent and tendency of human nature—expect to see and hear expressions of irritation, violence and recrimination as against Mrs. Curtis, Mr. Flood and other persons, but particularly as against Mrs. Curtis. So far, however, from seeing or hearing anything of that sort, every palliation that could be suggested of Mrs. Curtis's conduct has been suggested by Mr. Curtis himself. There has never been, I think I may say, a single expression tending to any recrimination, except so far as the exigency of the case required that Mr. Curtis should endeavour to shew that Mrs. Curtis was representing things inaccurately, untruly and falsely. Now, if that be assumed or artificial, I can only say it is as able a piece of acting as I have ever witnessed; but I confess I cannot see any reason for supposing that it is assumed; and, in the absence of anything to lead me to a contrary supposition, I am bound to assume, what the witnesses say who have known this gentleman both in his early and later life, and who all concur in stating that he is a man of placid temper and disposition, not subject to these violent fits of excitement; in short, that he is anything but what he is represented to be.

Now, there is no direct medical testimony that I am aware of; and I should have been glad if, during the last few years Mr. Curtis had had occasion to call in for his general health a medical gentleman, who would have known what was his opinion. It happens, however, that Mr. Curtis has had no occasion to employ a medical gentleman; at all events, this is clear, that there is no suggestion that there has been any necessity for calling in a medical man in respect of tendencies to cerebral disorder. There is a slight degree of evidence upon the sub-

ject, which, however, I can hardly consider of importance; for Dr. Winslow saw Mr. Curtis a few times, and, so far as I consider he gives any evidence on the subject, I have no reason to suppose that in his opinion there is cerebral disorder, either permanent or temporary.

I believe I have now gone through all the principal points that have been raised, with the exception of one, which is of this nature:—It has been suggested that ever since July 1852, down at least to the period of July 1857, when he went to Ireland, and had the interview to which I have alluded, Mr. Curtis has taken no pains to unite himself to his wife and children; that he has “deserted” them—that was the expression repeatedly used in the opening, although very properly it has not been insisted on in the reply; that there has been a state of things with regard to these children, superinduced with respect to their habits and education, which ought not, upon the principle on which *Lyons v. Blenkin* was decided, to be interfered with; and that this Court will preserve that condition of things. Now, *Lyons v. Blenkin* has no application to the present case; that was a totally different case, and the principles upon which it was decided depended on circumstances which have no existence here.—[His Honour, after stating the facts in *Lyons v. Blenkin*, continued]:—If that case were like the present, I should undoubtedly act upon it; but there is no resemblance whatever to it. First of all, this is a case in which, although desertion there has been, that desertion was, in the first instance, a desertion of the husband by the wife; and although I am very reluctant to say anything which can be painful to any lady, I am bound to say that a more heartless desertion can hardly be imagined. I make every allowance for this poor lady’s condition. I assume in her favour, what I have no doubt was the case, that she was most unkindly and harshly treated, and perhaps treated occasionally with great violence by her husband; but her husband was unfortunately in a lunatic asylum in a foreign country—in a Government lunatic asylum—governed, that is, by the municipal authorities; but being in that asylum (and I am not sup-

posing that he should not have been thrust there) the wife goes away; leaves him there; comes to England; leaves him to the mercy of strangers; and the father of the wife is the party who assists her in doing so. No doubt, it was at his instigation that it was done, and so earnest and eager was he about it that she is carried away from New York within seven days of her confinement with her last child. Who, then, is to talk of desertion? In that state of things, conceive what must be the feelings of a husband with regard to what his wife had done; and yet in the month of August, after he comes out of the lunatic asylum, he writes a letter to her full of contrition, containing expressions of the most complete acknowledgment of fault on his part, expressions of regret, and also of a desire for reconciliation. I do not mean to say that Mrs. Curtis might not have been justified in saying, “I cannot trust to all this, and I will not be reconciled.” My own private opinion is, that the wife was not justified, although I am not assuming that judicially; but what must have been the feelings of the husband? He had done what he felt to be humiliating; although I confess, reading that letter, so far from thinking it humiliating, I consider it a highly creditable letter, not at all degrading or humiliating. It was a confession of great wrong; of his having behaved harshly, unjustly, and in an unchristianlike manner. I do not know that he admits what amounts to actual cruelty; but he acknowledges that he was grievously wrong, and urges upon her reconciliation; he does not, as he hoped, get a favourable answer to that application. What the correspondence was that took place subsequently is not in evidence before me, and I can only surmise that it was of a cold kind, for they seem to have addressed each other as “Dear Mr.” and “Dear Mrs. Curtis,” and “Sir” and “Madam”; but what the actual correspondence was I do not know. She has, however, withdrawn herself under these circumstances, and I cannot say it is to be wondered at (although I do not say that she was quite right); and instead of coming home to England, desiring to meet her, and endeavouring to effect a reconciliation in person, he goes

to Spain, where there were Government works being carried on, and where he might be employed as an engineer, and where he was actually employed during a portion of the period that elapsed between that time and June 1856. How, then, is this the case of *Lyons v. Blenkin*? He allowed the children to remain with their own mother, but not under any bargain or arrangement, or gift of property. It is true that Mr. Flood has maintained the mother and the children; but under no bargain on his part, and it appears from the evidence that Mr. Curtis, in that letter which he wrote, or in some other, desired to know what were her pecuniary arrangements, not at all neglecting them; but not receiving answers, such as he expected to receive, he remains away. Is that the principle of *Lyons v. Blenkin*? Not at all. It does not approach it.

I believe I have now mentioned every point upon which the least reliance was placed, and the result of the whole is this: that, to my mind, what occurred with respect to the children (whatever may have been the degree of severity, if severity there was, or whatever was the nature of the chastisements inflicted upon the children) has been, at all events, grievously aggravated by the state of things existing between the husband and wife; and I think that is a matter of great importance to be kept in mind, because it appears to me that, although I might apprehend, and I think I should apprehend, that if the husband and wife came together again, with their children, there might possibly be a recurrence of these scenes as between the husband and wife, and therefore a recurrence of painful things with regard to the children; I see no reason to conclude that if the father has the custody of his children only, and the wife were separated from him as she is now separated by the decree of the Court of Divorce, he would not live with his children, not only in the most amicable way, but that he would not do for them everything which the kindest father could and ought to do. He may have some peculiar notions, not amounting to aberration of mind, either about religious questions or about the best mode of bringing children up either physically or mentally; he may have those peculiar

opinions which any father is justified in entertaining and acting upon, provided they do not amount to cruelty, or an indication of aberration of intellect. I see, however, no reason to conclude that, whatever was the nature of the conduct of Mr. Curtis towards his children, which was very much brought about and very much aggravated by the state of things between him and his wife, such scenes, now that the husband and wife are separated, will again occur.

I think, further, that I have no reason to conclude that that ailment of Mr. Curtis has left his mind in a continuous morbid condition. If that were the necessary consequence of such a disease, of course, evidence could have been given of it. If it were so, I think, in this particular case, means might have been found of giving some evidence upon the subject, although, perhaps, it would have been difficult; but if he is not in that morbid condition of mind, how am I to apprehend that he will treat his children cruelly hereafter? If I considered it well founded that he had treated his children cruelly before, I might consider there was a chance of his doing so again; but I do not think that he has treated his children cruelly, I mean in the sense which is properly called cruel. I do not think that the allegations which have been made are established before me, or that I have a sufficient ground for feeling a reasonable doubt upon the subject. I have no doubt that both parties may have coloured the acts done, upon the one side and upon the other, in a manner not consistent with strict truth; but certainly nothing appears upon the evidence which amounts to that which is represented; for I believe that which is represented is such a state of things as is quite unaccountable, excepting on one or other of two suppositions, either that Mr. Curtis is habitually an insane man, or else that he is a person of that brutal and ferocious character (quite contrary to the evidence of those persons who have deposed to his general character,) that he cannot even keep his hands from injuring physically the very children that God has given him.

With regard to the allegation of his uncontrollable and violent disposition, he may be a passionate man, but I cannot say

that I see much reason to suppose that he is more passionate than I am afraid the majority of men are when they get into quarrels with persons exhibiting violence and ill-temper. I am, however, perfectly satisfied of this, that although there can be no justification for his cruelty to Mrs. Curtis, Mrs. Curtis's conduct has undoubtedly been such as tended to aggravate any tendency to excitability in the temper of Mr. Curtis.

Under all these circumstances, have I got a case presented to me in which I can or ought to conclude, that the conduct or the condition of Mr. Curtis, with regard to his children, is such as that I ought, even if the children were now with him, to interfere for the purpose of taking these children from him? If not, how can I say that I will, although the children are not with him, grant an injunction to restrain him from having any interference with those children, or that I ought to order that he should be displaced from his position of a parent, and that another person, although the mother of the children, should be nominated the *quasi* guardian, to have the control of those children? I see no such case; and as I said in the outset, if this had not been a case affecting the interests of children, as it is, but had been merely a question of money between man and man, I felt, after having heard the opening, that so little case was presented by the petition, and by the affidavits in support of it, that I should have been disposed to dismiss the petition, without calling upon the respondent to argue the question. I have, however, thought it right and best to hear it all through; and having done so, I have stated my view of the case, and I think that all I can do is to dismiss the petition.

M.R. }
Dec. 2, 3, 4; } BANKART v. HOUGHTON.
Jan. 13. }

Nuisance — Action — Damages — Acquiescence.

If works likely to become a nuisance are erected, and subsequently carried on without any objection, the owners of adjoining estates, who acquiesced so long as no perceptible in-

jury was sustained, are not precluded, when injury arises, from objecting to an extension of the works, or from pursuing their legal remedy to recover damages for injury sustained by such works; and when an action has been brought, and damages recovered, this Court will not restrain the execution to obtain payment of the amount, or prevent the plaintiff in the action from taking other proceedings at law.

The bill in this suit was filed by Frederick Bankart, who carried on the business of copper-smelting at the Red Jacket Works, near Briton's Ferry, in the county of Glamorgan, against Dugdale Houghton, who was the tenant of several farms adjoining, to restrain him from taking out execution upon a judgment for 450*l.* obtained in an action, which D. Houghton had brought to recover damages for injury done to his crops and cattle, by the fumes and vapours thrown off during the process of roasting or calcining the ore, to get rid of the sulphur and arsenic, which deposited itself on the adjoining lands. The bill also prayed that the defendant might be restrained from taking any further proceedings at law, and that he might repay any monies he had recovered under an execution issued; and that the plaintiff might be quieted in the enjoyment of the works.

The works were originally established for the manufacture of spelter or zinc. They subsequently came into the hands of the plaintiff, and in 1849 he altered them into copper works, and they have ever since been in operation. When the works were first erected, Jacob Williams was the tenant of the farms, and he continued to hold them until October 1853, when D. Houghton purchased his interest in the farms, together with the stock and crops, and entered into possession. At that time there were seventeen furnaces erected, seven calcining or roasting furnaces, nine melting furnaces and one refining furnace. These had since been increased, and there were now twenty-six furnaces, viz., eight calcining or roasting furnaces, fifteen melting furnaces, and one refining furnace; four of these had been erected since the action brought by Mr. Houghton. The plaintiff now sought to be relieved from the

consequence of the verdict and judgment, on the ground that D. Houghton, and those through whom he claimed, had acquiesced and encouraged him in the erection and use of the works.

Mr. R. Palmer, Mr. Pullen and Mr. C. Jones, for the plaintiff.—

Bliss v. Hall, 4 Bing. N.C. 183; s. c. nom. *Bliss v. Hale*, 7 Law J. Rep. (n.s.) C.P. 122.

The East India Company v. Vincent, 2 Atk. 83.

Tulk v. Moxhay, 11 Beav. 571; s. c. 2 Ph. 774; 1 Hall & Tw. 105; 18 Law J. Rep. (n.s.) Chanc. 83.

Elliotson v. Feetham, 2 Bing. N.C. 134.

The Caledonian Railway Company v. Sprot, 2 Macq. 449.

Powell v. Thomas, 6 Hare, 300.

The Duke of Devonshire v. Eglin, 14 Beav. 530; s. c. 20 Law J. Rep. (n.s.) Chanc. 495.

The Rochdale Canal Company v. King, 16 Beav. 630; s. c. 22 Law J. Rep. (n.s.) Chanc. 604.

The Duke of Beaufort v. Patrick, 17 Beav. 60; s. c. 22 Law J. Rep. (n.s.) Chanc. 489.

The Somersetshire Coal Canal Company v. Harcourt, 24 Beav. 571; s. c. 27 Law J. Rep. (n.s.) Chanc. 139, 625.

Daniels v. Davison, 16 Ves. 249.

Bailey v. Richardson, 9 Hare, 734.

Clavering's case, cited 5 Ves. 690, and 6 Hare, 304, n.

Hewlins v. Shipham, 5 B. & C. 221; s. c. 7 D. & R. 783; 4 Law J. Rep. K.B. 241.

Barnhart v. Greenshields, 9 Moore, P.C. 18.

Short v. Taylor, 2 Eq. Cas. Abr. 522, pl. 3.

Bennett v. Thompson, 25 Law J. Rep. (n.s.) Q.B. 378.

Mr. Lloyd, Mr. Grove and Mr. Hobhouse, for the defendant.—

Mitford's Pleading, 105, 3rd edit.

Young v. Guy, 8 Beav. 147.

Harrison v. Nettleship, 2 Myl. & K. 423; s. c. 3 Law J. Rep. (n.s.) Chanc. 26.

Chuck v. Cremer, 2 Ph. 477; s. c. 17 Law J. Rep. (n.s.) Chanc. 287.

Terrell v. Higgs, 1 De Gex & Jo. 388; s. c. 26 Law J. Rep. (n.s.) Chanc. 837.

Evans v. Bremridge, 25 Law J. Rep. (n.s.) Chanc. 334, 102.

Williams v. the Earl of Jersey, Cr. & Ph. 91; s. c. 10 Law J. Rep. (n.s.) Chanc. 149.

Haines v. Taylor, 2 Ph. 209.

The Earl of Ripon v. Hobart, 3 Myl. & K. 169; s. c. 3 Law J. Rep. (n.s.) Chanc. 145.

Jones v. the Royal Canal Company, 2 Moll. 319.

Rennie v. Young, 2 De Gex & Jo. 136; s. c. 27 Law J. Rep. (n.s.) Chanc. 753.

Dann v. Spurrier, 7 Ves. 231.

Jan. 13.—THE MASTER OF THE ROLLS.
—The injury complained of by D. Houghton, the defendant, has been occasioned by the exhalation and deposit from the works of F. Bankart, the plaintiff; they affect not only the land, but the crops and the cattle. F. Bankart, however, says that D. Houghton, or those through whom he claims, have acquiesced and encouraged him in the erection and use of the works, and he insists that D. Houghton is bound by these acts. The damage is not disputed; and on the trial at law, after a lengthened investigation and examination, the jury assessed the damage sustained by D. Houghton up to that time at 450*l*. This damage is a constantly recurring injury, it is daily giving rise to fresh causes of action. There are two questions now to be considered: first, the extent of the acquiescence alleged and proved; and next, the legal consequences of such acquiescence. As to the fact of the acquiescence, this is proved, and, indeed, is not questioned on the part of D. Houghton, that both his lessor and he himself when he took the farm were well aware of the existence of the works; that the tenant who assigned the lease to D. Houghton had seen them while they were being erected, and that he had not taken any steps to prevent such erection; and that D. Houghton when he took the farm knew of the existence of the works. These

facts are material for some purposes, and if the case were reversed, and the defendant were here as plaintiff, seeking the aid of this Court for an injunction to restrain the plaintiff from permitting the noxious effluvia or vapour to issue from his furnaces, and to be deposited upon the defendant's lands, I should, upon these facts, consider that the defendant had debarred himself from any right to obtain such relief as an injunction, and that he must be left to his remedy at law; but this is materially altered when the party who commits the injury comes here, and calls upon the Court to prevent the defendant from obtaining that legal remedy to which *prima facie* he would be entitled. It has been argued on behalf of F. Bankart, that in a district where the effects of copper smoke are widely felt and understood, the tenant who takes lands adjoining copper works, and who makes no objection to them, must be held to have acquiesced not only in the evil produced by the works then in the course of erection, but also in all that may thereafter be produced by their existence, and that the addition to the works is a natural consequence of their existence, and that the tenant cannot afterwards complain of the effects of the smoke issuing from the works then existing or thereafter to be added, which he must have foreseen, and of which he did not complain. The case is simple; it is unnecessary to go through the evidence in detail; there is a conflict of testimony as to whether the acquiescence of Jacob Williams, the former tenant, under whose assignment the defendant holds a portion of the land, was obtained by his trusting to an assertion of the plaintiff's sons, that they were in possession of a patent process by which copper smoke would be rendered innocuous; it is unnecessary to consider that, for, upon the fullest concession to the plaintiff of the truth of all the facts he alleges, his case wholly fails upon the merits, and the facts upon which he relies do not justify the legal inference he attempts to draw from them. The roasting furnaces are said to be those which originally produced the injury. The original number of these was small. They were increased, and since the trial at law others have been added. The evi-

dence shews that it was not until 1853 that any perceptible damage was sustained from the works, and even then it must have been slight. It is impossible to hold that it can be reasonably contended that, because a man has acquiesced in the erection of works which have produced little or no injury, he is not afterwards to have any remedy if by the increase of the works he sustains a serious injury. But this is what the plaintiff must establish; nay, more, he must satisfy the Court that it ought to interfere to debar his opponent from his legal remedy, and prevent him from obtaining that compensation at law which he would *prima facie* be entitled to. I am unable to acquiesce in the argument that the defendant must be held to have foreseen and to have assented, as a probable consequence, to the great and injurious addition which has been made to the works. The highest that it can be put is, that he assented to what was done, and to the consequences that are necessarily to be derived from that construction, but no further. The consequence of so holding would be most injurious. Such a construction would also be unwarranted by any authority. It would follow, that the partial obscuration of an ancient light assented to involves its complete and total obscuration, and that any easement assented to might be increased at the pleasure of the grantee, provided it could be shewn that the increase was a probable consequence of the use of the easement. But even to the extent of the first limited statement of the proposition I do not assent. It may well be that a person's assent is given under an erroneous opinion and view, and in ignorance of its consequences. Is that mistake of a fact to bind him thenceforward and for ever? I think not; this Court holds that a man is not to be considered bound by an election which he has made in ignorance or mistake of actual facts. Is a man to be bound by an acquiescence made in ignorance or mistake of actual facts? I think not. In this case there is this important circumstance to be borne in mind. Can the Court replace both parties in the situation they were in when the first act was done by the one side and acquiesced in by the other?

If it can, it may probably be the duty of the Court to do so; but if the Court cannot replace the parties in the situation they were previously in, its usual course is to decline to interfere altogether, and accordingly here, as I have stated, if the defendant were plaintiff seeking for an injunction I should, upon the facts, leave him to his legal remedy; but it is an error to suppose that the opposite proposition holds good, that because the Court would not interfere to assist the tenant of the adjoining lands, it will therefore interfere to assist the plaintiff against the tenant. The evidence satisfies me that the defendant did not know what the injurious consequences would be to his crops and flocks. The most favourable way in which I can put it for the plaintiff is, to believe that he was equally ignorant, for if the plaintiff knew the consequence and the defendant did not, then, either intentionally or unintentionally, the plaintiff was obtaining an undue advantage over the defendant; but if they were both equally ignorant of the consequences, why is the defendant to be made to suffer for ignorance more than the plaintiff? Why is his consent to the erection of works which were not expected to injure, and did not injure the lands at that time, to confer upon one the right to erect additional works which will destroy the whole property, and entail upon the other the incapacity of making any objection or obtaining any remedy. It is impossible to say that the defendant and Jacob Williams, under whom he claims, ever assented to the erection of any works of the extent to which they have been subsequently made; his assent was to the limited extent in which they existed, and that cannot be enlarged by any such construction. If the proper remedy is a legal one, the defendant has deprived himself of all remedies except his legal remedies, but he has not deprived himself of these. Both parties have mutually taken the case out of the jurisdiction of equity. Injunctions and prohibiting orders have nothing to do with this case upon either side. Their rights and their defences are legal, to be estimated in damages, which up to the time of the trial have been ascertained at law, and which

for the future will be better ascertained at law than they can be in this court. It is necessary, in order to avoid misconception of my observation on the ignorance of the consequences of his assent being not binding upon the assenting party, to distinguish between this case, where the consequences of the act assented to are obvious and plain, and another where they are necessarily doubtful. This may be easily illustrated. For instance, if a neighbour permits a person to open a window overlooking his close, he knows the exact consequences of that permission, namely, that he is liable for ever to be overlooked, and that he cannot afterwards so build upon the close as to obscure that window. This is the extent of the injury that can be produced, and he cannot say that he did not foresee it. So, also, if he allows another a right of way across his meadow, he knows, and can accordingly estimate the extent of the injury that will result from such permission. But if a copyholder allows the lord of the manor to work the coals under the close of his copyhold, by offset out of the adjoining land, does it therefore follow that if the lord, in winning the coal, works so near the surface as to destroy the farm-buildings of the copyholder, he is to have no remedy at law for the injury so done to him? Could the lord be permitted to allege in this court that the copyholder must have known that the coal lay near the surface, and that such a result was probable from its having often occurred in the neighbourhood? Certainly not; but all such illustrations present a weaker case than that before the Court, and the strongest illustration of the distinction to be taken in such cases appears to be the case of works erected, which at first seem to be and are innocuous, and which afterwards, by addition, become seriously injurious to the proprietors of the neighbouring lands. This is exactly a case in which equity declines to interfere upon either side, and leaves the parties to their legal rights and legal liabilities. The case of the plaintiff, therefore, fails, and the motion must be refused, with costs.

WOOD, V.C. }
March 21, 22. } KEER v. BROWN.

Fines and Recoveries Act—3 & 4 Will. 4. c. 74.—Protector—Feme Covert.

The 24th section of the Fines and Recoveries Act (3 & 4 Will. 4. c. 74.) is retrospective as well as prospective, and therefore a married woman having an estate settled to her separate use by an instrument executed before the passing of the act is alone a sufficient protector of the settlement.

By an indenture of appointment and release, dated the 23rd of April 1805, certain freehold hereditaments were settled to the use of trustees during the life of Esther Moore, upon trust for her separate use, and after her decease to the use of John Bedwell, Mary Goldsmith, Martha Bedwell and Elizabeth Bedwell, during their respective lives, in equal shares, as tenants in common (subject, as to the estate for life of the said Mary Goldsmith therein, to the proviso thereafter contained respecting the same), with remainders to the use of all and every his or her respective child or children, as tenants in common in tail, with benefit of survivorship, with remainders over; and it was declared that the estate for life thereinbefore limited to the said Mary Goldsmith should not be subject or liable to the power, control, debts, engagements or incumbrances of her husband in any manner whatsoever, and that her receipts alone should be sufficient discharges.

By the same indenture power was given to Esther Moore, notwithstanding her coverture, by will, to determine and make void all and every or any of the uses, &c. thereinbefore contained of and concerning the same hereditaments, and to appoint new uses as she should think fit.

Pursuant to the power above stated, Esther Moore did, by her will, dated the 20th of May 1811, revoke the uses of the settlement by the above indenture limited, and appointed that all the said hereditaments should immediately after her decease (subject to certain restrictions not material to be mentioned), go, remain and be to such and the same uses, &c. as in the said indenture were expressed concerning the

same, but so as if John Bedwell and his issue had not been introduced. And the testatrix also directed that the life interests limited to Mary Goldsmith, Martha Hayward and Elizabeth Bedwell, then Elizabeth Last, should be subject to the like restriction, for their separate use, as in the same indenture were contained as to the life estate of Mary Goldsmith; and that all such life interests should be without power of anticipation.

Esther Moore died in 1818, without having revoked or altered her will.

Mary and William Goldsmith had seventeen children, four of whom died infants and without having been married before the year 1841.

On the 10th of October 1841 Eliza Goldsmith, one of the children of Mary and William Goldsmith, intermarried with James Lenton.

By an indenture, dated the 2nd of November 1841 (duly acknowledged and enrolled for the purpose of barring estates tail), J. Lenton and Eliza his wife did "with the consent of the said Mary Goldsmith as protector of the settlement" release and dispose of all the one undivided thirteenth part or share of the said Eliza Lenton, of and in the said one undivided third part or share of the said Mary Goldsmith of and in the premises, subject to the life estate of Mary Goldsmith therein, unto Thomas Cree, his heirs and assigns. William Goldsmith, the husband of Mary Goldsmith, was alive at the time of the execution of this deed, but he did not consent to or execute the same.

In May 1849 a suit was instituted for partition of the property, and in 1857 a decree was made by which two messuages, part thereof, were allotted to the plaintiff in the present suit and her husband, since deceased; and it was ordered, that all parties, including Cree, should join in the conveyance.

In 1858 the plaintiff put up the two messuages for sale by auction, and the defendant became the purchaser, but raised an objection to the title, on the ground that under the 3 & 4 Will. 4. c. 74. s. 31. W. Goldsmith was at the time of the execution of the indenture of the 2nd of November 1841, either alone or jointly with his wife, protector of the settlement, and

ought to have consented thereto. The plaintiff, on the other hand, contended that under section 24. of the same act Mary Goldsmith was sole protector of the settlement, and the concurrence of her husband was unnecessary.

The matter now came before the Court in the form of a special case, the questions being, first, whether, at the date of the indenture of the 2nd of November 1841, W. Goldsmith and Mary his wife together were, or Mary Goldsmith alone was, protector of the settlement; secondly, whether, by means of the disposition in the indenture of the 2nd of November 1841 contained, all persons, whose estates were to take effect after the determination of the estate of Eliza Lenton, were effectually barred; and, thirdly, whether, in a suit for specific performance, the Court would force a title depending upon such a disposition upon an unwilling purchaser.

The case was argued by—

Mr. Giffard and *Mr. B. B. Rogers*, for the plaintiff; and by—

Mr. Willcock, for the defendant.

They referred to the 3 & 4 *Will. 4. c. 74. ss. 22, 23, 24, 27, 29, 31. and 34, and cited—*

In re Wainwright, 1 Phil. 258; s.c. 12 Law J. Rep. (N.S.) Chanc. 426.
1 *Rop. H. & W.* 3.

March 22.—Wood, V.C.—I think, after having heard the able arguments which have been addressed to me on both sides, that the construction of this act is clearly that which is put upon it by the plaintiff. In the first place, I observe that the 15th section of the act gives to every tenant in tail full power, in the largest terms, to dispose of the entailed lands for an estate in fee simple, as against all persons claiming by force of the estate tail, and also as against all persons whose estates are to take effect after the determination, or in defeasance of such estate tail. The 22nd section seems to be the first section which introduces the novelty of a protector. Then, from that clause to the 33rd, there is a series of sections, mostly defining who, in certain cases, shall be the protector. Then the 34th section provides, in effect, that where there is a protector his consent

shall be requisite to enable an actual tenant in tail to create a larger estate than a base fee, so that, although the first clause gives a tenant in tail full power over the estate, it nevertheless points to the clauses thereafter in the act contained, that is, amongst other things, to the whole machinery of the protector, and the consent of the protector in all cases where that is necessary. The 22nd section begins this set of clauses, and it points to all settlements, future as well as past. It begins by enacting, "That if at the time when there shall be a tenant in tail of lands under a settlement, there shall be subsisting in the same lands, or any of them, under the same settlement, any estate for years, determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this act deemed the prior estate), shall be the protector of the settlement." Here is the first definition of the officer whose consent is necessary to give complete effect to the conveyance; and who, I may observe in passing, is a complete substitution for the person who, under the old law, would have been tenant to the *præcipe*. The later part of the clause confirms the right once acquired, although it may have been parted with.

Now, the first general section, the 22nd, being prospective and retrospective, all these various clauses which follow (as it appears to me in the shape of provisos) must be equally extensive, namely, prospective and retrospective, until you arrive at something that points to the contrary. The first proviso tacked on to this general clause is in the 23rd clause, which enacts, "that where two or more persons shall be owners, under a settlement within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the

owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share." That must be both prospective and retrospective. There is nothing at all indicating any intention that it should be otherwise. When you come to the next section, the 24th, there is not the slightest indication there of any change of intention in the legislature, or of any limitation of the class of settlement to be dealt with. It enacts, "That where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled to her separate use, she and her husband together shall, in respect of such estate, be the protector of such settlement, and shall be deemed one owner." It appears to me that there is nothing in this part of the section in the slightest degree indicating that it is not to extend as far as the 22nd, and to apply to settlements executed before the act equally with those executed afterwards. The section proceeds:—"But if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall, in respect of such estate, be the protector of such settlement." If, therefore, the question had stopped there, I think the case would have been too clear for argument. It seems to me plain that the whole of this set of clauses have been carefully framed to apply to all cases.

It is quite clear, as Mr. Rogers has said, that, grammatically, I cannot split the two branches of the alternative, and say that as to settlements not to the wife's separate use the clause is prospective and retrospective, and as to settlements to the separate use it is prospective only. The legislature deals with the case of husband and wife; and considering it a case in which the general clause might create a difficulty, it explains the position of husband and wife by saying, where it is settled to her separate use she alone shall be protector; where it is not so, then she and her husband together shall be protector. The act, however, does not stop here, and it becomes necessary to examine the clauses

which follow. The 25th and 26th sections are not material to the present question. Then, when I come to the 27th, for the first time I find a provision containing an express exception in the case of settlements made before the time fixed for the act to come into operation, confirming positively the presumption that the preceding clauses, as to which no such exception is expressed, were intended to apply to the case of settlements executed before the passing of the act, unless they should happen to fall within this exception. The 27th section is this:—"Provided always, and be it further enacted, that no woman in respect of her dower, and (except in the case hereinafter provided for, of a bare trustee under a settlement made on or before the 31st of December 1833) no bare trustee, heir, executor, administrator or assign, in respect of any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement." Now, the exception comes here. The legislature has dealt in a large and general manner with the question as to who shall be protector in the 22nd section; in the 23rd it deals with the special case of joint owners; in the 24th with the special case of husband and wife; in the 25th with that of estates confirmed or restored by settlement; and in the 26th with that of leases at rent created by settlement; and then we come to the 27th, which deals with the case of a bare trustee. It provides that no bare trustee shall be protector of a settlement, "except in the case thereafter provided for" (meaning by the 31st section) "of a bare trustee under a settlement made on or before the 31st of December 1833."

Nothing is said expressly as to whether or not a husband is to be deemed to be included under the general term, "bare trustee." And the question whether the act is to be so expounded as to include the specific instance under the general term is one, as to which the observations cited by Lord Justice Turner from the old report in *Plowden* (1), are plainly appli-

(1) *Stradling v. Morgan*, *Plowd.* 204; referred to in *Hawkins v. Gathercole*, 6 *De Gex, M. & G.* 1: s. c. 24 *Law J. Rep. (N.S.) Chanc.* 332, 338.

cable. And if, on comparing one part of the act with another, I arrive at the conclusion that such was the intent of the legislature, then I may, and must, expound "acts which are general in words, to be but particular, where the intent is particular." The frame of the act appears to be this:— Dealing with the general question of the protector in the 22nd section, all the following sections are tacked on by way of proviso down to the 35th section, where the framers of the act seem to have exhausted their particular and special provisions on that subject. The 31st section provides for the excepted case, to which reference is made in the 27th. It provides that "where under any settlement of lands made before the passing of this act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry, or other writ for suffering a common recovery of such lands, for the purpose of barring any estate tail, or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement." Now, no doubt, some little difficulty does arise on the words of this clause, for where the legal estate in lands is limited to a married woman, to her separate use, it is true that under the old law, as it existed before the act was passed, her husband would have been the proper person to make the tenant to the *præcipe*; and it is also true that he would be, in a sense, a bare trustee. But the question I have to determine is, whether he could be a bare trustee within the meaning of the term, as employed by the legislature in the act before me; and it is plain to me that he would not, for if I once arrive at the conclusion that the 24th section is throughout retrospective as well as prospective, and applies to settlements executed before as well as to those executed after the passing of the act, then the wife alone is, by that section, to be, in respect thereof, if the estate is settled, the protector of the settlement. And independently of that consideration, it would, as it seems to me, admit of considerable question upon

the construction of the 31st section itself, without the aid of the 24th, whether a husband, under the circumstances supposed, could be deemed to be a bare trustee within the meaning of the 31st section; or, at all events, whether he could be deemed a bare trustee under the settlement; both of which conditions are essential in order to bring the case within the 31st section of the act. In the 22nd section, the legislature thought it necessary to insert an express provision, that a husband's estate by the curtesy in respect of the estate tail, or of any prior estate created by the same settlement, should be deemed a prior estate under the same settlement, and that an estate by way of resulting use for the settlor should be deemed an estate under the same settlement, within the meaning of that section. It seems to me that it is not hypercritical to infer, in the absence of any similar proviso in the case of a husband to whose wife lands had been settled before the act for her separate use, that he was not intended to be included in the exception contained in the 31st section in favour of a bare trustee. Still less probable is the contention, that a husband so situated was intended by the legislature to be included under the expression "a bare trustee under the settlement," for, as it was argued, it would amount to an absurdity to say that a husband is a trustee under the settlement, when the settlor has done his utmost expressly to exclude him. But, irrespective of these considerations, it appears to me on the whole scheme of the act, the 22nd section enunciating the general canon and applying to past as well as future instruments, that the 24th in like manner applies throughout to the case of settlements executed before as well as to those executed after the act, and on that ground the case is so clear in favour of the title, that in a suit for specific performance the purchaser would be decreed specifically to perform his contract. Therefore, all the questions will be answered in the affirmative.

M.R. }
 Jan. 21; } READ v. STEDMAN.
 Feb. 11. }

Executor—Undisposed of Residue—Presumptive Trust—Illegitimate Testator—Crown.

A testator, who died in 1855, by his will gave all his property and the residue of his estate to three persons, upon trust, to pay various legacies; he also gave legacies of unequal amounts to each of his trustees, whom he also appointed executors. The trustees were also empowered to appoint new trustees in the place of those unable to act. The testator afterwards gave an additional legacy to one of his executors. He was illegitimate, and died without having ever been married:—Held, that the undisposed of residue did not belong to the executors, but lapsed to the Crown, and that it was unaffected by the 11 Geo. 4. & 1 Will. 4. c. 40.

Chambers Hall, by his will, dated the 8th of February 1855, disposed of his property as follows:—"I give, devise and bequeath unto Charlotte Read, the widow of my late dear friend David Charles Read, and unto Mary Read, daughter of the said Charlotte Read, and unto my friend Charles Henry Stedman, and to the survivors and survivor of them, and to the executors and administrators of such survivor, all my $\text{\$}$ l. per cent. consolidated Bank annuities, all my long annuities, and also all my Royal Exchange stock, together with all the rest, residue and remainder of my property, of what nature or kind soever, and to which I am now in my own right, or to which I may or shall hereafter be or become entitled to, either in possession, reversion, remainder or expectancy, upon trust, in the first place, to collect and get in all my said estate, and convert the same into money, and thereout to pay all my just debts and funeral and testamentary expenses, and the expenses of proving this my will; and, in the next place, to raise and pay the several legacies hereinafter given and bequeathed, or which I may hereafter give or bequeath by any codicil to this my will." The testator then gave 3,000*l.* consols to his sister Eliza Sterling and various other legacies, and he gave 500*l.* to Charlotte Read, 500*l.* to

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Mary Read, and 350*l.* to C. H. Stedman; and he appointed Charlotte Read, Mary Read, and C. H. Stedman executrices and executor of his will, and directed that C. H. Stedman should be employed as the attorney and solicitor of the trustees and executors for the time being, and that he should be paid all his professional and other costs, charges and expenses, notwithstanding his being a trustee and executor; and there was the usual power for the appointment of new trustees in the place of any dying, declining, or becoming incapable to act in the execution of the trusts of his will. The testator then declared that every trustee and executor should be charged with such monies only as he should receive, and that each should be entitled to retain his costs and expenses attending the execution of the trusts, or in relation to the will. The testator on the same day made a codicil, simply giving a pecuniary legacy. He also made a second codicil, dated the 14th of June 1855, whereby, after revoking some charitable legacies, the testator gave as follows:—"I bequeath to Charlotte Read, widow of my only late dear friend D. C. Read, late of Salisbury, artist, in addition to what I have before given her by my will, the sum of 1,000*l.* consols for her sole use and benefit, in testimony of my gratitude, and as an additional mark of my respect and esteem for her, in waiting and attending upon me with such continued, undeviating kindness, throughout the whole period of my long and painful illness, with which it has pleased God to afflict me."

The testator was illegitimate; he died shortly after the date of the last codicil, without having been married. The will was proved by Charlotte Read and C. H. Stedman; power being reserved to Mary Read to come in and prove. The question now discussed was as to the right to the residue undisposed of.

Mr. R. Palmer and Mr. Southgate, for Charlotte Read.—The testator gave his personal estate and the residue to his executors; a limited trust was attached, but this was satisfied by the payment of debts, and by the appropriation and application of the legacies. No residue was mention-

ed as undisposed of; it must, therefore, be presumed, that the gift of the residue to the executors was for their own benefit. The testator was aware that he had no next-of-kin, and he must also have been aware that a residue would remain after debts and legacies were satisfied. His executors were his personal friends; he must, therefore, have intended to benefit them, especially as one was an infant when the will was made. There was no intention to die intestate; the apparent intention was an entire disposition of the property. It was only when there was an undoubted intestacy that the Crown could claim; it could not claim against the executors; as therefore the trusts were satisfied, the gift to the executors became absolute for their own benefit. It could not for a moment be presumed that a trust would be created for the Crown.—

Williams v. Roberts, 27 Law J. Rep. (N.S.) Chanc. 177.

King v. Denison, 1 Ves. & B. 260.

Dawson v. Clark, 15 Ves. 409, 416; s. c. 18 Ves. 247.

Mapp v. Ellcock, 15 Sim. 568; s. c. 16 Law J. Rep. (N.S.) Chanc. 425; 2 Phill. 793; 18 Law J. Rep. (N.S.) Chanc. 217; 3 H. L. Cas. 492.

Mr. Lee and Mr. Miller, for Charles Henry Stedman, referred to—

Pratt v. Sladden, 14 Ves. 193.

11 Geo. 4. & 1 Will. 4. c. 40.

Mr. Whitbread, for Mary Read.—When this lady was appointed an executrix she was an infant; the appointment could, therefore, only have been with an intention to confer a benefit upon her, through the gift of the residue.

Mr. Wickens, for the Crown.—The law formerly left this question in doubt, and an inference was raised in favour of the executors. It was, however, now clear, that a gift to executors upon trusts which did not exhaust the whole beneficial interest, did not give them the undisposed of residue. Such was now the rule of law, and there was no context in the will to alter it. Had the testator intended the executors to take, he would have made a different disposition of his property: the disposition which he had made was incon-

sistent with that idea. The executors took legacies of different amounts under the will; they were to be indemnified from loss, they had power to deduct their expenses, and they were to be charged with no more than they received. The residue, therefore, lapsed to the Crown.—

Clennell v. Lewthwaite, 2 Ves. jun. 465.

Lynn v. Beaver, Turn. & R. 63.

Russell v. Clowes, 2 Coll. 648.

Robinson v. Taylor, 2 Bro. C.C. 589.

Mr. Palmer, in reply, cited

Southouse v. Bate, 2 Ves. & B. 396.

Feb. 11.—THE MASTER OF THE ROLLS.

—The question is, whether the executors of the testator take the residue of his estate which is not disposed of by his will. Although the will is dated the 8th of February 1855, and the 11 Geo. 4. & 1 Will. 4. c. 40. was passed in 1830, that statute does not affect this question; because the legislature simply directed that the residue of personal estate undisposed of by a testator should, in case there was no evidence of a contrary intention to be discovered on the face of the will, go to the next-of-kin, and not to the executors. In effect, it merely shifted the burden of proof from the next-of-kin to the executors. But in this case, the testator left no next-of-kin, and, therefore, the statute does not apply; but the question arises between the Crown and the executors. The question is exactly the same as it would have been if the will had been made and the testator had died before the passing of that act, and had left next-of-kin. The circumstance that legacies of different amounts are given to the executors, does not in the slightest degree prejudice their claim to the residue. The property, however, is given to them in trust; it is not disputed, and it is settled by numerous authorities, that where property is given to persons as executors upon trust, they cannot take the residue undisposed of, so far as those trusts either fail or do not apply; but it goes to the next-of-kin. But a distinction is taken in *Dawson v. Clark*, which is applicable to this case. There, as here, the gift of the property was to certain persons by name, in trust, and in a subsequent part of the will the testator appoint-

ed the same persons executors; and Sir William Grant says, "There is no connexion between the appointment of executors and this trust in the first part of the will, nor are there any words accompanying their appointment or subsequent to it, which imply that the testator considered them as subject, in that character, to any other trust than the law imposed upon them, or as having any other interest than that which the law gives them. They are, therefore, entitled to the residue for their own benefit." The question was brought before Lord Eldon by appeal, who, upon the first hearing, expressed an opinion against the decision, giving at the same time reasons for the distinction, which no one can read without feeling the great force of them. His Lordship, however, took time to consider his judgment, and, after a year and five months, affirmed the decision of Sir William Grant, upon grounds on which the Master of the Rolls had expressed no opinion. Subsequently the question came incidentally before Sir William Grant, in *Southouse v. Bate*; when, after referring to Lord Eldon's judgment, he expressed his continued adherence to the opinion he had previously expressed in favour of the peculiar distinction upon which he had come to his decision. The question was again raised in *Russell v. Clowes*, when the opinion of Sir William Grant was supported, after a long and careful argument. This decision was again confirmed in *Mapp v. Ellcock*; it was, however, taken by appeal to Lord Cottenham, who concurred with the observations of Lord Eldon, and reversed the decision. This case was carried to the House of Lords, who affirmed the decision of Lord Cottenham; so that it is now to be considered settled by the highest authority, that the distinction upon which Sir William Grant rested his decision cannot now be supported. I cannot help observing, though I do not think it necessary to refer in detail to the observations of Lord Eldon in the case before him, that they appear to be wholly unanswered, and the observations of Lord Cottenham in *Mapp v. Ellcock* appear to be such as completely to govern the present case, if it were *res nova*, and not already adjudicated

upon; and that no substantial answer could be given to these observations. The words are to this effect:—"Sir William Grant's opinion in *Dawson v. Clark*, and the Vice Chancellor's opinion in *Mapp v. Ellcock*, do not question the rule that a gift to executors as such, in trust, excludes their claim to any beneficial interest; and that if the property be left to any third persons in trust, for purposes which fail, the executors have no claim; but it is contended that if the property, instead of being left to the executors in trust, or to third persons in trust, be left to the executors, not as such, but in their own names, upon trusts which fail, or do not exhaust the property, those trustees, in their character of executors, are entitled to the residue as incident to their office. I cannot see any principle for this distinction. If the official and private characters of the persons appointed executors are to be considered as distinct, it would seem to be immaterial whether the trustees were the same persons who were named executors, or strangers; and if the two characters are to be considered as united, the case of a gift to executors in trust is complete. It seems to be admitted that *Robinson v. Taylor* would negative the supposed distinction, unless a gift in trust 'to the executors hereinafter named' be so different from a gift to persons by name, who are afterwards appointed executors, as to operate as a transfer of the residue from the next-of-kin to the executors. It would be to be regretted if the title to property were to depend on such unsubstantial distinctions as these." Now, there is no word in this passage in which I do not concur. If the property is given to the executors by their names—in this case to Charlotte Read, Mary Read and C. H. Stedman—not appointing them executors, but treating them quite distinctly from parties having any trust, it is quite clear they could take nothing respecting that property which was given to them in trust, except so far as the trusts were declared. If it is given to them in their character of executors, then it is also clear, upon the decided cases, that they cannot take it; and if the rule is to be applied to the present case, it is conclusive upon the point; and all the various passages contained in the will

which relate to the duty of executors relative to this property would make me hesitate long, even if the case of *Mapp v. Ellcock* had not been decided as it was, before I could have followed *Dawson v. Clark*, and the subsequent decision which followed Sir William Grant's rule in that case. From these passages, and from taking the whole will together, it is conclusively shewn that the testator did not intend his executors to take the property beneficially beyond the amount of the legacies he gave to them. I must therefore declare that the Crown is entitled to the residue.

KINDERSLEY, V.C. }
Feb. 9. } GOMPERTZ v. POOLEY.

Common Law Procedure Act—Equitable Plea.

The 83rd section of the Common Law Procedure Act, giving a right to plead an equitable defence, is only permissive, and not compulsory; and a defendant at law who has not exercised his option of putting in an equitable plea may come for an injunction to restrain the action, as he might have done before that act.

This was a motion for an injunction to restrain an action at law upon two bills of exchange, and to restrain the defendant from continuing certain proceedings in bankruptcy. It appeared that the plaintiff was the holder of two bills of exchange for 150*l.* each, dated the 16th and 23rd of September 1858 respectively, and payable at four months after date. The bills were accepted by George Duyters, and were handed over by the plaintiff to the defendant; but they were not indorsed by the plaintiff. A guarantie was given by the plaintiff to the defendant in the following form:—

“London, September 24, 1858.

“Mr. A. G. Pooley,—In consideration of your receiving from me this day two bills, accepted by Mr. G. Duyters for 150*l.* each, dated September 16, at four months, and September 23, and for which you have given me valuable consideration, I engage, in the event of the said bills not being paid

at maturity, to pay the same. Particulars of bills:—September 16, 1858, 150*l.* due January 19, 1859; September 23, 1858, 150*l.* due January 26, 1859.

“(Signed) Henry Gompertz.”

Some correspondence subsequently took place between the parties, and on the 22nd of November the defendant wrote to the plaintiff, agreeing to cancel half the guarantie on receiving his I O U for 20*l.* The plaintiff gave the I O U as agreed upon, and on the 19th of January 1859, the defendant sent a notice in writing to the plaintiff, that the first of the bills had been presented and dishonoured. The plaintiff then wrote to the defendant, appointing an interview for the next day, in order to pay the amount of the bill, but the defendant did not attend. The defendant then gave another notice to the plaintiff that the second bill had been dishonoured. The plaintiff remonstrated against this further application, and offered to pay whatever was fairly due from him. On the 1st of February the plaintiff received a demand and notice under the Bankrupt Law Consolidation Act for payment of the whole 300*l.*; and an action for that amount was commenced against the plaintiff in the Court of Common Pleas. The plaintiff then filed this bill, alleging that, at the time of giving the guarantie, it was agreed that if the bills should be paid away “without recourse” to the defendant, or without requiring his indorsement, or if the defendant should take the risk upon receiving a money consideration from the plaintiff, the guarantie should be delivered up, and the plaintiff freed from liability on payment of 40*l.*; but if the guarantie should remain in force as to one bill only, then on payment of 20*l.* The plaintiff alleged, that he was advised the only defence he had to the action was an equitable plea, and he therefore prayed the injunction to restrain the action and the proceedings in bankruptcy, on payment of 150*l.*, the amount of one of the bills, for which he did not dispute his liability.

Mr. Roxburgh, in support of the motion, contended that the plaintiff was justified in filing this bill, and in declining to take advantage of the permissive clause as to filing an equitable plea to an action, con-

tained in the Common Law Procedure Act. He cited *Kingsford v. Swinford* (1).

Mr. C. Swanson, for the defendant, submitted that this was a case contemplated by the Common Law Procedure Act, and the plaintiff was bound to take the course there pointed out, and file an equitable plea, if he had a defence of an equitable nature—*Wild v. Hillas* (2).

Mr. Roxburgh was not called upon to reply.

KINDERSLEY, V.C.—In my opinion the injunction ought to be granted in the terms of the notice of motion. In the case of *Kingsford v. Swinford* I had occasion to consider this very question, as to the effect of the Common Law Procedure Act in giving power to a defendant to plead an equitable defence to an action. In that case the view which I took of the statute was, that it was permissive and not compulsory; and that it did not interfere with the right which a defendant at law had before the statute, in case he had an equitable defence, of coming to this court for an injunction to restrain the action. In the case of *Wild v. Hillas* the defendant had exercised his option, and had pleaded an equitable defence to the action; and the parties were at issue upon that plea. I was, therefore, of opinion that he could not come to this court to restrain the action after having exercised his option. Here the plaintiff in equity comes for the injunction without pleading to the action, and I think that he is entitled to the order in the terms of the motion; that is, upon paying the defendant 150*l.*, the amount of one bill not covered by the I O U, about which there is no dispute.

LOKDS JUSTICES. }
Feb. 10. } WYNNE v. HUGHES.

Jurisdiction—Courts General and Local—Stay of Proceedings.

The Master of the Rolls having decided that parties to a suit in a local court of limited jurisdiction could not apply to stay proceedings in a court of general jurisdiction, when part of the property in question

was situate out of the limits of the local court, on appeal, the Lords Justices ordered all the proceedings in this suit to be stayed, the plaintiffs here to have the conduct of the suit in the Court of limited jurisdiction, they appearing in that court for that purpose.

This was an appeal motion, from a decision of the Master of the Rolls, (reported ante, p. 283,) who had refused to make an order upon a motion asking him to stay all further proceedings in this court, on the ground that since the commencement of this suit another suit had been instituted by other parties, in the Chancery of the Court of the County Palatine of Lancaster, and a decree therein obtained for administering the same estate. It appeared that John Edwards, Esq., deceased, was the owner of freehold property in Lancashire, and in Cheshire, and elsewhere, out of the jurisdiction of the duchy court. In 1848, he executed a deed, vesting his property in H. W. Banner and T. Hughes, as trustees, for sale; and by deed of even date, he declared the trusts, the object being the liquidation of his debts and liabilities. Mr. Edwards died, in 1854, intestate.

The case was fully argued on appeal, and most of the cases cited on the hearing at the Rolls were referred to, and the Lords Justices directed the proceedings in the Court of Chancery to be stayed, the plaintiffs in this suit having facilities afforded them of attending the proceedings in the Chancery of the Court of the County Palatine of Lancaster, the costs being referred to the Vice Chancellor of the latter court. The order was in terms as follows:—"The parties moving, and Mr. Read undertaking to consent to an order that Mr. and Mrs. Wynne (the plaintiffs) shall appear in the Lancaster Chancery suit, and have the conduct of the proceedings there, and that the costs of the suit at the Rolls, including the costs of this motion, shall be costs in that cause, stay all further proceedings in *Wynne v. Hughes*. Liberty to apply."

Mr. Selwyn and Mr. Little were for the appellants; and—

Mr. Lloyd and Mr. F. O. Haynes supported the order of the Master of the Rolls.

(1) *Ante*, p. 413.

(2) *Ante*, p. 170.

KINDERSLEY, V.C. }
Feb. 22. } POTTS v. ATHERTON.

Legacy—Vested Interest—Death under Age—Annuity.

A testator gave a portion of his personal property to trustees, to invest the same in the securities therein mentioned, and pay out of the proceeds an annuity of 5l. to T. P., and apply the residue of the interest, &c. towards the maintenance and education of W. C. until twenty-one, and on his attaining that age to transfer the principal of the trust-monies charged with the said annuity of 5l. unto W. C. absolutely. But if W. C. should die before twenty-one, and during the life of T. P., then the trustees were to pay T. P. for life an annuity of 10l. in lieu of the 5l., and to pay the remainder of the interest during the life of T. P., as well as the principal after her death, to a third person absolutely. T. P., the annuitant, died before W. C., but W. C. died a minor:—Held, that the gift to W. C. was an absolute vested interest in him, and notwithstanding he died under twenty-one the estate was not divested, since the precise contingency of W. C. dying under twenty-one and during the life of T. P. never happened; that consequently the representatives of W. C. were entitled to the property.

James Pavitt, by his will, dated the 1st of June 1849, gave and devised two cottages at Worksop, and all other his real estate, to Simon Potts and Joseph Goy, the plaintiffs, their heirs and assigns, upon trust, to permit his sister-in-law Theodosia Pavitt and her assigns to receive the rents, issues and profits thereof for her life; after her decease to the use of the trustees and their heirs, until William Clark, the son of his housekeeper Harriet Clark, should attain the age of twenty-one years, upon trust, in the mean time, to pay and apply the rents and profits of the said hereditaments for or towards his maintenance, education and bringing up; and when he should attain twenty-one years, or in the event of his attaining that age during the life of Theodosia Pavitt, then from and immediately after her decease to the use of him, the said W. Clark, his heirs and assigns for ever. But in case the said W. Clark should depart this life before he

should have attained his age of twenty-one years, then the trustees were, from and after the decease of the survivor of them the said Theodosia Pavitt and W. Clark, to stand and be seised of the said hereditaments and premises, to the use of Samuel Atherton, his heirs and assigns for ever. And the testator gave and bequeathed all and singular his monies, securities for money, and the debts which might be due and owing to him at the time of his decease, to the said trustees, their executors and administrators, upon trust, after paying thereout all his debts and testamentary expenses, to lay out and invest the same in government funds or upon real securities, and upon trust to pay to the said Theodosia Pavitt and her assigns for life, from and out of the interest, dividends and annual proceeds of the said trust-monies, one annuity or clear yearly sum of 5l., free from all deductions, by two equal half-yearly payments in the year, the first of such payments to commence and be made at the end of six months after his decease; and upon trust to pay and apply the residue and remainder of the interest, dividends and annual proceeds of the said trust-monies, in or towards the maintenance, education and bringing up of the said W. Clark until he should attain his age of twenty-one years, and when and so soon as he should attain that age, upon trust to pay, assign and transfer the capital or principal of the said trust-monies, and all securities for the same, subject nevertheless to, and charged and chargeable with, the payment of the said annuity or yearly sum of 5l. thereinbefore given and bequeathed to the said Theodosia Pavitt for her life, in case she should then be living, unto him, the said W. Clark, for his own absolute use and benefit. But in case the said W. Clark should depart this life before he should have attained the age of twenty-one years, and during the life of the said Theodosia Pavitt, then the testator directed his trustees to pay to her from thenceforth for the residue of her life, from and out of the interest, dividends and annual proceeds of the said trust-monies, an annuity or clear yearly sum of 10l. in lieu of the said annuity of 5l., and to pay as well the residue and remainder of such interest, dividends and annual proceeds, from time

to time, as the same should become due and payable during the lifetime of the said Theodosia Pavitt, as also the capital or principal of the said trust-monies after her decease, unto the said Samuel Atherton, his executors and administrators, for his and their own absolute use and benefit, to whom he thereby gave and bequeathed the same accordingly. And the testator bequeathed all the residue of his goods, chattels and effects not before disposed of, unto and equally between the plaintiffs, his trustees, for their own absolute use and benefit.

The testator died on the 29th of July 1849, leaving Theodosia Pavitt and W. Clark him surviving.

Theodosia Pavitt, on the death of the testator, entered into possession of his real estate, and she died on the 18th of June 1851. W. Clark died in October 1858, an infant, under fourteen years of age. The plaintiffs, in pursuance of the directions contained in the will, during the life of W. Clark applied a sufficient sum in each year out of the rents and profits of the testator's real estate and the income of the trust fund, in the maintenance, education and bringing up of the said W. Clark; the annual income, however, exceeded the yearly expenses consequent upon maintaining and educating the said W. Clark, and at the time of his death there was in the hands of the plaintiffs a sum of money in respect of such annual income.

The questions arising upon the will were, whether the trust funds belonged to the defendant, Samuel Atherton, or whether the plaintiffs, the trustees, were entitled to retain such trust fund for their own benefit: and the representatives of W. Clark insisted that the trust fund vested absolutely in the said W. Clark, notwithstanding he died under twenty-one.

The bill prayed that the rights and interests of all parties in the trust fund and in the personal estate of the testator might be ascertained and declared.

Mr. Baily and *Mr. Nalder* appeared for the plaintiffs, and submitted that the gift to W. Clark was contingent upon his attaining twenty-one, and that as he had

died under that age, the gift was void; and since the contingency of W. Clark dying under age and during the lifetime of Theodosia Pavitt, in which case alone the defendant Atherton could take, had not occurred, the property went to the representatives of the testator.

Mr. Glasse and *Mr. Hobhouse*, for the defendant, contended that as W. Clark had died under twenty-one, that was the contingency upon which the estate became divested, and notwithstanding that he died after Theodosia Pavitt, the defendant was entitled to the whole property absolutely.

Mr. Giffard and *Mr. Southgate*, for the representatives of W. Clark, were not called upon to address the Court.

The following cases were cited for the plaintiff:—

Batsford v. Kebbell, 3 Ves. 363.
Watson v. Hayes, 5 Myl. & Cr. 125 ;
 s. c. 9 Law J. Rep. (N.S.) Chanc. 49.
Leake v. Robinson, 2 Mer. 363.
Vawdry v. Geddes, 1 Russ. & M. 203 ;
 s. c. 8 Law J. Rep. Chanc. 63.
Hanson v. Graham, 6 Ves. 239.

The cases cited for the defendant were

Wilson v. Mount, 2 Beav. 397.
Webb v. Hearing, Cro. Jac. 415.
Meeds v. Wood, 19 Beav. 215.
Pearsall v. Simpson, 15 Ves. 29.
Warren v. Rudall, 4 K. & J. 603; s. c.
 ante, 70.

KINDERSLEY, V.C. — I have looked through all the cases cited, and I do not find that there is one in which the decision had the effect in a case like this of divesting a prior vested gift. I consider that the gift to W. Clark is an absolute vested interest; and supposing that to be the case, I think I may dispose of the case without further argument. The question then, in the first place, is, whether there is a gift to W. Clark contingent upon his attaining twenty-one, or whether it is an absolute vested interest in him. It appears to me that it is an absolute vested interest. It is a gift of a portion of the estate described thus: "All and singular my monies, securities for money, and the debts which may be due

and owing to me at the time of my decease unto the said S. Potts and J. Goy, their executors and administrators, upon trust, after payment of debts, to lay out and invest the same in the stocks or upon real securities, and upon trust to pay to Theodosia Pavitt and her assigns for her life, out of the proceeds of this property, an annuity of 5*l.*, by half-yearly payments; and upon trust to pay and apply the residue and remainder of the interest, dividends and annual proceeds of the said trust monies in or towards the maintenance, education and bringing up of the said W. Clark until he shall attain his age of twenty-one years; and when and so soon as he shall attain that age, upon trust, to pay, assign and transfer the capital or principal of the said trust monies, and all securities for the same, subject to and charged and chargeable with the payment of the said annuity of 5*l.* thereinbefore given to the said Theodosia Pavitt, unto the said W. Clark for his own absolute use and benefit." Is this, then, a vested gift in W. Clark absolutely, or is it contingent upon his attaining twenty-one? It is admitted that, if it was not for the gift of the annuity of 5*l.* to Theodosia Pavitt, it would be a vested interest; for it is a portion of the property separated from the general assets of the testator, and a trust to apply the income for his maintenance and education until twenty-one. If there were no direction as to education, it would still be a vested absolute gift; for though there is no direction to give him the capital till he attains twenty-one, it is still vested absolutely. The question then is, whether the gift of the annuity prevents this from being a vested interest, and it appears to me to come within those cases in which there is a gift of a limited portion of the income. The rule applicable to such cases is, that whatever is the capital given, if you give the income of it you do satisfy the exigency of the rule. Now, suppose this were a perpetual annuity of 5*l.*, it is quite clear that that would not prevent the gift from being a vested gift of the whole capital, which is given to W. Clark when he attains twenty-one. Instead of that, it is an annuity for the life only of Theodosia Pavitt; but if she survive the

time of his attaining twenty-one, she is to have the annuity nevertheless, and the capital is given to him on attaining that age, subject to the annuity; but if she dies before he attains twenty-one, then he gets the whole income applicable for his maintenance and education; so that, although this is only terminable with the life of Theodosia Pavitt, still that does not prevent the gift from being vested. Now this being, in my view of the case, a vested interest, the question arises, whether by the subsequent clauses that gift is divested in the event of W. Clark dying under twenty-one. The language is this:—"But in case the said W. Clark shall depart this life before he shall have attained the age of twenty-one years, and during the lifetime of the said Theodosia Pavitt, then I direct the said trustees to pay her from thenceforth for the residue of her life, out of the proceeds of the trust-monies, an annuity of 10*l.* in lieu of the annuity of 5*l.*, and to pay the residue of such proceeds from time to time as the same shall become due during the life of Theodosia Pavitt, as also the capital of the said trust-monies, unto the said Samuel Atherton, his executors and administrators, for his and their own use and benefit, to whom I hereby give and bequeath the same accordingly." Now, it appears to me that if this is not divesting a prior vested interest, there would be strong ground for saying that the introduction of the annuity was only to provide a fund, from which Theodosia Pavitt was to have the increased annuity; but I do not think there is any case to justify the argument, and that none of them amount to this—that where there has been a prior vested gift, and then a clause divesting the gift on certain contingencies expressed, the Court has ever been found to divest that gift, unless the precise contingency referred to should occur; and as the precise contingency has not happened, I think I am bound to come to the conclusion that neither the plaintiffs nor Atherton are entitled; but that the representatives of W. Clark are entitled to the fund.

Wood, V.C. }
 March 23 ; } *In re LOVELACE'S SETTLE-*
 April 19. } *MENT.*
 Lords Justices.
 June 3, 4, 14. }

Succession Duty Act, 16 & 17 Vict.
c. 51. ss. 2, 4, and 12.—General Powers
of Appointment.

It was held by one of the Vice Chancellors that the 2nd section of the Succession Duty Act, 1853, did not apply to the case of donees of powers; and that the 4th section of the same act did not operate by way of exception out of that section, but laid down the general rule to commence from a given time, for donee and predecessor in every case. Therefore where a settlor, having by a settlement executed prior to the time fixed for the coming of the act into operation, reserved to herself a general power of appointment, executed that power by will, and died after the act came into operation, his Honour held, that the case was governed by the 4th and 12th sections of the act, and the property was not liable to succession duty.

Held, upon appeal, reversing that decision, that the property was subject to the payment of the duty, and that the case was within the 2nd section of the act; that the 4th section had no application, nor did the 12th section have any bearing on the question.

By the settlement made upon the marriage of Maria Vanneck with Charles Lovelace, and dated the 21st of April 1817, Maria Vanneck assigned to trustees the one-fourth part or share of her, the said Maria Vanneck, in the monies to arise from the sale and conversion of such parts of the residuary real and personal estates directed by the will of her late father, Lord Huntingfield, to be sold as were not then sold, and also the one-fourth share in certain sums directed by the same will to be raised, upon trust, when and as they should receive the same, to invest it in government or parliamentary security. And it was declared, that the trustees should stand possessed of the money so to be invested, and of a sum of 12,000*l.* 3*l.* per cent. reduced annuities, transferred into their names by the said Maria Vanneck, upon

trust, after the marriage, to pay out of the interest and dividends 200*l.* a year to the said Maria Vanneck, during the joint lives of herself and her husband, for her separate use, and to pay the residue thereof to the husband; and in the event (which happened) of the said Maria Vanneck surviving her husband, upon trust to pay the interest and dividends to her for life, and after her decease, upon certain trusts, for the children of the marriage; and in the event of there being no children who should attain a vested interest, then that the said trust-monies, funds and premises, or the unapplied or unadvanced part thereof, should be and remain (but subject to a power therein contained for the said Charles Lovelace to dispose of 5,000*l.* thereof) upon such trusts, and to and for such intents and purposes, and with, under and subject to such powers, provisos and declarations as the said Maria Vanneck, at any time or times, and from time to time, notwithstanding her intended or any future coverture, or whether she should be sole or married, by any deed or deeds, or by her last will and testament in writing, should direct or appoint; and in default of any such direction or appointment as aforesaid the said trust-monies, funds and premises, or the unadvanced part thereof, should be and remain upon trust for such person or persons of the blood and kindred of the said Maria Vanneck (living at the time of her decease) as would by virtue of the Statute of Distributions have become entitled to her personal estate, in case she had died without having been married and intestate, and in the same shares and proportions as he, she or they would in that case have become entitled to the same.

Mr. and Mrs. Lovelace left England soon after their marriage, and became domiciled at Bordeaux. Mr. Lovelace died at that place, in March 1852. Mrs. Lovelace continued to reside at Bordeaux, after the death of her husband, until her own death, which happened on the 21st of April 1856. There were no children of the marriage.

By her will, dated the 15th of April 1852, Mrs. Lovelace bequeathed to the petitioners, M. Facioli and Madame Werth (who were natives of France, residing at

Bordeaux), the sum of 10,000*l.*, to be equally divided between them. The only property, except household furniture, &c. of which Mrs. Lovelace was possessed at her death, consisted of the trust funds comprised in the marriage settlement; and the question which arose on the petition was, whether legacy or succession duty was payable upon the 10,000*l.* in respect of this appointment by will. The right to legacy duty was given up by the Crown without argument.

Mr. Willcock and *Mr. J. Hinde Palmer*, for the petitioners, contended that no succession duty was payable.

The Solicitor General and *Mr. Hanson*, contra.

Mr. Willcock, in reply.

The following authorities were cited and referred to:—

Bainton v. Ward, 2 Atk. 172.

Cope v. Doherty, 4 Kay & J. 367; s. c. 27 Law J. Rep. (n.s.) Chanc. 600.

Thomson v. the Advocate General, 13 Sim. 153; s. c. 12 Cl. & F. 1.

Eccles v. Cheyne, 2 Kay & J. 676.

The Attorney General v. Staff, 2 Cr. & M. 124; s. c. 4 Tyr. 14; 3 Law J. Rep. (n.s.) Exch. 6.

The Attorney General v. the Marquis of Hertford, 14 Mee. & W. 284; s. c. 14 Law J. Rep. (n.s.) Exch. 266.

1 *Sugden on Powers*, 496, 6th edit.

Holmes v. Coghill, 7 Ves. 499; s. c. 12 Ibid. 206.

In re Cholmondeley, 1 Cr. & M. 149; s. c. 2 Law J. Rep. (n.s.) Exch. 65.

The Attorney General v. Pickard, 3 Mee. & W. 552; s. c. 7 Law J. Rep. (n.s.) Exch. 188; and in error, 6 Ibid. 348; s. c. 9 Law J. Rep. (n.s.) Exch. 329.

Reference was also made to the *Succession Duty Act*, 16 & 17 Vict. c. 51. ss. 2, 3, 4, 12; all of which are set out in the judgment of the Vice Chancellor.

WOOD, V.C.—The point to be determined on the petition in this case is simply whether or not succession duty is payable in respect of a bequest under a testamentary appointment made by the Hon. Mrs.

Lovelace, under a power contained in the settlement made previously to her marriage. By this settlement personal property to a considerable amount was settled; and in the events which have happened Mrs. Lovelace took a life estate, with an absolute power of appointment. The lady who made this testamentary appointment was domiciled in France at the time of her decease, and at the time of executing her testamentary appointment. She made an appointment, attested in the manner required by the settlement; and the appointment itself is undoubtedly effective. It is conceded, on the part of the Crown, that no legacy duty would be payable in a case of this description; but the question arises, whether under the Succession Duty Act succession duty is payable. The point seems to be a very short one; it was argued by the Solicitor General very tersely and briefly; and it depends, as it seems to me, simply upon three sections of the Succession Duty Act.

The difference between power and property has been so long established, that I was surprised to hear any argument attempting to treat this as the property of the lady, which she was thus disposing of by her power of appointment. No doubt there is a substantial difference, which is recognized in many respects by the Courts between a general power of appointment and a power of appointment amongst particular objects. In order to dispose of a property in which you have only a limited interest, but at the same time have a power enabling you to dispose of it, you may displace the original limitations of a settlement by the exercise of the power; else they will remain in full effect; you have no property which is subject to your power, but you have simply a power to displace the arrangements made by a settlement, and to substitute others in its room. There is a substantial difference between an unlimited and absolute power of substituting an entirely new series of limitations, and a mere power of saying in reference to particular classes of limitations, "I am the person to determine which of the classes of limitations shall take effect with reference to the property over which I have a control." The difference is, I say, substantial, and it was recognised in

the case of *Holmes v. Coghill*. Where a general power of appointment or a complete and absolute power of appointment is intrusted to a donee of a power, when such a power is executed the Court is enabled to say, you have displaced all the estates limited by the settlement, and you have made a certain disposition of the property; we now will fasten on that property over which you have exercised the control and ownership conferred upon you, and we will treat it as your property, for the purpose of drawing out of that property that which will be sufficient for the payment of your debts, before we allow it to pass according to the disposition which you have made by virtue of your power. That is a clear and substantial position. Both in the Legacy Duty Act and in the Succession Duty Act, unquestionably, as to all instruments taking effect after the particular period there mentioned, the legislature has acted upon this distinction, and it has provided that where there is an absolute power of appointment, the donee of the power shall be taken to be the owner from the moment at which he exercises the power. In the one case legacy duty is payable, in the other succession duty is payable in respect of the donee of the power being treated as the absolute owner from the moment that he takes upon himself to exercise that power. Now, with regard to a limited power, both the acts to which I have referred provide, that the persons taking under an appointment by virtue of a limited power shall be deemed to take under the donor of the power, and not under the person who exercises it. The point here arises, as I said, upon three sections of the Succession Duty Act, and it involves the question, how they are to be interpreted, looking at the general state of the law upon the subject. The first of these three sections of the Succession Duty Act, under which the Crown claims, is the 2nd. It runs thus:—"Every past or future disposition of property"—these are most general terms—"by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, either immediately or

after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, to any other person, in possession or expectancy, shall be deemed to have conferred, or to confer on the person entitled by reason of any such disposition or devolution, a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor or other person from whom the interest of the successor is or shall be derived." Now, if there were nothing else in the act of parliament I certainly think, interpreting this clause alone, and not looking to the other sections of the act (a mode of proceeding which is not open to me, for I must construe this act of parliament, like every other instrument, by all its parts,) I say, if it rested here, I think it would be extremely difficult for those who contend that succession duty is not payable, to say that it is not included within the general terms and provisions of this section. Certainly they are not so pointed to a particular case as might have been expected; and hence it affords a ground for the Court to say whether, on looking to the whole of the arrangements and dispositions made by the act relating to the succession duty, the true construction of the act ought to be a construction, which would include in this section all descriptions of property taken under a general power of appointment. Of course, under this 2nd section, a person taking under a general power of appointment would come in under these words: he would take "either originally or by way of substitutive limitation." These are the words that would carry the case where a general power was exercised. You might in a certain sense, although it might be expressed in much more apt terms—especially with reference to a general power of appointment—say the settlor has provided a certain series of limitations; he has provided such substitutive limitations as A. B, the donee of the power, may indicate, and it shall go in this course, unless A. B. in-

dicating some other course; and if he does indicate another course, then it shall go to such uses and purposes as he shall appoint, which is, in a sense, a "substitutive limitation." Therefore, in that case it would be found that, by the 2nd section, the successor would be the appointee under the power, and the predecessor would be the settlor, that is to say, the person creating the settlement. Now then, that being so generally, qualified only by the circumstance that the instrument may be executed at any time, however remote, but the interest must come into possession with reference to the decease of some person who shall depart this life after the passing of the act, one would conceive that the whole thing was disposed of and for ever settled (for throughout the act one finds the successor to be the appointee, and the predecessor to be the settlor), unless there were something by way of proviso, which would restrict the general operation of the words. What you find next is no such proviso, no limitation of this 2nd section. The 3rd section is totally different. The marginal note is, "joint tenants taking by survivorship to be deemed successors." I do not think it necessary to dwell upon this, except simply to observe, that the interposition of that section between the previous section and the next tends strongly to shew that the 4th section, which is the important one, was not intended by the legislature as a proviso, excepting a certain class of cases out of the operation of the 2nd, but was intended as a substantive and distinct provision, indicating, as it appears to me, really what is the intention of the legislature with reference to persons taking under a general power, and not saying that that is an exception out of the former clause. This affords, as it appears to me, I confess, with regard to the construction to be put upon the 12th section, which I shall come to presently, an indication that the legislature did not intend by the words of the 2nd section—although large enough, uninterpreted by anything else you find in the act—to include the particular case in question, and did not intend to deal with the case of a disposition by virtue of a general power. I find that the 4th section is this:—"Where any person shall

have a general power of appointment, under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed, as a succession derived from the donor of the power." The opening portion of this section, stopping at the words "over property," is very awkwardly worded; but it is so worded that I think it impossible in grammatical construction to read the words, "taking effect upon the death of any person dying after the time appointed for the commencement of this act," as applying to anything else than the instrument making the disposition. The reason why I say it is impossible grammatically to interpret it in any other way is, that after the long parenthesis I have just read, I find the words, "over property"; and hence I hardly see any other way in which it can be construed. One must throw out the intervening sentence which is printed between the two commas, and consider the words "power of appointment" as followed by the expression "over property." I think, therefore, it is plain by this section that the legislature, for some reason or other, has restricted the operation of the succession duty, with reference to the execution of powers of appointment, to cases which shall take place under dispositions of property taking effect on the death of some person dying after the time appointed for the commencement of this act; in other words, either to wills taking effect, or to settlements made, after the commencement of the act. The effect of the section is, that the donee of a general power shall be deemed to be the predecessor, and that the appointee shall be deemed to be the successor; that the donee of a particular power shall not be the predecessor, but that the settlor shall be the predecessor, and the appointee shall be the successor. Now, I will turn to the 12th section of the act, and when I have looked at that, I think I shall have looked at everything that is necessary for the determination of this case. The words are,

"Where any person shall take a succession under a disposition made by himself." That is the case before me. This lady, Mrs. Lovelace, made a settlement when she was Miss Vanneck; it was a disposition made by her. The section proceeds, "then, if at the date of such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this act, and such person shall have died during the continuance of such disposition, he shall be chargeable with duty on his succession, at the same rate as he would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself, and no person shall be chargeable with duty upon the extinction or determination of any charge, estate or interest created by himself, unless, at the date of the creation thereof, he shall have been entitled to the property subjected thereto expectantly on the death of some person dying after the time appointed for the commencement of this act." Now, what is the result of section 4. and section 12. taken together, in cases where a disposition takes effect upon the death of any person dying after the time appointed for the commencement of this act. It is plainly this: that the donee of a general power created by himself over his own property will not pay any duty on exercising his power; that is plain and clear. Having these three sections before me, I thus put the case to myself:—The 2nd section is general in its terms; it may include, unless I get a clue to the construction by the subsequent words of the act, the case of an appointment under a general power; but the words do not so absolutely and necessarily include that, as to enable me to say that the subsequent section may not be an interpretation of the meaning of the legislature. In one sense it may be said, that a person is not entitled to any property by reason of the disposition mentioned in the section *simpliciter*; it requires that disposition and something more; it requires that disposition, *plus* a will or an instrument, which the person having that general power is obliged to execute. And,

therefore, although I might, under the words "substitutive limitation," if the word "disposition" stood quite alone, be bound to construe it as taking in every class, there might be indications in the act to shew it was not so intended. If I found a clause pointing in this general way, and making appointees under a general power successors to the person creating the power, that is, to the settlor, and I found nothing else in the act, then I might be bound to construe it in that way; but if I found another clause, not by way of provision or exception out of this, but another positive, distinct and separate clause, saying that the appointee under a general power should not be successor to the settlor, but that the donee himself of the power, when he executed a general power, should be the successor to the settlor, there would be at once such a contradiction, that I should say the general words of the 2nd section are not intended to apply to that case; the only doubt being this, whether, as this is applied to a particular case, namely, a settlement taking place, and a person dying after the particular time of the passing of the act, that ought to make any difference. I apprehend that it ought not to make a difference, unless the Court is satisfied that it is a proviso limiting this class of cases, and taking it out of the 2nd section. I have given a reason why, technically, it does not look like a proviso, because it does not come in as a proviso to the 2nd section, but another section on a somewhat different subject is interposed. That, perhaps, is technical; but when you look at the substance, can any reason be suggested for its being a proviso taking it out of the general case? I waited for the Solicitor General to explain that; but the Solicitor General's case was this, that probably there was some blunder in drawing the section. A reasonable suggestion, certainly; but it is clear that it is not intended to be excepted; for, taking the 4th and 12th sections together, if this be not the general rule, we should come to this plain and palpable absurdity, that any person taking after the passing of this act, shall not be liable in respect of a settlement made by herself, if she has reserved to herself a general power, and executes that general power; but if she takes under a settlement executed before the

passing of the act, then she is to be subjected to that provision. One would have thought that the rule ought to be just the contrary, if there is any rule at all. I cannot impute to the legislature the intention of saying, this is an intended special exemption out of the general clause; whereas, by the general clause, we have made everybody, before the passing of the act, who never dreamt of the act being passed, liable in respect of their execution of a general power created by themselves; yet, after the passing of the act, when all the world has had notice of the act, or had notice of its being about to be passed, and might have prayed the legislature not to pass an act affecting their interests, they shall be all exempted from the liability and the burthen which can be imposed upon persons who never dreamed of any such act being passed. That would be the result of such a conclusion. I think the sound conclusion is this: that the second clause does not apply to the case of donees of powers at all; that the fourth clause is not an exception out of the general clause, but is a general rule laid down, to commence from a given time, for donees and predecessor, in every case, although the rule of construction will not come into operation upon any settlements except those executed after the passing of the act; and, therefore, that this particular property in question is not liable to succession duty.

Mr. Willcock.—With reference to the costs of this application?

The VICE CHANCELLOR.—I think it would not be proper to give the costs; the Crown could not be expected in such a case not to have it discussed.

From the above decision (except as to costs) the Attorney General, on behalf of the Crown, appealed, and the case was argued by the same counsel as appeared in the court below, with the addition of *Mr. R. E. Turner*, for the respondents. The same authorities, and the same sections of the Succession Duty Act were also relied upon. The case was argued on the 3rd and 4th of June, when judgment was reserved.

June 14.—LORD JUSTICE KNIGHT BRUCE.—On the occasion of the marriage of Miss Vanneck with Mr. Lovelace, in the year 1817, a settlement was made, under which the question in the present case arises. The settlement was dated in that year, and by the terms of it Mrs. Lovelace, as there was no issue of the marriage, and she survived her husband, who died in 1852, became tenant for life of the property—personalty altogether—which was settled by him, with an absolute power of appointment over the capital, exercisable by her either by deed or will, and in default of execution of the power, the property, after her death, was not to belong to herself or her estate, but was to devolve on her next-of-kin. She executed the power by a will made in the year 1852, after her husband's death; it was a full and valid appointment and perfectly effectual, and she died after the year 1853, without having revoked or altered it. The respondents in the present case are some of the appointees, and being strangers in blood to Mrs. Lovelace, and not connected with her by marriage, a duty of 10*l.* per cent. on the amount appointed—a considerable amount—is claimed by the Crown from them by force of the Legacy Duty Acts prior to the statute 16 & 17 Vict. c. 51, and of that statute, or, at least, by force of the statute 16 & 17 Vict. c. 51. The settlement was an English marriage settlement, made in England upon the marriage of two English persons; it affected English property only, but the lady's English domicile of origin was, I think, before the year 1852, changed for a foreign—I believe for a French—domicil, which newly-acquired domicil she retained probably, or certainly, throughout that year, and thenceforth to her death. I doubted at one time whether that change of domicil might not affect the controversy, which, as I have said, was as to the alleged title of the Crown, if not under the Legacy Duty Acts preceding the statute 16 & 17 Vict. c. 51, at least under that statute, to a duty of 10*l.* per cent. on the amount of the settled personalty appointed by the lady to strangers in blood, and not connected with her by marriage, under a general power given or reserved to her by the settlement. The change of domicil now seems to me to be

not material. The appointed property would, if she had not exercised her power of appointment, not have been a part of her estate; it would, in that event, have devolved, on her death, upon her next-of-kin, as the persons designated by the settlement. The Crown appears to me clearly to have a right to the duty claimed, unless excluded by the 4th section of the statute, the 16 & 17 Vict. c. 51, which section—and I say so with the utmost deference towards the learned Judge who is stated to have thought otherwise—does not, I think, bear on the controversy. The husband and wife were the donors, or one of them was the donor, of the power, which the wife duly exercised; but I do not collect from the 4th section any intention of conferring an exemption from duty in consequence of the execution of the power in such circumstances as existed in the present instance. I also think the 12th section of the act, from the fact that the respondents, the appointees, are aliens, immaterial for every present purpose; and my opinion is in favour of the Crown, claiming, as it does, only a single duty, that is to say, no duty in respect of any acquisition, or supposed acquisition of property by Mrs. Lovelace—no duty as against that lady or her estate—only a duty in respect of her execution of the power as against those, or some of those, in whose favour she exercised it.

LORD JUSTICE TURNER.—This is a question upon the Succession Duty Act of 1853. The late Mrs. Lovelace, under her marriage settlement, dated long before the passing of the act, was tenant for life in remainder after the death of her husband, who died before the act was passed, of considerable personal property in this country, originally vested in trustees resident here, but afterwards paid into court under the Trustees' Relief Act. She had a general power of appointment over the property by deed or by will, which power, from the failure of intermediate limitations, followed immediately after her own life estate. After her marriage she became domiciled abroad, and whilst so domiciled abroad she exercised her power of appointment by will, dated before the passing of the act, in favour of persons who appear also to be domiciled abroad.

She died after the time appointed for the commencement of the act, and the question is, whether succession duty is payable by her appointees. Vice Chancellor Sir W. P. Wood has been of opinion that it is not, and the appeal before us, presented by the Attorney General, brings his Honour's judgment under review. Having considered the case, both during the argument and since, I find myself compelled to dissent from the conclusion at which his Honour has arrived. The case depends, as it seems to me, upon the 2nd and the 4th sections of the act, the point raised upon the 12th section not appearing to me to arise. By the 2nd section it is enacted in these terms: "Every past or future disposition of property by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this act, to any other person in possession or expectancy, shall be deemed to have conferred, or to confer on the person entitled, by reason of any such disposition or devolution, a 'succession'; and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the settlor, disponent, testator, obligor, ancestor or other person from whom the interest of the successor or shall be derived." Taking this section by itself, there cannot, I think, be any reasonable doubt that appointees under general powers of appointment were meant to be included, and are included, within it. It extends to all persons who are, by reason of any past or future disposition of property, entitled, either originally or by substitutive limitation; and it cannot, I think, be said that appointees under a general power are not entitled by reason of the disposition which created the power. They derive their title, indeed, through the instrumentality of the donee of the power; but they could have no title if the disposition creating the power had not

existed. I have had less difficulty upon this point, as the Vice Chancellor has arrived at the same conclusion upon it; but then his Honour has held, that, taking the 4th section of the act in connexion with the 2nd, it sufficiently appears that powers of appointment, and successions under them, were intended to be dealt with by the 4th section only, and that appointments under general powers, and—as I presume, in his Honour's judgment—appointees under limited powers also, are not therefore affected by the 2nd section; and he has further held, that the 4th section has restricted the operation of the succession duty, with reference to the execution of powers of appointment, to cases which take place under dispositions of property taking effect upon the death of some person dying after the time appointed for the commencement of the act; in other words, to wills taking effect or to settlements made after the commencement of the act; and upon these grounds he has determined that no succession duty is payable in the case before us. With the most unfeigned respect for the judgment of the Vice Chancellor, from whose opinions I never differ without some considerable degree of apprehension, I cannot agree with him in either of these conclusions. The 4th section is in these terms:—"Where any person shall have a general power of appointment under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of this act, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled, at the time of his exercising such power, to the property or interest thereby appointed as a succession derived from the donor of the power; and where any person shall have a limited power of appointment, under a disposition taking effect upon any such death, over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor." This section provides, therefore, that where there is a general power of appointment under a disposition "taking effect upon the death of a person dying after the time appointed for the commence-

ment of the act," whatever may be the meaning of those words—a point to which I shall presently advert—the donee of the power, if he exercises it, shall be deemed to be entitled to the property appointed as a succession derived from the donor. But it does not appear to me to follow that, because in the particular case pointed out by the section, the donee of the power is to be the successor to the donor, therefore in other cases not falling within this section, the appointee is not to be liable under the 2nd section. If indeed all the cases of appointment under general powers which could fall under the 2nd section would also fall within the 4th section, there would, I think, be strong ground for supporting the construction of the Vice Chancellor; but there certainly may be cases which would fall within the 2nd section, and would not fall within the 4th; the very case before us is one, as I shall presently have occasion to point out. If his Honour's construction as to the 4th section applying only to wills taking effect, and to settlements made after the commencement of the act, be upheld, there would plainly be numberless others. The consequences of this construction of the act cannot be disregarded. The effect would be that in all cases not falling within the 4th section there would be no duty payable by the appointee if the power was exercised, although the parties entitled in default of appointment would certainly be liable to the duty if the power had not been exercised. It is difficult to suppose that this could have been the intention of the legislature. It may be said that, unless the Vice Chancellor's construction be adopted, there would be this difficulty: that the 4th section, in the cases in which it applies, would make the donee of a power a successor, and that the 2nd section would at the same time place the appointee in that position; and that in cases in which the donee and the appointee would be liable to different rates of duty, it could not be determined which rate of duty would be payable. But this difficulty is, I think, more seeming than substantial; for I apprehend that the express provision of the 4th section, that the donee of a power should be a successor, would, in the cases in which it applied, override the general

provision of the 2nd section, placing the appointee in that position. I have gone into this part of the case, as it seems to me to bear directly upon the question before us; but this part of the case is of no great general importance if considered independently of the question as to the 4th section applying only to wills taking effect, or settlements made, after the time appointed for the commencement of the act; for, independently of that question, there could be but few cases in which duty would not be payable by the donee of the power. I have thought it right, therefore, to consider the case before us with reference to that point also, and I am of opinion that the decision upon it cannot be maintained. The decision is arrived at by treating the words, "taking effect upon the death of any person dying after the time appointed for the commencement of the act," as immediately connected with the words, "under any disposition of property," reading the sentence thus: "Under any disposition of property taking effect upon the death of any person dying after the time for the commencement of the act." But the disposition of property here referred to is a disposition under which a person is to have a general power of appointment, and may be, therefore, a disposition either by deed or will; and the legislature surely cannot have intended to speak of a disposition by deed, which must take effect upon the execution of the deed, as a disposition taking effect upon the death of a person dying after the time appointed for the commencement of the act. It appears to me, therefore, that the true construction of the section is, to refer the words, "taking effect upon the death of any person dying after the time appointed for the commencement of the act," to the power, and not to the disposition of the property. The respondents, not relying wholly upon the judgment of the Vice Chancellor, argued that this case came within the 4th section, but they failed to convince me of this. I think, looking to the context, that the words of the section refer to a power coming into operation, and not to the appointment under it taking effect; and it is for this reason that I think this case does not fall within the 4th section—the power having come into opera-

tion on the death of Mr. Lovelace, who died before the passing of the act, and that it is not affected by the 12th section, as Mrs. Lovelace, not being a successor at all, could not, of course, be a successor to herself. The respondents also argued that the property in question ought to be regarded as the property of Mrs. Lovelace, and that, her domicile having been a foreign domicile, this duty ought not to attach, and would not have attached upon her property under the Legacy Duty Act. I can find nothing in the act which can make this property the property of Mrs. Lovelace, unless the case falls within the 4th section, and I have already stated that, in my opinion, it does not; and if the property cannot be considered as the property of Mrs. Lovelace, the principle on which the cases under the Legacy Duty Act proceed, has not, as it seems to me, any application. It was further argued, for the respondents, that the act must be regarded as applying to British subjects only, and several of these provisions were referred to as shewing that it was so intended—but the provisions referred to go no further than to shew that there may be cases in which it may be difficult to recover the duty; and I cannot go the length of holding that this act of parliament, general in its terms, does not apply to the case of a succession under a British settlement, of British property, vested in British trustees, and falling under the jurisdiction of a British Court. Upon the whole, therefore, my opinion is that the duty in this case is payable. I think the case is within the 2nd section, not within the 4th section, and that it is not affected by the 12th section.

The question of costs was then spoken to, and it appearing that a sum had been retained in court to meet the claim of the Crown to duty, the Solicitor General agreed that the costs of the hearing before the Vice Chancellor, and on appeal, should be paid out of that sum. The Lords Justices said they considered such a course very reasonable, the question of construction being difficult.

L.C. }
 May 6, 7, 9, 27. } DE MATTOS v. GIBSON.

Ship — Charter-party — Mortgage of Ship—Specific Performance.

A. being equitably entitled to a ship entered into a charter-party with C, and afterwards mortgaged the ship to B, B. the mortgagee having notice of the charter-party. The ship proceeded on its voyage, but shortly afterwards was obliged to put into port for repairs, which were paid for by B, and B. took possession of the ship. C. filed a bill against A. and B, praying specific performance of the charter-party and for an injunction to restrain the use of the vessel for any other purpose than in performance of the contract entered into with C. One of the Vice Chancellors dismissed the bill; and, on appeal, this decision was affirmed, the Lord Chancellor considering that specific performance of the charter-party could not be decreed, the highest right against B. being to prevent him from actively interfering to stop the performance of the contract, while the contract remained in force, but that under the circumstances of the case the contract was virtually at an end, upon B's taking possession of the ship.

This was an appeal, by the plaintiff, from the decision of Vice Chancellor Wood, who had dismissed the bill. The case has already been reported (*ante*, p. 165), upon an appeal motion for an injunction, but some additional facts having been before the Court upon the hearing of the cause, the following statement, with which the Lord Chancellor prefaced his judgment, will give the entire case upon which the questions arose:—

The bill was filed for the purpose of obtaining the specific performance of a charter-party, and also to restrain the mortgagee of the chartered vessel from interfering to interrupt the voyage for which she was engaged. The defendant Curry, in October 1857, had contracted to purchase a vessel called the *Allerton*, which had been mortgaged to Mr. Dickinson, a member of the firm of Bramley, Moore & Co., for 1,935*l.* Before the purchase was completed, and on the 23rd of October 1857, Curry entered into a charter-party

with the plaintiff, by which it was agreed that the *Allerton*, which was then in the port of Shields, should proceed to the Tyne, and there take a full and complete cargo of coals, and therewith proceed to Suez, or so near thereunto as she safely could, and deliver the same, the freight at 60*l.* sterling per keel to be paid one-third by the charterer's acceptance at three months, and one-third by a like acceptance at six months, from the sailing of the vessel from her lading port in Great Britain, the same to be returned if the cargo were not delivered at the port of destination; and the remainder by a like bill at three months, at the charterer's office in London, from the date of the certificate of the right delivery of the cargo: penalty for non-performance of the agreement, the amount of the freight. Curry was unable, from his own resources, to provide means for the completion of the purchase; and for the purpose of obtaining the necessary funds, he engaged to mortgage the vessel to the other defendant, Mr. Gibson, for the sum of 1,500*l.* The mortgage to Gibson was executed on the 12th of January 1858, before Curry had become the registered owner of the vessel, and it contained a power of sale which was not to be exercised for six months. It was admitted that Gibson took this mortgage with full knowledge of the existence of the plaintiff's charter, and there was no doubt that the plaintiff knew the terms of the power of sale in Gibson's mortgage deed. On the 6th of January 1858, Dickinson sent the mortgage and the bill of sale to Curry, executed, to Heald & Co., of Newcastle, with instructions not to part with the bill of sale until the whole of the purchase money was paid. On the same day, Curry drew on the plaintiff two bills for the stipulated proportion of freight, which were accepted by him and returned to Heald & Co., with orders not to deliver them until the vessel had sailed. On the 7th of January 1858, Gibson sent a Liverpool Dock bond for 1,200*l.* to Dickinson, for him to sell and apply the proceeds in part payment of the purchase-money for the vessel. The dock bond produced the sum of 1,080*l.*; and upon its receipt, Dickinson sent instructions to Heald & Co. not to detain the bill of sale, and it was accordingly de-

livered by them to Curry on the 11th of January 1858. On the 19th of January, Curry was registered at Shields as the owner of the vessel, and on the following day, the mortgage to Gibson was registered at the same port. The vessel, having received her cargo of coals, sailed on her voyage on the 29th of January 1858. It had been arranged by Gibson and Curry with Heald & Co., that as soon as the vessel sailed they should get the plaintiff's bills discounted, and pay the residue of Dickinson's mortgage out of the proceeds; and, accordingly, on the 30th of January, the day after the sailing of the vessel, the discount of the bills was procured, and a sum of 735*l.* was handed to Heald & Co., for Dickinson, and also a cheque of Gibson for 120*l.*, which fully paid the purchase-money. The vessel, shortly after the commencement of the voyage, met with bad weather, and was obliged to put into Portsmouth to be repaired, and the repairs amounted to 250*l.*, which was paid by Gibson. The vessel then sailed, but had not proceeded far before it became necessary to put into Penzance, where she arrived in a leaky condition on the 24th of February. On the 2nd of March, the surveyor of that port ordered the cargo to be discharged, in order that the vessel might be repaired. The coals were accordingly taken out of the vessel, and deposited in an inclosed yard on the 16th of March, and a shipwright at Penzance commenced the repairs by the order of Adamson, the master of the vessel. He, however, soon became dissatisfied with Adamson's responsibility, and on Gibson's refusal to be answerable for the repairs, they were stopped. There was an entire blank in the evidence from this period down to the beginning of July; the plaintiff offering no explanation of his conduct during these three months. He did nothing until the 2nd of July, when he wrote to Mr. Gibson a letter, in these terms:—"The delay in the despatch of this ship is becoming a very serious matter, and must be attended to. The owner, Mr. Curry, is, and has now been detained at Genoa for months past for your benefit, and as I cannot continue to be the sufferer by this, I must beg of you to see that immediate arrangements are made to despatch her, and I have no

doubt that Mr. Mathews, of Penzance, will grant you any reasonable facilities to this end." This letter was not answered by Mr. Gibson until the 13th of July, which was the day after the power of sale in the mortgage-deed could be exercised. In his reply he said, "I duly received your letter of the 2nd instant, and it was my intention to have called upon you when I was in town, from whence I only returned on Monday, but I was so occupied that I had not time to do so. I can only repeat what I said to you at our last interview, that I am advised to sell the ship as she now is. Capt. Curry will, I expect, be here in a day or two, when I have no doubt but he will make an arrangement respecting the ship which will be satisfactory both to you and Mathews, of Penzance." It appeared by this letter, that there had been a previous interview between the plaintiff and Gibson, in which the plaintiff had been informed of the power of sale possessed by Gibson. Curry, as Gibson anticipated in this letter, did call on the plaintiff afterwards, and proposed to carry the plaintiff's coals by a vessel called the *Mary Ann*, instead of the *Allerton*, or to carry them by the latter if the plaintiff would advance some more freight in order to assist him in doing the requisite repairs. The plaintiff refused both these offers; the first, on the ground that he had no confidence in Curry, and did not wish to lose the benefit of his agreement for the *Allerton*; and the other, because, although the plaintiff was willing to make an advance, it was on the condition that Curry would bring him a certificate of the vessel being in a state of repair fit for sea, which he was unable to do. From this time there was again considerable delay on the part of the plaintiff until September, when, under an apprehension that Gibson might exercise his power of sale without notice to the purchaser of the charter-party, he filed a bill on the 15th of September against Gibson only, praying that he might be restrained from selling the vessel otherwise than subject to the burden of the charter-party. The injunction was refused. The defendant Gibson then put in his answer, by which it appeared that Mathews, the shipwright, claimed a lien on the vessel for repairs; that the vessel was unable to prosecute the voyage to

Suez, because Curry could not pay for the repairs, and because he had made default in payment of the mortgage-money to Gibson; and that Gibson intended to sell the vessel under his power of sale without reference to the engagement under the charter-party, and with that view he had sent instructions to Mathews to allow the vessel to be removed out of dock and sent back to Newcastle. On the 18th of October Gibson took possession of the vessel, and he afterwards authorized repairs upon her, which were completed, and he paid the sum of 850*l.* for these repairs to Mathews, whose lien was consequently withdrawn on the 19th of November. The bill was amended, and Curry was made a defendant. Specific performance of the charter-party was prayed against him, and also that he might be restrained from permitting the vessel to remain at Penzance, or at any place other than Suez. There was an additional prayer against Gibson that he might be restrained from removing the vessel to Newcastle, or otherwise interfering to interrupt the voyage. On the 25th of November, the motion for the injunction was made before Wood, V.C., and refused: but upon an appeal to the Lords Justices, they granted an injunction to restrain Gibson from removing the vessel. Upon that occasion, Lord Justice Turner intimated his opinion that the questions which would have to be determined upon the hearing of the case would be, first, whether the plaintiff was entitled to the specific performance of the contract; secondly, whether, if he were not so entitled, he might not nevertheless be entitled to an injunction to restrain the breach of the contract contained in the charter-party; and, thirdly, whether the charterer of the vessel might not be entitled to the benefit of the equity which Curry would have against Gibson, the mortgagee, to prevent his permitting or compelling a breach of the contract.

These questions were fully argued before Wood, V.C., and he gave judgment against the plaintiff, and dismissed his bill without costs as against Curry, and as to Gibson with costs, except so far as they were occasioned by the motion for the injunction. The same questions were also fully argued upon this appeal.

Mr. Amphlett and Mr. E. Macnaghten, for the plaintiff, the appellant.—No opinion had been expressed by the Vice Chancellor as to the right to specific performance of the charter-party. But whether there were this right or not, the plaintiff was entitled to an injunction against Curry and Gibson, to restrain them from using the vessel in any other way than that in which it had been contracted that it should be used.—

Lumley v. Wagner, 1 De Gex, M. & G. 604; s. c. 21 Law J. Rep. (n.s.) Chanc. 898.

Tulk v. Moxhay, 2 Phil. 774; s. c. 18 Law J. Rep. (n.s.) Chanc. 83.

Clarke v. Price, 2 Wils. Ch. Rep. 157.

Webster v. Dillon, 3 Jur. N.S. 432.

Many illustrations might be given of this: for instance, if the Government were induced to advance a large sum to complete the *Great Eastern* ship on a contract that, when completed, the ship should be used for conveying troops to India, the proprietors could not, according to the defendant's argument, be restrained from selling the ship and allowing her to be used in any other way; but the Government would be left to a remedy for damages against the proprietors.

As to the question of specific performance, they cited—

Moseley v. Virgin, 3 Ves. 184.

Storer v. the Great Western Railway Company, 2 You. & C. C.C. 48; s. c. 12 Law J. Rep. (n.s.) Chanc. 65.

Price v. the Corporation of Penzance, 4 Hare, 506.

Lytton v. the Great Northern Railway Company, 2 Kay & J. 394.

Doloret v. Rothschild, 1 Sim. & S. 590.

Buxton v. Lister, 3 Atk. 382.

Pooley v. Budd, 14 Beav. 34.

Lindsay v. Gibbs, 22 Ibid. 522.

Mr. Rolt and Mr. Bedwell, for the defendant.—The case of the plaintiff had been set up as if it were a mere question of priorities, which was not at all the fact. At the date of the charter-party, Curry had a mere equitable interest in the ship, and the defendant was entitled to claim the benefit of the Ship Registry Acts, and to say that the registered owner was still the owner. The sections of the 17 & 18 Vict. c. 104. applicable to the present

case were 38, 39, 62, 65, 67, 100 and 103, and section 10. of 18 & 19 Vict. c. 91. The decisions on the old Registry Acts on this question were—

M'Calmont v. Rankin, 2 De Gex, M. & G. 403; s.c. 22 Law J. Rep. (n.s.) Chanc. 554.

Hughes v. Morris, Ibid. 349; s.c. 21 Law J. Rep. (n.s.) Chanc. 761.

If the plaintiff made out his right to an injunction, it must be upon the same principles as those upon which he would be entitled to specific performance. But specific performance he was clearly not entitled to: there was no privity between the parties; and no lien, either express or implied, could be established against the ship.—

Harnett v. Yielding, 2 Sch. & Lef. 556.

Adderley v. Dixon, 1 Sim. & S. 607.

Cud v. Rutter, 1 P. Wms. 570.

Ragner v. Stone, 2 Eden, 128.

Flint v. Brandon, 8 Ves. 159.

The South Wales Railway Company v.

Wythes, 1 Kay & J. 186; s.c. 24 Law J. Rep. (n.s.) Chanc. 1, 87.

Dietrichsen v. Cabburn, 2 Ph. 52.

Heathcote v. the North Staffordshire Railway Company, 2 Mac. & G. 100.

As to the delay of the plaintiff, they referred to—

Pollard v. Clayton, 1 Kay & J. 462.

Mr. Amphlett, in reply, referred to—

Holmes v. the Eastern Counties Railway Company, 3 Kay & J. 675.

May 27.—The LORD CHANCELLOR (after stating the facts as before set forth) said—In dealing with the case, it will be necessary, in the first place, to consider the relative positions of the several parties, arising out of their different engagements with each other. The charter-party is merely a contract for the conveyance to Suez of a cargo of coals for the plaintiff, leaving Curry the complete ownership of the vessel, but subject to an engagement to carry the coals and deliver them at their place of destination. This contract he is bound to perform, unless disabled by any of the causes excepted in the charter-party; and if his vessel sustains any injury, by which repairs become necessary before he can proceed on the voyage, he must have those repairs done with all

reasonable dispatch. His engagement under the charter-party is one of which he cannot divest himself by transfer of the vessel, nor would the assignment of the property in the vessel transfer to the assignees either the benefit or the obligations of the stipulations in the charter-party. Except through him, Gibson, as mortgagee, though with full notice of the charter-party, incurred no liability in respect of the contract with the plaintiff, nor was he bound to do anything to forward its performance. He is not the owner of the vessel, as all the Shipping Acts, from the reign of George the Fourth downwards, have always provided; and by the act of 1854 he would have had the power of sale, though it was not expressed in the mortgage deed, but which he agreed to postpone for a period of six months. The highest right which the plaintiff could assert against him would be that he should not interfere actively to interrupt the prosecution of the voyage. Under these circumstances, what course ought the plaintiff to have pursued upon the long detention of the vessel at Penzance, without anything being done towards repairing her, so as to enable her to proceed with the voyage? I apprehend he was entitled to treat the unreasonable delay as a breach of the contract, for which he might have maintained an action; and if it clearly appeared that Curry had no intention of putting the vessel in a position to proceed on her voyage, he would have been justified in engaging another vessel to carry his coals to Suez, and making Curry answerable for the damages he so sustained. But, assuming that Curry had shewn no disposition to fulfil his contract, but had passively permitted the vessel to remain un-repaired and in a state in which the further prosecution of the voyage was out of the question, is the plaintiff entitled to resort to a court of equity to compel a specific performance of the charter-party? A contract of this kind consists of various stipulations, as to many of which it is beyond the power of the Court to enforce performance. The vessel must be in a fit state to perform the voyage; she must be provided with a skilful master and a competent crew; she must be found in all things necessary; and she must commence

and pursue her voyage with reasonable despatch and without deviation. But how can the Court decide on the skill of the master, the competency of the crew, or the sufficiency of the vessel, so as to compel the observance of the contract in all those particulars? Even with respect to enforcing the repairs of a vessel, though it may be conceded if an agreement for repairs "is in its nature defined," in the words of Lord Rosslyn in *Moseley v. Virgin*, "perhaps there would not be much difficulty in decreeing specific performance," yet the repairs to be done under the charter-party being such as will render the vessel seaworthy, the contract is far too uncertain and indefinite to enable the Court to carry it into effect. So far, therefore, as Curry is concerned, who has been merely guilty of omission, and has done nothing actively to hinder the voyage, the bill cannot be maintained either to enforce specific performance of the charter-party, or to restrain him from permitting the vessel's remaining at Penzance or at any other place than Suez, which is, in other words, to require him to perform the voyage and do all acts which are necessary to put the vessel in a seaworthy state for the purpose. We may, therefore, confine our attention entirely to the case of Mr. Gibson, and the relief prayed against him. Ought the Court, under all the circumstances, to interfere to restrain him from exercising his rights under his mortgage, and thereby preventing the performance of the contract by Curry? I will first of all consider what the case would have been as against Curry if he himself, instead of remaining passive, had done or threatened to do some act which had been a breach of his engagement to employ the vessel in the plaintiff's service. Could the Court have restrained him, and so, indirectly, perhaps, have compelled him to perform his contract? It is said there was no negative stipulation in the charter-party which could be thus enforced, for there was nothing to prevent Curry carrying coals in his vessel for other persons; but I agree with Vice Chancellor Wood's view in the case of *Webster v. Dillon*, that an affirmative agreement may involve a negative, and when by this charter-party Curry undertakes to carry to Suez a full and complete cargo of coals for the plaintiff, it

necessarily implies that if the plaintiff provides a full cargo, the vessel shall not be employed for any other purpose or person. It is also said that any other vessel might have carried the plaintiff's coals as well as the *Allerton*; that the charter is a mere contract to deliver goods at a certain time and place; and that Lord Cottenham, in *Heathcote v. the North Staffordshire Railway Company* puts this very case as one in which the Court will not interfere. But it seems to me that these arguments are not well founded. A person who hires a vessel under a charter-party does so, not merely from a wish to have his goods taken to a particular place, but upon a careful choice of the vessel itself as the vessel best adapted for his purposes. Many considerations may have influenced him in the determination of his choice; and after these have determined him to make a contract for a particular vessel, he would be surprised to be told that all he wanted was to have his goods conveyed to their destination, and that it was immaterial to him in what manner, or by what conveyance, it was accomplished. I think a vessel engaged under a charter-party ought to be regarded as a chattel of a peculiar value to the charterer; and that though the Court of equity cannot enforce a specific performance, yet it will restrain the employment of the vessel in a different manner, whether such employment is expressly or impliedly forbidden, according to the principles so fully expounded in the case of *Lumley v. Wagner*. In such cases the Court repudiates the idea of indirectly compelling a performance where it could not directly decree it. It gives all the relief in its power without looking to the effect which may be ultimately produced by the restraint it places on the party who is disposed to break his contract. I have no doubt that the plaintiff would have been entitled to the interference of the Court to this extent, if the case had been the one supposed of Curry attempting to employ the vessel in a manner not in accordance with the terms of the charter-party; but Gibson's position is entirely different from Curry's. He is not bound by any engagement with the plaintiff. It is true he took his mortgage with a full knowledge of the charter, and he must therefore abstain, of course, from any

act which would have the immediate effect of preventing its performance. If, for instance, when the vessel put into Penzance, and before a reasonable time for Curry to do the repairs had elapsed, supposing his power of sale to have been then available, he had determined to exercise it, expressly declaring that he meant to conceal the charter from the purchaser, or much more certainly if he had endeavoured to hinder the voyage by sending the vessel in a different direction, I think he might have been restrained from doing such acts as those by injunction. But Mr. Gibson has not in any way interfered with the performance of the charter-party, until it was evident that Curry was wholly unable to perform it. On the contrary, he assisted Curry in carrying it into effect by advancing money for the repairs at Portsmouth, by which the vessel was again in a position to prosecute her voyage. He was not bound to provide for the repairs at Penzance, nor would it have been reasonable to have expected him to do so before the power of sale became operative. In the mean time what does the plaintiff do? Literally nothing. He took no steps to procure the repair of the vessel from her arrival at Penzance in February until his letter to Gibson in July, nor again from that month until September. He must have known perfectly well that Curry was without means to enable him to do the repairs. On the other hand, what was Gibson doing? He had advanced the money upon his mortgage; and he also paid 250*l.* for the repairs. If the vessel had remained in the possession of Curry it was clear no repairs would have been effected, and without them the vessel could not put to sea. The actual performance of the contract as between the plaintiff and Curry was, therefore, virtually at an end when Gibson, on the 18th of October 1858, took possession of the vessel, and some time after repaired her at an expense of 850*l.* In order to entitle the plaintiff to an injunction against Gibson, he must shew that he has done or threatened to do some act which has interfered with the performance of the contract, of which he had notice; but does any one believe that if Gibson had not interfered at all, Curry could possibly have effected the repairs and enabled the vessel to pro-

ceed to sea? If not, how can it be said that Gibson has done anything to hinder the voyage, which had been completely stopped by Curry's utter inability to perform it before any active interference by him? I think, under these circumstances, it would be most unjust to restrain Gibson from exercising any rights, which his possession of the vessel and his title as mortgagee have enabled him to exercise. It is only necessary to advert to the question of the possible equity which the plaintiff might derive from Curry, to prevent Gibson doing anything to hinder Curry in the performance of the contract for the purpose of dismissing it in a word. How could Curry succeed in restraining Gibson from exercising any right as mortgagee, and thereby interfering with his performance of his contract, which he was wholly incapable of performing? No equity could possibly exist between Curry and Gibson under such circumstances, and therefore the plaintiff could derive no equity against Gibson. Under these circumstances, I am of opinion that the Vice Chancellor's decree must be affirmed, and the appeal dismissed, with costs.

L.C. }
May 9. } MONTPENNY S. DERING.

Practice—Enrolment of Decree—Infant.

On the 20th of July 1852, a decree was made giving an infant defendant costs out of the estate, upon an undertaking not to appeal. On the 9th of May 1857 the infant attained twenty-one, and in May 1859 applied for leave to enrol the decree, with a view to appeal to the House of Lords:—Held, that the application was too late, the defendant having allowed two years to elapse from his attaining twenty-one before applying.

This was a petition for leave to enrol a decree, dated the 20th of July 1852, notwithstanding five years had since elapsed.

The petitioner was a party to the suit when the decree was made, and by an arrangement made upon the requisition of Lord St. Leonards, L.C., the costs of all parties, including the petitioner, were paid out of the estate, upon the understanding

that no further proceedings, by way of appeal, should be taken—*Monypenny v. Dering* (1). The petitioner, R. P. D. Monypenny, was then an infant, and he came of age on the 9th of May 1857. The 5th Order of the 7th of August 1852, provided "that no enrolment of any decree, order or dismissal shall be allowed after the expiration of five years from the date thereof"; but the 6th Order provided "that the Lord Chancellor, either sitting alone, or with the Lords Justices, or either of them, shall be at liberty, when it shall appear to him, under the peculiar circumstances of the case, to be just and expedient, to enlarge the periods hereinbefore appointed for a rehearing or an appeal, or for an enrolment." The 118th of the Standing Orders of the House of Lords allowed an infant to appeal within two years after coming of age; but as in order to appeal to the House of Lords an enrolment was required, this application was rendered necessary.

Mr. Malins and *Mr. Berkeley*, in support of the petition.—When the decree was made the petitioner was only sixteen years old; and although his costs were given to him by an arrangement to prevent an appeal, the terms were imposed upon him by Lord St. Leonards, and ought not to be so binding upon him as to prevent his having the opportunity of appealing—*Taylor v. Philips* (2) and *Turner v. Turner* (3). The case of *Wellesley v. Wellesley* (4) was a very different case from the present, as there the effect of the enrolment would have been to extend the time for an appeal beyond the seven years.

The LORD CHANCELLOR (without hearing *Mr. Selwyn* and *Mr. C. Hall*, *contrà*) said, that it appeared to him that he was not called upon to consider whether he could bind the estate or enforce the contract of an infant upon such an undertaking as had been given here; but whether, "under the peculiar circumstances of the case," it was "just and expedient" that the petitioner

should be allowed to enrol the decree. Undoubtedly, if there had been no agreement or undertaking at all on behalf of the infant, and the five years had expired, and even the two years since attaining his age, and he had come for leave to enrol the decree, his Lordship might have been disposed to yield to the application. But, in considering whether it was "just and expedient," the Court must look at the circumstances of the case. Here there had been much litigation, the case having been before various tribunals, and, at last, Lord St. Leonards gave his decision adverse to the petitioner, and the question arose as to the costs. It was then proposed that the costs should come out of the estate. Lord St. Leonards considered that there should be an end put to the litigation, and he was not disposed to give costs unless consent was given that the contest should end there. On the part of the infant consent was given, and his costs were paid out of the estate under the arrangement then made, of which he thus received the benefit. It was now said that this was an imprudent bargain. If the party had been adult the Court would not have entered into a consideration of the prudence of the arrangement; but the petitioner, being an infant when the arrangement was made, might have had the arrangement considered on this ground, if he had come promptly upon attaining his majority. But he attained twenty-one two months before the expiration of the five years within which the decree should be enrolled; and he allowed two years to elapse without attempting to disturb the arrangement. The parties might naturally have expected that there was no intention to interfere with it, and new rights in the property had consequently arisen. The petitioner now sought to undo all that had been done, under the assumption that he would be able to set aside the decree in the House of Lords. Was it then "just and expedient" that this application should be granted? Certainly not. Except a strong and peculiar case were made out, his Lordship considered that it would be making the order a dead letter if he granted the application. The petition must be dismissed, with costs.

(1) 2 De Gex, M. & G. 145; a. c. 22 Law J. Rep. (N.S.) Chanc. 313.

(2) 2 Ves. 23.

(3) 2 De Gex, M. & G. 28; a. c. 21 Law J. Rep. (N.S.) Chanc. 422.

(4) *Ante*, l.

(IN THE HOUSE OF LORDS.)

March 11, 12. { GWENLIAN WILLIAMS v.
MARGARET LEWIS AND
OTHERS.

Will—Accumulation—Remoteness.

A testator was possessed of leasehold estates; he created a term for thirty years, which he vested in trustees to pay debts and to accumulate rents until the legacies were paid, and then to permit his son Benjamin to take the rents "until the son of my son Benjamin (if he shall have a son) shall attain twenty-one," when this son of Benjamin was to take the rents for life, "and after his decease, to the heirs male of such son, and the heirs male of their bodies." There were exactly similar provisions (in default of Benjamin having children) as to the next son, Lewis, and on failure of Lewis and his sons, then to the son of the testator's daughter Abigail. Benjamin and Lewis entered successively into possession of the rents, and died without issue. Abigail had a son who attained twenty-one:—Held, that the devise over was not void for remoteness, but that the rule as to freeholds applied in this case to leaseholds, and as in freeholds Abigail's son would have taken an estate tail, so here he took an absolute interest. Also, that as the only legacy in the will was to be paid to a person in being at the time of the testator's death on her attaining twenty-one, the direction to accumulate was not void.

Lewis Williams, being possessed, among other property, of certain leasehold estates for the residue of two several terms of 999 years, made his will, dated the 3rd of October 1799, containing, among other things, the following provision:—"I give and bequeath unto my trustees, Lewis Williams and William Perry, their executors and administrators, all my messuages, &c. called Pentwyn, Troscod and Tir Kenol, situate, &c., in the hamlet of Troscod, in the parish of Gwenddwr, in the county of Brecon, to hold the same for and during the term of thirty years, to commence from and immediately after my decease, upon the trusts and to and for the several uses, intents and purposes hereinafter mentioned, &c., that they, the trustees, &c., shall and may receive, perceive, dispose and employ

the rents, issues and profits of the said messuages, &c., to the uses and purposes following: in the first place to pay all such debts and sums of money as shall be due and owing from me at the time of my decease; to lay out and continue at interest upon the best security or securities that they can get for the same, and accumulate and improve the same yearly, by making the interest thereof principal, and to bear interest until the several legacies hereinafter by me given and bequeathed, and hereby made chargeable thereon, shall be satisfied and paid; then I give and bequeath the said premises and every part thereof, with their appurtenances, unto the trustees, &c., for the term thereof to me granted, upon trust to permit and suffer my son, Benjamin Williams, to have and receive and take the rents, issues and profits thereof, and of every part thereof, to and for his own use, until the son of my said son Benjamin, if he shall have a son, shall attain his age of twenty-one years, and from and immediately after such son of Benjamin shall attain his age of twenty-one years, then to the trustees, &c., to support contingent remainders, and to permit and suffer such son to have, receive and take the rents, issues and profits thereof, for and during the term of his natural life, and after his decease to the heirs male of such son, and for want of such issue to the second, third, fourth, fifth and all and every other son and sons of the body of the said Benjamin, lawfully begotten, severally, successively," &c. There was then a like provision for the testator's son Lewis and his issue; and in default, &c. then for the son of the testator's daughter Abigail and her issue; and in default, to the son of the testator's daughter Winifred and her issue. And the testator, after giving certain specific legacies, gave the residue to his wife, his son Philip, and his daughters Abigail and Winifred, in equal shares.

The testator died in 1799. The sons Benjamin and Lewis successively entered into possession, and died without male issue, in 1832 and 1846. Abigail had died in 1809, but left a son, E. W. Lewis, and a daughter, Margaret; the son attained twenty-one, but died the following year, a bachelor, leaving his sister Margaret (the respondent) his personal representative.

The testator's eldest son (Philip), who was the testator's executor and residuary legatee, died in 1837, leaving a widow, the appellant.

In 1855 Margaret Lewis filed her bill against Mrs. Williams and the representatives of the trustees, for the recovery of the leaseholds, and in November 1856 Vice Chancellor Kindersley made a decree in her favour (1). This decree was afterwards affirmed by Lord Chancellor Cranworth. The present appeal was then brought.

Mr. Malins and *Mr. Harris Prendergast* contended that all the limitations subsequent to those in favour of the son of Benjamin were void for remoteness, and that the same objection affected the direction as to the term for accumulation for payment of legacies. They cited—

Knight v. Ellis, 2 Bro. C.C. 570.

Ex parte Wynch, 5 De Gex, M. & G. 188; s.c. 23 Law J. Rep. (N.S.) Chanc. 930.

Forth v. Chapman, 1 P. Wms. 663.

Hodgeson v. Bussey, 2 Atk. 89.

Sands v. Dixwell, 2 Ves. 652.

Clare v. Clare, Ca. t. Talb. 21.

Palmer v. Holford, 4 Russ. 403; s.c. 6 Law J. Rep. (N.S.) Chanc. 104.

Speakman v. Speakman, 8 Hare, 180.

Lord Dungannon v. Smith, 12 Cl. & F. 546.

Oddie v. Brown, 4 Jur. N.S. 605; s.c. *post*.

Lord Southampton v. the Marquis of Hertford, 2 Ves. & B. 54.

Mr. J. Baily and *Mr. W. W. Cooper* were not called on.

The LORD CHANCELLOR (LORD CHELMSFORD) adopted the rule with respect to legacies, as stated in *Roper* (c. xxii.), that if personal estate be given by will to A. and the heirs of his body, as such words would create an express tail in freehold lands, so, in personal estate, they would vest the absolute interest, and the remainder and the subsequent limitation depending on a failure of them will be of no effect. It was, however, contended that this was not an inflexible rule; but

was adopted to prevent the intention of the testator from being defeated, and that where the existence of this absolute interest would have the effect of defeating the testator's intention, it could not be allowed to take effect; and *Ex parte Wynch* was cited. There the bequest was to a married woman of an annuity for her life, and the issue of her body lawfully begotten, on failure of which to revert to her heirs, with a request that K. and C. would act as trustees for her; so that the annuity might be secured for her sole benefit. This was held to be a life interest only, with a gift to the issue by way of remainder. There the words were "issue lawfully begotten"; which were, as Lord Cranworth observed in that case, much more flexible than the words "heirs male." The appellant had attempted to shew that the words "heirs of the body," in order to effectuate the intention of the testator, had been, with reference to personal property, treated as words of purchase; and to support this argument *Hodgeson v. Bussey* and *Sands v. Dixwell* were cited. The former was the case of a settlement, which, although it was executed, yet being evidently a provision for the children, shewed a plain intention that it should not vest in the wife absolutely; and the superadded words, such as "executors, administrators and assigns," shewed clearly that "heirs of the body," which were those used, were not meant as words of limitation. In *Sands v. Dixwell* the trust was to the executors, and the devisees in trust were to convey. The intention, therefore, had room to operate; and the separate trusts to the use of the wife were considered an indication of the intention. The intention in all these cases was collected from the words of the will. But none such could be so collected here; and the appellant actually assumed an intention different from the words used, and then insisted, upon authorities cited for that purpose, that no such assumed intention could be carried into effect. It was better, where words capable of a definite meaning were used, not to speculate upon intention, but to take the ordinary meaning of the words used. The declarations in this will were certainly capricious; but if capable of execution they must be executed. Benjamin was to be supplanted by

(1) *Lewis v. Hopkins*, 3 Drew. 668.

his own son (a curious provision certainly), when that son attained twenty-one; but the testator did not shew by any words in the will an intention that if Benjamin died without a son who attained twenty-one, the estate should not go over to Lewis and his issue. On the contrary, he had provided with respect to Lewis, and after him to Abigail's sons, precisely the same set of devolutions of the property. Under these circumstances, the analogy of freehold limitations must be taken, and the words "heirs male" must be taken as words of limitation. This would give Benjamin's son an estate tail in freehold, and must therefore give him an absolute interest in leasehold property. The other limitations were consequently alternative limitations, which took effect on the failure of the first. The decree of the Court below was therefore correct, and must be affirmed.

But another point, involving the same objection of remoteness, had been raised, as to the trust for accumulation for payment of debts and legacies under the term of thirty years. This was alleged to be a trust for accumulation for an arbitrary period, the persons who were ultimately to take the fund not being in existence, and the trust therefore being void as tending to a perpetuity. But that was not so. The trust was for the payment of "legacies." Had it been to apply the rents and profits in satisfaction of the legacies during the term of thirty years, that would have been good. This was a trust for the payment of legacies; but the only "legacies" to be found in the will was one legacy of 600*l.*, which was to be paid to a person on her arriving at twenty-one; so that, in fact, the object was to accumulate funds for the payment of one legacy, which was payable not beyond the period allowed by law. There was, therefore, a definite limitation given to this period of accumulation by the character of the legacy in respect of which it was to take place. In his opinion, the judgment of the Court below ought, on both points, to be affirmed.

LORD WENSLEYDALE entirely concurred.

LORD CRANWORTH wished only to add a word, to declare that he fully adhered to the opinion he had expressed in the Court of Chancery; and to say, that if intention were to be taken as the ground of decision, he believed that the construc-

tion contended for by the appellant, so far from effectuating, would defeat the testator's intention.

LORD KINGSDOWN expressed his concurrence with his noble and learned friends.

Judgment affirmed.

M.R. }
April 15. } MOLLETT v. ENEQUIST.

Injunction—Bill of Discovery.

A plaintiff, who filed a bill against parties abroad, and on an affidavit of merits obtained an injunction to stay proceedings at law, cannot, upon a sufficient answer being put in, retain the injunction upon inferences to be drawn from a previous evasive answer and the proceedings taken upon the exceptions. And though it was suggested that the bill had been amended and filed, the injunction was dissolved (1).

The bill was filed, by John Mollett and others, trading under the firm of John Henry Schroeder & Co., against Lawrence Nicholas Enequist, G. F. Thomson, Quincey Rew and David Wallace, to obtain a discovery of facts, and also relief from any agreement to pay a large sum for the salvage of five casks of gold, which had been shipped per *Eagle* from Cronstadt to Hull.

On the 5th of November 1857 the ship struck on Fahludd Reef, on the south-east coast of Gottland.

On the same day it was alleged that Capt. Ford, on behalf of the owners, agreed with G. F. Thomson that upon his taking upon himself the responsibility of landing the gold and transmitting it to Wisby, and delivering it into the hands of L. N. Enequist, he should, after having fulfilled the conditions, receive one-tenth part thereof as salvage.

The gold was safely delivered to L. N. Enequist, who was British Vice Consul and Lloyd's agent at Gottland, and he forwarded it to Messrs. Rew and Wallace, of London, with a claim of 4,678*l.* for salvage, &c.; this claim was disputed. The gold was given up to the plaintiffs on their depositing 5,120*l.* with Messrs. Prescott & Grote, the bankers, in the joint names

(1) *Mollett v. Enequist*, 27 Law J. Rep. (n.s.) Chanc. 815.

and to the joint order of the plaintiffs and Messrs. Rew & Wallace.

The plaintiffs then filed this bill to have the agreement for salvage declared void, and after payment of a reasonable sum for salvage to obtain the surplus of the 5,120*l*. The bill also prayed, in the alternative, for an issue to try the validity of the agreement, and for an injunction to restrain the defendants from proceeding at law upon the agreement.

An answer was put in to this bill, and exceptions were taken to it for insufficiency, some of which were allowed.

On the 1st of June 1858 Mr. Enequist brought two actions against the plaintiffs for sums amounting to 4,678*l*. on account of salvage, and for charges of watching, carriage and safe keeping the gold, as well as for average charges, commission and forwarding the gold to London.

The plaintiffs then moved for an injunction to restrain the defendant from proceeding with the actions; and on the 28th of July 1858, upon an affidavit of the plaintiffs as to merits, the same was granted.

On the 11th of March 1859 the defendants put in a further answer, and the time having expired without any further exceptions being taken to the second answer, the defendants moved to dissolve the injunction.

Mr. Selwyn and *Mr. Piggott*, in support of the motion, cited *Fox v. Hill* (2).

Mr. R. Palmer and *Mr. Druce* appeared for the plaintiffs.

THE MASTER OF THE ROLLS.—It is material to consider in what way the 15 & 16 Vict. c. 86. has altered the law. By the old practice, when a plaintiff filed a bill for an injunction to restrain proceedings at law, he was entitled to an injunction until the defendant filed a sufficient answer, and when exceptions were allowed to the answer the common order obtained was for leave to amend the bill, with a direction that the defendants should answer the amendments and exceptions together; in that case the injunction was continued until a sufficient answer was put in to the amended bill. But if the plaintiff allowed the exceptions to be answered, and afterwards amended his bill, then the injunction

dropped of itself as a matter of course, that is to say, the time for excepting to the answer having expired, the injunction was dissolved upon a mere motion of course. When the 15 & 16 Vict. c. 86. was passed it required the Court to assimilate the practice, to some extent, to the case of an injunction upon merits; and section 58. required the plaintiff to make an affidavit of merits with respect to the case which he had—for a defence to the action at law—or for a case for coming into equity, and for that purpose it assimilated the case as nearly as possible to that of a special injunction, although it was the case of a common injunction, and thereupon it was supposed that they were identical in all respects. But, having been a member of the commission who recommended the alteration of the law, I expressed an opinion that the statute did not by that alteration intend to take from the plaintiff the advantage which he would gain of having the right to a full discovery from the defendant; and accordingly not only have I acted upon that, but the Vice Chancellors have concurred with me, and have acted in the same manner.

The plaintiff here has had the benefit of that practice upon the present occasion; he has had a full discovery; a complete answer has been put in; and all that occurs now is, that I am informed that the bill has been amended either to-day or yesterday, and that this amended bill is put upon the file, but of this I have no evidence; but if I had, I do not think it very material, because all that I am asked to do now is upon inferences to be derived from the evasive answer given to the original bill, coupled with the facts arising from the answers to the exceptions which, it is alleged, shew very great cause of suspicion. On that, however, I say nothing, not wishing to prejudice any question, whether it be tried here or at law; but assuming all that is urged to be correct, it would not make out a case in which this Court has a question to try in equity, when there is an equitable question to be established; but it only shews that the ultimate question must be tried at law. It is one that may possibly be tried in this court, but it is a legal question—a pure question of fact to be determined by a Court of law, and in which it is justly observed, that if I enter-

tain very considerable doubt with respect to the contradiction of the testimony before me at the hearing of the cause, I should, in case there were no action, either direct an issue to try the question, or summon a jury and have witnesses examined before me *visd voce* for the purpose of determining that question. If the plaintiff is able to make a new case, which may entitle him to an injunction, nothing I have said will preclude him from adopting that course; but the full discovery required having now been given, and it appearing that the question is one properly to be tried at law, this injunction must be dissolved.

WOOD, V.C. }
April 20, 27. } BATES v. JOHNSON.

Mortgage—Tacking—Notice—Trustee.

A mortgagee of an equity of redemption without notice of prior equitable charges, is entitled, even after a foreclosure bill, filed by the intervening incumbrancer, to get in the legal estate and tack his mortgage.

T. E. B., by ante-nuptial settlement, covenanted to convey certain freehold hereditaments of which he was seised in fee, to trustees, upon trusts, for the benefit of himself and his wife and the children of the marriage. No conveyance was ever made, and T. E. B. afterwards, in fraud of the settlement, executed a mortgage of the premises, and subsequently mortgaged the equity of redemption, none of the mortgagees having notice of the trusts of the settlement. The first mortgagee having afterwards received notice of the trusts of the settlement, it was held, that, notwithstanding such notice, he was at liberty to transfer the legal estate to any person who would pay off his incumbrance, being in a different position from a dry trustee or a satisfied mortgagee.

By an indenture, made in contemplation of the marriage of Thomas Ellis Bates with Lucy Baden, and dated the 28th of July 1823, certain freehold hereditaments, of which T. E. Bates was seised in fee, were covenanted to be conveyed to the use of trustees, upon trust during the joint lives of T. E. Bates and L. Baden, to pay the rents to her separate use, with remainder upon trust for the survivor of them

for life, with remainder upon trusts for the children of the marriage; and it was declared, that from and immediately after the solemnization of the marriage, and until the premises should be conveyed, the same premises and the rents and profits thereof should be held, paid, applied and disposed of, upon and for such and the same or the like trusts, &c., and subject to the same powers and authorities as were thereinbefore mentioned and agreed upon concerning the same, to be inserted and contained in the said settlement or settlements to be made as aforesaid, and that all such trusts, &c. should and might be executed in as ample a manner as if such settlement was actually made and executed, or as near thereto as might be.

The marriage was solemnized on the 29th of July 1823, and the plaintiffs were the only issue of the marriage.

No settlement was ever made in pursuance of the above-mentioned agreement, and T. E. Bates continued to receive the rents down to his bankruptcy in January 1858.

In 1847 and 1848, T. E. Bates mortgaged the premises comprised in the agreement, together with other hereditaments, to Henry John Brooke, for 4,000*l.*, and delivered the title-deeds to the mortgagee. In 1851, 1853 and 1855, he mortgaged the equity of redemption in the various premises to Edwin Nash, for 1,200*l.*, and in 1856 he again mortgaged the equity of redemption to Edward Browne Hooke. None of the mortgagees had notice of the indenture of 1823.

The bill was filed, by the infant children of the marriage, against the assignees in bankruptcy of T. E. Bates, the several mortgagees, and T. E. Bates and Lucy Bates. It alleged, that the plaintiffs had not until the bankruptcy any notice of the mortgages or any of them, and it claimed for the plaintiffs that the legal mortgage to Brooke was the only subsisting charge upon the premises comprised in the deed of 1823, except the charge created by that deed, and that they were entitled, upon redeeming the legal mortgage, to hold the premises discharged of the other incumbrances, and prayed a reconveyance to new trustees upon payment of what should be due to the first mortgagee.

After the institution of the suit, Hooke, the third mortgagee, redeemed the prior incumbrancers, and obtained transfers of their mortgage securities, and he claimed to be entitled to the benefit of all the mortgage securities in priority to the trusts of the deed of 1823.

Mr. Giffard and *Mr. Swanston, jun.*, argued the case on behalf of the plaintiffs.

Mr. Willcock and *Mr. Daune*y, for the defendant Hooke.

Mr. H. Stevens, for Brooke.

Mr. Speed, for the assignees in bankruptcy of T. E. Bates; and

Mr. Wickens, for the other defendants.

The authorities cited were—

Carter v. Carter, 3 Kay & J. 617; s. c. 27 Law J. Rep. (N.S.) Chanc. 74.

Peacock v. Burt, 4 Law J. Rep. (N.S.) Chanc. 73.

Rooper v. Harrison, 2 Kay & J. 86.

Lacey v. Ingle, 2 Phil. 413.

Belchier v. Butler, 1 Eden, 522; s. c. 5 Bro. P.C. 292.

Ex parte Knott, 11 Ves. 609.

Coote on Mortgages, 569.

April 27.—Wood, V.C.—The question is, whether Thomas Ellis Bates, the father of the plaintiffs, having made a settlement by which he agreed to convey certain property to himself for life, and to continue it in trust for his children afterwards, and having suppressed that settlement, and in fraud of it executed mortgages which are now vested in the defendant Hooke, who has, since the institution of the suit, got in the legal estate in the first mortgage, none of the mortgagees having had notice of the settlement, that legal estate can now be insisted on as against the plaintiffs, who have filed their bill to redeem Brooke, as against whom they admitted that they could not establish any priority, but insisted that, upon redeeming him they would be entitled to the estate discharged of the subsequent mortgages, notwithstanding the legal estate had been got in by a subsequent mortgagee. The plaintiffs admitted the long-established doctrine that where there is a mortgage to a first, second and third mortgagee, and all of them take without notice of the securities

of the others at the time of advancing the money, if the third mortgagee can manage to obtain the estate of the first mortgagee he can squeeze out the second mortgagee; so that the first mortgagee, should both the subsequent incumbrancers desire to redeem him, can give the preference to whom he pleases. It has been held in every case down to *Peacock v. Burt*, which is probably one of the most striking cases of the kind, that a person advancing his money without notice stands in an equally good position in every respect with the other incumbrancers, except as to time; and having afterwards got in the legal estate, he has a right to avail himself of that legal estate, there being no equity to deprive him of it until the whole of the incumbrances have been paid off. In *Peacock v. Burt* the first mortgagee had notice of the second mortgage; then he made further advances; and then, though with notice of the intervening mortgage, transferred his mortgage and conveyed his legal estate to the third mortgagee without informing him of the intervening incumbrance. It was there held, that the third mortgagee was entitled to hold the legal estate discharged of the intervening mortgage, of which the first mortgagee had notice when he transferred the legal estate. It has been contended that the agreement from and after the marriage, and until the property shall be conveyed and assured, as hereinbefore mentioned, "to stand seised," &c., was a covenant running with the land, and that it would bind Brooke if he had notice, and that it might even bind him if he had not notice; at all events, that it would bind him after he had received notice, being equivalent, in fact, to a declaration of trust inserted in Brooke's own deed, by which, after satisfying his own mortgage, he would be bound to hold the property subject to the trusts of the settlement. It was further said, that it would be a breach of trust in Brooke, who was distinctly affected by the trust of the settlement, to convey the property to a subsequent mortgagee without conveying it upon those trusts by which he was himself affected. After carefully considering the authorities referred to in *Carter v. Carter*, I do not see that there can be any doubt upon the doctrine, as it appears to me established by

the authorities, that any person holding an unsatisfied mortgage or charge, may at any period convey the legal estate in respect of his unsatisfied mortgage or charge to any subsequent incumbrancer who may have advanced his money without notice of any intervening incumbrance, and he may, by so doing, give a benefit to such other incumbrancer of which the Court cannot deprive him, viz., a right to insist upon that legal estate which he has thus properly acquired. I do not find any case where a person holding as a trustee a dry legal estate, and fixed with notice, has been allowed to convey that estate after he has had notice, or to give to others a security which he only obtained by committing a breach of trust. *Mawdrell v. Mawdrell* (1), *Saunders v. Dehew* (2), and *Allen v. Knight* (3), have determined that where there is an express declaration of trust, the trustee cannot convey the trust property otherwise than as he holds it, viz., fettered and accompanied by the trusts upon which the estates are held; and I had occasion in *Carter v. Carter* to say that I had not been able to find any case of a dry trust of a satisfied mortgage or a satisfied term of years attendant upon the inheritance, where a second mortgagee, without notice of a previous incumbrance, had been held to be entitled to obtain from the trustee with notice a conveyance of the legal estate.

In the present case there was a first mortgagee unsatisfied, and taking without any notice whatever of the trust upon his mortgage deed, without any engagement on his part to enter into, fulfil or undertake any trust, and being merely informed afterwards that there was a trust affecting the property upon which he held his mortgage. Under these circumstances, he is in the condition of any other unsatisfied mortgagee, and he has a right to transfer that mortgaged estate which has so vested in him to any one who will pay off his debt. He is not to be fettered with anything whatever relating to the trust, which he has not undertaken, and which he has not assumed, but of which he is informed

after advancing the money and obtaining the legal estate. He is not obliged to incumber himself with any of those considerations, and he is fully justified in transferring the legal estate as he took it from the mortgagor, subject simply to the equity of redemption, to the second or third incumbrancer. What equity, then, is there against a second or third incumbrancer, who, having advanced his money without notice of any prior charge, has fairly and properly obtained the legal estate? The position is correlative. If the holder of the legal estate can lawfully part with it, the acceptor of the legal estate can avail himself of it for every purpose and for every charge which he has obtained upon the property without notice of the rights of any person in priority to his own. He is entitled to do so at any period after as well as before bill filed, according to the class of authorities ending in *Peacock v. Burt*, from which this case cannot be distinguished. Upon the authorities there is nothing to justify me in holding that Brooke could not lawfully part with his legal estate as long as his debt remained unpaid; and having parted with it, that legal estate cannot be taken from the person holding it until the whole of his debt has been satisfied. The bill, therefore, must be treated as a redemption bill, and the accounts must be taken in the common form.

Loans Justices. } THE ATTORNEY GENERAL
May 12. } v. HANMER.

Practice—Costs—Information—Form of Order—Attorney General.

In an information filed before the passing of the act, 18 & 19 Vict. c. 90, 'An act for the payment of costs in proceedings instituted on behalf of the Crown in matters relating to the revenue, and for the amendment of the procedure and practice in Crown suits in the Court of Exchequer,' the Court has no jurisdiction to order the Attorney General to pay the costs of a successful defendant: aliter, with respect to defendants made parties after the passing of the act.

This was an appeal from a decision of Vice Chancellor Stuart, in the above-named

(1) 10 Ves. 246.

(2) 2 Vern. 271; a.c. 2 Freem. 123.

(3) 5 Harc. 272; a.c. 15 Law J. Rep. (n.s.) Chanc. 430; 16 Ibid. 370.

case, reported 27 *Law J. Rep.* (N.S.) Chanc. 837.

The information was filed on the 5th of January 1854; was amended on the 2nd of July 1855; and re-amended on the 10th of June 1856. By the latter amendment, Wyndham Edward Hanmer, and Edward Henry John Hanmer and James Eyton were made defendants. In June 1858 the information was dismissed, with costs; and from so much of the decree as directed the Attorney General to pay the costs of Sir John Hanmer the Crown appealed.

By the 1st section of the act mentioned in the heading of this report, and which statute received the royal assent on the 14th of August 1855, it is enacted (after reciting, "whereas it is expedient to assimilate the law relating to the recovery of costs in such proceedings, by or on behalf of the Crown, to that in force as to proceedings between subject and subject"), "that in all informations, actions, suits and other legal proceedings to be hereafter instituted before any Court or tribunal whatever in the United Kingdom of Great Britain and Ireland, by or on behalf of the Crown, against any corporation, or person or persons, in respect of any lands, tenements or hereditaments, or of any goods or chattels belonging or accruing to the Crown, the proceeds whereof," &c. the Attorney General shall be entitled to recover costs on behalf of the Crown, when judgment shall be given for the Crown, in the same manner as in proceedings between subject and subject. And by the 2nd section it is enacted, "that if in any such information, &c. judgment shall be given against the Crown, the defendant or defendants shall be entitled to recover costs in like manner, and subject to the same rules and provisions as though such proceedings had been had between subject and subject," &c.

The Solicitor General, Mr. W. M. James and Mr. Hanson, for the Attorney General, supported the appeal, contending that the costs of Sir John Hanmer, against whom the information was originally filed, in January 1854, and therefore, before the statute (18 & 19 Vict. c. 90.) came into operation, had been improperly given against the Crown by the Vice Chancellor; for inasmuch as

the act of parliament had no retrospective operation, the rule in respect to costs then prevailing must be held to apply. That rule was, that the Attorney General, suing on behalf of the Crown in the performance of his public duty, should never be called upon to pay costs in a court of equity. Nor was it to be lost sight of that there was no fund out of which Sir John Hanmer's costs could be paid; and if the order of the Vice Chancellor were to stand, the present Attorney General, Sir Fitzroy Kelly, who was not Attorney General when the information was filed, must personally bear them. The learned counsel said, that no complaint was made against the order for costs as to the defendants Wyndham Edward Hanmer, Edward Henry John Hanmer and James Eyton, inasmuch as those persons were made defendants, by amendment, after the act of parliament came into operation. As to Sir John Hanmer's costs, they cited and relied upon the following cases:—

The Attorney General v. Ashburnham
1 Sim. & S. 394, 397.

The Attorney General v. the Corporation of London, 2 Mac. & G. 24
s.c. 19 *Law J. Rep.* (N.S.) Chanc.
314: on appeal, 1 H.L. Cas. 440.

The Lord Advocate v. Lord Dunglass
9 Cl. & F. 173.

The Lord Advocate v. Hamilton
Macq. 46.

Smith v. the Earl of Stair, 2 H.L.
Cas. 807.

Mr. E. F. Smith appeared for the defendants other than Sir John Hanmer, who did not appear upon the appeal.

LORD JUSTICE KNIGHT BRUCE.—I wish we could do as Sir John Stuart has done; but I fear we cannot. The precedents and the course of proceeding are too strong against our doing so. Still I hope that the Crown will be able to provide for the costs of this gentleman. I fear we have not the means of finding them for him.

LORD JUSTICE TURNER.—I entirely concur, both in the view that we have no power to give these costs, and in the expression of my regret at feeling compelled so to decide.

After some further discussion, the order

made was similar to that made by Vice Chancellor Wood, on the 9th of November 1858, in *The Attorney General v. Mathias* (1). The Court doth order, that the costs of the defendants, Wyndham Edward Hammer, Edward Henry John Hammer and James Eyton, of this application, be taxed by the proper Taxing Master of this court; and that the same, when taxed, be paid to the said defendants, in the manner directed by the act of parliament, 18 & 19 Vict. c. 90, intituled, &c., with liberty to the said defendants to apply to this Court, as they may be advised, with respect to such costs.

L.C. }
May 12. } PEARCE v. LINDSAY.

Practice—Enrolment of Decree—Vacating Enrolment.

A defendant entered a caveat against enrolment of a decree on the 22nd of December. On the 2nd of March he obtained an order to set down the appeal, and served the order on the 23rd of April. On the 29th of March notice was given that the docket for enrolment would be presented for the Lord Chancellor's signature, unless the appeal were lodged, and an order for setting down the same served within twenty-eight days. The appeal was set down on the 29th of April, after the expiration of the twenty-eight days, and the enrolment was signed on the following day:—Held, that although to prosecute the caveat with effect, according to the 4th Order of August 1852, the appeal ought to have been set down and notice of it served within the twenty-eight days, yet, as the defendant appeared to have been misled, the enrolment was vacated on the ground of indulgence.

This was an application by the defendants to vacate the enrolment of a decree, dated the 21st of December 1858, on the ground of irregularity and surprise. On the 22nd of December 1858, the defendants lodged a caveat against enrolment. On the 2nd of March 1859 the defendants

presented their petition of appeal, and obtained the usual order for setting down the same, upon payment of 20*l.* deposit within a week. On the 4th of March the deposit was paid. On the 29th of March, the appeal not having been set down, the defendants received notice, from the Record and Writ Clerks' Office, of the docket of enrolment having been left by the plaintiff for signature by the Lord Chancellor; and the defendants were then informed that the docket would be presented for signature, unless the defendants lodged their appeal, and served an order for setting down the same, within twenty-eight days. On the 23rd of April the defendants served the order to set down the appeal. The twenty-eight days from the 29th of March expired on the 26th of April, which was Easter Tuesday, and, consequently, the offices were closed. The appeal was set down on the 29th of April, but on the 30th the plaintiff obtained the Lord Chancellor's signature to the enrolment, and on the 2nd of May the decree was enrolled.

Mr. Giffard and Mr. Habershon Cox appeared for the defendants, in support of the application to vacate the enrolment, and referred to—

Daniel's Chanc. Pract. (3rd edit.) 739.

Smith's Chanc. Pract. 469.

Ayckbourn's Chanc. Pract. (5th edit.) 195.

Robinson v. Newdick, 3 Mer. 13.

Groom v. Stinton, 2 Ph. 384; s. c. 17

Law J. Rep. (N.S.) Chanc. 1.

Dearman v. Wych, 4 Myl. & Cr. 550;

s. c. 9 Law J. Rep. (N.S.) Chanc. 76.

Anon. 1 Ves. 326.

Kemp v. Squire, *Ibid.* 205.

Mr. Roll and Mr. E. R. Turner, for the plaintiff.—In the cases which had been cited it was assumed, that if the order for rehearing had been obtained, it had been set down; it was not the practice to obtain the order and not to set it down. In fact, no notice of this having been set down had yet been given, although notice of the order for setting down had been. But if notice was not necessary, setting the cause down within the twenty-eight days was necessary. The defendants said that it might be set down at any time before the presentation for

(1) For this case, though not the order—see 27 Law J. Rep. (N.S.) Chanc. 761.

enrolment. They did set it down on the 29th of April, but the decree was presented for enrolment on the 28th of April, after the *caveat* was exhausted; and on the 30th of April the signature was obtained, upon motion in open court. In fact, the thing was done on the 29th of March, when the enrolment was applied for, and was only stayed by reason of the *caveat*. They cited—

Barnes v. Wilson, 1 Russ. & M. 486.

The Corporation of Gloucester v. Wood, 3 Hare, 150.

Church v. Marsh, 2 Ibid. 652; s. c. 13 Law J. Rep. (N.S.) Chanc. 12.

The LORD CHANCELLOR (without hearing a reply) said, that this was an application to set aside an enrolment on the ground of irregularity and surprise; and the question was on the effect of the Orders of the 7th of August 1852, as to enrolment of decrees, &c. The fourth order provided, "That where a *caveat* is entered with the proper officer to stay the signing of the docket of the enrolment of any decree, order or dismissal, such *caveat* shall be prosecuted with effect within twenty-eight days after the docket of such decree, order or dismissal shall be left to be signed with the proper officer by the party who entered the same, otherwise such *caveat* shall be of no force; and the docket of such decree, order or dismissal may, immediately after the expiration of the said twenty-eight days, be presented to be signed, as if no such *caveat* had been entered." The question was, what was the meaning of the words "prosecuted with effect"? It was contended on the part of the defendants that it was sufficient to satisfy these words if they were to present their petition for leave to appeal, obtain an order thereon, and serve upon the opposite party notice of such order. On the other side it was contended, that the requisitions of the fourth order were not satisfied unless the appeal were actually set down for hearing, and notice of it served on the opposite party. It appeared to his Lordship that the words "prosecuted with effect" were not satisfied by merely obtaining the order for setting down a cause for rehearing and serving such order. This was not equiva-

lent to setting down the cause, and therefore, if he had to determine the case entirely upon the proper construction of the orders, he should be compelled to say that the defendants had not brought themselves within the terms of the orders. But had the practice been in accordance with this view? The parties might well have been misled by the authorities to suppose that it was not necessary to set the cause down, and more particularly by the notice from the office to a party lodging a *caveat*, that unless he lodged an appeal, and served the order for setting down the same, within twenty-eight days, &c. The parties might well have been misled by this, and supposed that to lodge an appeal and serve an order for setting it down, were sufficient. Had his Lordship been satisfied that the defendants had been trifling with the order, he should not have considered them entitled to what they asked; but from the affidavits he did not think that this was the case. He was clearly of opinion that in order to comply with the fourth order, a party ought not merely to obtain the order and serve it, but that he should go on, and set down the appeal and serve notice of the setting down; but, considering that these defendants might have been misled by the practice, he should grant the application on the ground of indulgence, but make no order as to costs.

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LORDS JUSTICES. } CROUCH v. WALLER.
March 26. }

Practice—Married Woman—Formd Pauperis—Next Friend.

A bill was filed, by a married woman by her next friend, to enforce payment of an annuity settled to her separate use, and at the hearing the same was dismissed. The plaintiff wished to appeal, but the next friend refused to allow his name to be used. The plaintiff applied to the Lords Justices, and filed an affidavit stating that she was unable to find any other person whose name could be substituted for the present next friend, and that she was subsisting entirely by charity; and their Lordships made an order, that she should be at liberty to present the appeal and take any other proceedings in

the cause in formâ pauperis without a next friend.

This was a motion made, on behalf of a married woman, Emma Christiana Crouch, by William Jefferys, her next friend, that she might be at liberty to prosecute an appeal from a decision of the Master of the Rolls dismissing her bill (filed to enforce the payment of an annuity alleged to be settled upon her for her separate use for life) *in formâ pauperis* and without a next friend.

Mr. Cole, in support of the motion, read an affidavit of the plaintiff, saying that she was an inmate of the Gravesend Union Workhouse and subsisted wholly by charity; that William Jefferys refused to allow his name to be further used than for the present application; that she was desirous of appealing; that she had no friend or acquaintance who would allow his name to be used as next friend, and that she was supported entirely by parochial relief. The learned counsel stated, in answer to a question from the Bench, that the case came within the principle of that of *The Countess of Mornington* (1), and that the plaintiff wished the order to extend to all other proceedings in the cause as well as to the appeal.

Their LORDSHIPS made the order.

STUART, V.C. } JACKSON v. WARD.
April 21.

Practice—Order of Revivor and Supplement—Statute 15 & 16 Vict. c. 86. s. 52.

The sole plaintiff in a suit to restrain waste, died after decree, having devised all his real estate to his son, the Court, upon the ex parte application of the devisee, made the usual supplemental order under the 52nd section of the statute 15 & 16 Vict. c. 86.

This was a suit to restrain waste. After a decree had, by consent, been taken for the sole plaintiff, with costs of suit, the

(1) This case is referred to in *Wellesley v. Wellesley* and *The Countess of Mornington v. the Earl of Mornington*, 1 De Gex, M. & G. 501; s. c. 21 Law J. Rep. (N.S.) Chanc. 738.

plaintiff died, having devised all her real estate to her son; thereupon

Mr. T. H. Terrell, for the devisee, applied, *ex parte*, for the usual order of revivor and supplement after decree under the 52nd section of the 15 & 16 Vict. c. 86. He cited—

Lowe v. Watson, 1 Sm. & G. 123.

Moritt v. Walton, 2 W. R. 544.

Dendy v. Dendy, 5 Ibid. 221.

STUART, V.C. held, that the language of the 52nd section was general, and applicable to every case where there had been a transmission of interest by the death of a plaintiff or defendant. He then made the order asked, stating that it was *ex parte* and of course, but liable to be discharged at the instance of any one against whom it was improperly obtained.

LORDS JUSTICES. } MEIKLAM v. ELMORE.
May 12.

Practice—Plaintiff becoming insolvent—Costs.

When a plaintiff becomes insolvent, and a vesting order is made by the Insolvent Court, this Court will, on the provisional assignee expressing his desire to prosecute the suit, make an order that he do bring himself before the Court within a time limited in the order, or that the bill be dismissed without costs.

This was an appeal from a decision of the Master of the Rolls, declining to make any order on a motion to dismiss the plaintiff's bill.

The facts, as disclosed by the clerk of the solicitors for the defendant, were uncontradicted, and as follows:—On the 8th of December 1858 the defendant moved to dismiss the plaintiff's bill for want of prosecution, when it was ordered that the plaintiff should file replication on or before the 11th of December 1858, or that the bill should stand dismissed, and that the plaintiff should pay the costs of the motion. Replication was accordingly filed on that day, and the costs were taxed at 10*l.* 6*s.* 6*d.*, which the plaintiff had not paid, and he

COURTS OF CHANCERY:

in contempt for the non-payment, as a prisoner in the Queen's Prison debts. The plaintiff, on the 2nd of February 1859, served a summons to give time for closing evidence, and on the fourteenth days were given notwithstanding the attachment for non-payment of the same day a summons was issued for time to put in an affidavit as to documents, under an order of the 12th of November 1857, and a week's time was given. The plaintiff was in contempt for non-compliance with the last-named order, viz. that of the 12th of November 1857. On the 14th of February 1859 the fourteen days expired, when the defendant filed affidavits in support of his case; but the plaintiff had not filed any affidavits nor set down the cause, nor served a subpoena to hear judgment.

On the 26th of March the defendant moved, before the Master of the Rolls, to dismiss the bill for want of prosecution; but his Honour declined to make any order. On the day on which the motion was heard on the plaintiff caused a notice to be served on the defendant, that by an order of the Insolvent Debtors Court, dated the 16th of October 1858, all the plaintiff's estate had become vested in the provisional assignee of that court.

On the 15th of April the defendant moved, before the Master of the Rolls, that Samuel Sturgis, the provisional assignee of the Insolvent Debtors Court, should make himself a party to the suit, or that the plaintiff's bill should be dismissed with costs. An order being refused, this was a renewal of the motion by way of appeal.

Mr. Lonsdale, in support of the appeal, said that there was no settled rule that the bill of a plaintiff who had become bankrupt or insolvent should be dismissed without costs, and suggested that, looking to the very improper conduct of the plaintiff, the fact of his insolvency, his giving no notice of it to the defendant, and allowing him to incur heavy expenses, the plaintiff had disintitiled himself to any indulgence, and that therefore the bill ought now to be dismissed with costs; the defendant undertaking, as he now did, not to proceed personally against the plaintiff in respect of the costs incurred prior to the vesting

order. The learned counsel cited *Daniel v. Harding* (1) and *Fisher v. Fisher* (2). *Mr. Rogers*, for the plaintiff and the provisional assignee, insisted that the proper order was that the bill should be dismissed without costs, if the assignee did not bring himself before the Court within a reasonable time; and that order the Master of the Rolls was willing to make. Such being the case, the defendant ought to pay the costs of the motion. *Mr. Lonsdale* was heard in reply.

LORD JUSTICE KNIGHT BRUCE consulted with the Registrar, who said the practice was to dismiss without costs when a plaintiff became bankrupt or insolvent, and expressed his own opinion to be that, were he sitting alone, he should be disposed to order the plaintiff to pay the costs incurred since the insolvency. His learned Brother did not, however, appear to agree in that.

LORD JUSTICE TURNER said, although he felt that the defendant had been hardly treated, he thought it would be establishing a dangerous precedent to draw a distinction between costs incurred prior to and after bankruptcy or insolvency.

The order made was as follows:—"M. R. Sturgis by his counsel expressing a desire to prosecute the suit, the Court doth order that he do within three weeks from the 12th day of May instant take the necessary steps for bringing himself before Court; or in default, let the plaintiff's bill stand dismissed without costs. No costs of the motion."

WOOD, V.C. } ORR v. DICKINSON.
Jan. 18, 20, 21.

Merchant Shipping Act, 1854—Is a valid Bill of Sale—Registration—Equitable Interest.

The registration of a bill of sale of a ship does not confer an absolute title at law, unless the bill of sale itself not only appears to be, but is actually valid.

- (1) 1 You. & C. C.C. 436; s.c. 11 Law J. Rep. (N.S.) Chanc. 160.
- (2) 2 Phill. 236; s.c. 16 Law J. Rep. (N.S.) Chanc. 320.

Where a valid title has been acquired at law, quære, whether a Court of equity has jurisdiction to deal with the equitable interests.

In August 1857 the plaintiff, being the sole owner of the brig *Polly Hopkins*, and registered as such on the register of ships at the Custom-house, at Charlotte Town, Prince Edward's Island, executed to the defendant M'Calman, a partner in the firm of Wilson, Brown & Co., ship-brokers, of Liverpool, a certificate of sale in the form set out in Schedule N. to the Merchant Shipping Act, 1854, and thereby authorized him to sell the brig for a sum not less than 1,300*l.* Wilson, Brown & Co., being in embarrassed circumstances, agreed to mortgage the ship to the defendant Dickinson by way of conditional sale for 900*l.*; and accordingly on the 8th of September 1857 M'Calman, as the attorney of the plaintiff, executed a printed form of a bill of sale to Dickinson for 900*l.* Upon this document being presented to the registrar at the Liverpool Custom-house for registration, that officer declined to register it, on the ground that by the certificate of sale the minimum price was fixed at 1,300*l.* In order to obviate this objection the bill of sale was altered, by striking out the amount of 900*l.* and substituting for it the sum of 1,300*l.* In December 1857 the plaintiff arrived in England, and being informed by Messrs. Wilson, Brown & Co. that they had been in difficulties, and had pledged the ship's papers, executed a revocation of the certificate of sale, which was entered at the Liverpool Custom-house, and thence transmitted to Prince Edward's Island, where it was recorded and returned to Liverpool, at which place it was received on the 25th of January 1858. On the 30th of January 1858 Dickinson procured the bill of sale, as altered, to be registered, and his name was accordingly entered on the register as sole owner of the brig. On the 1st of February the bill was filed, in ignorance of the registration, against the defendants Dickinson and M'Calman, charging that no *bond fide* sale of the vessel had ever taken place; and praying that the defendants might be restrained from dealing with the vessel and detaining her documents, and from causing her to be registered, except for the benefit of the

plaintiff; and that the vessel and her documents might be delivered up to the plaintiff.

An *ex parte* injunction having been obtained, which was afterwards continued to the hearing, the cause now came on to be heard.

Pending the suit Wilson, Brown & Co. became bankrupts, and the ship was sold by arrangement between the parties.

Mr. Rolt and Mr. Robinson appeared for the plaintiff, and claimed to be entitled to the proceeds of the sale.

Mr. Daniel and Mr. C. T. Simpson, for the defendant Dickinson.

Mr. Amphlett, for the assignees in bankruptcy of Wilson, Brown & Co.

The arguments of counsel are fully stated in the judgment.

The authorities referred to were—

The Merchant Shipping Act, 1854,
17 & 18 Vict. c. 104.

The Merchant Shipping Act Amendment Act, 1855, 18 & 19 Vict. c. 91. s. 10.

The Trustees Act, 1850.

Curtis v. Perry, 6 Ves. 739, 745.

Ex parte Yallop, 15 Ibid. 60.

M'Calmont v. Rankin, 8 Hare, 1;

s.c. 19 Law J. Rep. Chanc. 215;

on appeal, 2 De Gex, M. & G. 403;

22 Law J. Rep. (N.S.) Chanc. 554.

Follett v. Delany, 2 De Gex & Sm.

235; s.c. 17 Law J. Rep. (N.S.)

Chanc. 254.

Daubigny v. Duval, 5 Term Rep. 604.

Jan. 21.—Wood, V.C.—I do not think any difficulty exists as to the minor question that has been raised, that is, the ownership of the vessel, for I must take John Orr to be the true owner of the vessel. Nor have I found any difficulty upon the equities alleged with regard to lien on the proceeds. I think the real pressure of the case has been with reference to the fact that Mr. Dickinson is, in a sense at all events, the registered owner at the time of the bill being filed. A question has been suggested whether, under the change which has been made by the Merchant Shipping Act Amendment Act, the doctrine, with reference to the jurisdiction of this Court, which was formerly considered on the policy of the acts of parliament having relation to the registry of ships to have had no existence, still applies. That is

a question undoubtedly of extreme importance, but I am not clear that it arises in the present case, for I think there is a way of dealing with the matter which does not render it necessary to determine the point. The Merchant Shipping Act, 1854, s. 76, enacts, that "any registered owner, if desirous of disposing by way of mortgage or sale of the ship or share in respect of which he is registered at any place out of the country or possession in which the port of registry of such ship is situate, may apply to the registrar, who shall thereupon enable him to do so by granting such certificates as are hereinafter mentioned." The schedule to the act furnishes the form of these certificates, and according to the form for the certificate of sale the minimum price at which the ship is to be sold is to be stated therein. In this instance John Orr has signed a certificate of sale to the bankrupts Wilson, Brown & Co., fixing the minimum price at 1,300*l.* Then, the 81st section of the act enacts, that certain rules shall be observed as to certificates of sale. By the second rule "The power shall be exercised in conformity with the directions contained in the certificate." Therefore, in this case, the power not being exercised in conformity with the directions contained in the certificate, the attempt to exercise it is *ultra vires*. Following the rule to which I have already adverted, is the third, which is not unimportant to observe for a different reason, to which I shall presently advert. This rule is as follows: "No sale *bond fide* made to a purchaser for valuable consideration shall be impeached by reason of the person by whom the power was given dying before the making of such sale." I next refer to the eighth rule, which provides that the registrar "shall retain the certificates of sale and registry, and after having indorsed on both of such instruments an entry of the fact of a sale having taken place, shall forward the said certificates to the registrar of the port appearing on such certificates to be the former port of registry of the ship, and such last-mentioned registrar shall thereupon make a memorandum of the sale in his register book, and the registry of the ship in such book shall be considered as closed, except as far as relates to any unsatisfied mortgages," &c. And the 12th

rule is this:—"If no sale is made in conformity with the certificate of sale, such certificate shall be delivered to the registrar by whom the same was granted; and such registrar shall thereupon cancel it, and enter the fact of such cancellation in the register book; and every certificate so cancelled shall be void to all intents."

Now, what happened in this case was this: The ship not having yet arrived, but the certificate of sale, limited to a power of sale for 1,300*l.*, having been transmitted, Wilson, Brown & Co., who had business transactions with Mr. Dickinson, and were indebted to him, and had obtained from time to time arrangements for accommodation, received at the time they were dealing with him in respect of other matters, certain bills, one for 1,400*l.* and the other for 1,000*l.* The bills, I think, were given a day or two before the matter was finally settled on the 8th of September 1857. Dickinson says here was no sale of the ship at all, but the arrangement was, that if the ship was sold at any time before the bills came to maturity, then the ship was to be handed back on his being paid 900*l.*, otherwise he was to retain the ship. His statement is very singular. He says, "I purchased the vessel on the 7th or 8th of September, and on presentation of the bill of sale at the custom-house, and the same transfer to me being found in order, I paid the purchase-money for her as agreed, and as therein declared." On cross-examination, the transaction appears to be this, that there was originally inserted 900*l.*, the agreement being that, while the bills were running, the ship was to be taken back at that price; and if not, he was to retain it as a purchaser for 900*l.* Then the bill of sale being made, purporting to be in pursuance of the certificate, it is sent to the proper officer at Liverpool filled up with 900*l.*, which was the real transaction, so far as it was any sale at all. The registrar told him, as it was his duty to tell him, that a bill of sale for 900*l.* was bad, and he could not register it. [His Honour then proceeded to read several passages from the examination of Mr. Dickinson, and stated the result of the evidence as follows.]—It comes to this, that he never bought for 1,300*l.* at all, although there is evidently an attempt all

through to shew that it is really a sale for 1,300*l.*, 400*l.* remaining due in respect of it; he only bought for 900*l.*, and that was a sort of conditional purchase, the ship being returnable if the 900*l.* should be paid within a given time; and the concluding passage of his evidence proves this. He says, If you do find 1,300*l.*, that must have been owing to some regulation of the Custom House. This regulation of the Custom House is the regulation of the law, that a man who has given a power of attorney to another to sell for 1,300*l.* has not authorized the attorney to sell for less. That the statute says—that common sense and every principle of law requires; and we are not to hear that it is the custom at Liverpool to put this high minimum into the power of attorneys in order that it may be a sort of puff for the ship, and that it is never intended that the attorney should be bound by the power under which he professes to act. I cannot listen to such a statement. If there had been a statement of an express agreement with John Orr, that would be another matter; but the only evidence of that is in the paragraph in which it is said he would have been willing to sell the ship for less. He denies its being a puff. He says "The ship cost me 1,500*l.*; I inserted 1,300*l.* thinking at the then prices I should be obliged to accept that." It is quite plain, on the evidence of Mr. Dickinson himself, that the bill of sale, though it purports on the face of it to be a bill of sale for 1,300*l.*, was originally a bill of sale for 900*l.*; that it was intended by everybody to be so, and the sale was made to him for 900*l.* only. In reality, therefore, there never has been an exercise of the power in conformity with the directions contained in the certificate, and therefore the bill of sale, though purporting to be good so that the registrar would be obliged to treat it as a perfectly valid instrument, was a nullity, and there was no power to pass by such a bill of sale as that any interest in the vessel. The attorney being simply an attorney, and being only competent to pass the vessel for 1,300*l.*, his signing a bill of sale for 900*l.* is no more than if anybody now sitting in this court had signed his name to such a bill of sale, and had proposed to make a sale to that amount. But then this ques-

tion arises—having such an apparent title, so that the registrar of the port would be bound to act on it, how far can it be said that the legal title is acquired? If a legal title is acquired, then the question would arise whether the plaintiff would be at liberty to assert an equitable title in derogation of this legal title acquired in this improper manner. That would bring us back to the question, whether the Court has jurisdiction to interfere with the legal title of the registered owner. I do not think that here the defendant Dickinson has acquired the legal title to the ship; and the subject is one which must therefore be considered as yet open to question, and one which will require a good deal of grave consideration on all the provisions of the statute. I am not by any means convinced that the argument raised in consequence of the late statute 18 & 19 Vict. c. 91. enacting, that shares in ships shall be deemed within the Trustee Act, 1850, or the recognition in certain cases of trusts throughout the act of 1854 is of great cogency, inasmuch as there are in all the recent shipping acts trusts, for instance, in respect of property which devolves on the next-of-kin through the medium of the administrators—trusts in respect of ships which are allowed to be registered in the names of joint-stock companies, and in the names of trustees for those companies. It would be necessary to make provision for those equitable interests, and that, perhaps, would be sufficient to answer the particular clauses of the acts of 1854 and 1855, to which I have been referred. There are other clauses, too, in those acts, which will require deliberate consideration whenever the question of jurisdiction fairly arises; but I have now to consider whether the defendant Dickinson has acquired the legal title to the ship. I think that the rules in the 31st section of the act of 1854 shew, that the bare fact of registration of a bill of sale valid on the face of it, would not of itself give an absolute title at law, otherwise the 3rd rule, which I have already noticed, having reference to the case of the death of the person giving the power of an attorney before the bill of sale is registered, would be unnecessary. The legislature contemplated that, unless they inserted a special clause that the death should not have any effect

in vacating the bill of sale, the bill of sale would have been void. Therefore I must conclude that the purport of this clause is, that where the registrar registers bills of sale it must mean that he registers valid bills of sale, and the legislature feels itself compelled to enact expressly that the bill of sale shall be valid, although the person giving the power is dead; and if it had not so enacted, although there was a perfect bill of sale on the face of it, if that person were dead it would not have been a valid bill of sale, even though registered. Here it is declared that the power shall be exercised according to the certificate; and I am entitled, according to this construction of the act, to ascertain whether the power has actually been exercised in conformity with the certificate. I find it has not, and it appears to me that the mere writing in of that 1,300*l.* in order to make it an execution by the attorney, which it was not, has no more effect than if the bill of sale had been a forgery. And though Mr. Simpson tells me that a case of the sort has arisen, in which it has been doubted very much whether the remedy must not be against the forger, I can find nothing in the principle of national policy, which requires that registration shall give operation to that which is a nullity, or that when the legislature says the ship is only to be passed by a valid bill of sale of the owner, that which is no bill of sale of the owner can possibly pass it. There would be no place where you could stop if that were the policy of the law. It would be in the power of the registrar to register at any port all ships according to his fancy, or for any bribe that might be given to him by anybody. It would be very strange if any such doctrine as that could be upheld. I have come to the conclusion that no valid bill of sale has ever been executed; that, therefore, the registration has been made of that, the validity of which the registrar could not try; that the registration was an irregular registration in every sense of the word; and that, according to the 12th rule of section 81. no sale having been made in conformity with the certificate of sale, the certificate ought to be cancelled. In this particular case it is satisfactory to find that, although the certificate of sale was presented on the 8th of September

with the 900*l.*, which was the true consideration, filled in, and, on its being found that would not do, afterwards sent with a false representation in order to make it do, yet no indorsement being made upon it, nothing was done at that time in order to enable the transmission of the title; but the thing stood in that state, with every apparent indication of Messrs. Wilson, Brown & Co. remaining the persons who were about to sell, until the plaintiff thought it right to revoke the power of sale, which he had full power to do. That had to be done at Prince Edward's Island, the port of registry, and it had to be returned to Liverpool. It is returned to Liverpool, and the revocation is in the hands of the registrar before he is called on to make any entry on this void bill of sale; therefore, the revocation was complete before the registrar made this blunder—a very pardonable one on his part, arising simply from his not being aware of the irregularity, which was probably concealed from him. But having made the registry simply in pursuance of that which was no bill of sale at all, I think the registry of sale must be treated as a nullity. I hold that there has been no acquisition of legal title at all; there has been no bill of sale which has actually transferred the title; the registration has been made under an error, created by the act of those who improperly obtained the registration; and there must be a declaration that the registration of the brig *Polly Hopkins* in the name of John Henry Dickinson, on the 30th of January 1858, was void, the alleged sale having been made for a less price than that named in the certificate of sale; and the ship having been sold by arrangement pending this suit, Declare, that the plaintiff (subject to the account hereinafter directed) is entitled to the net proceeds of such sale. And let an account be taken of all payments and disbursements for insurance, dock dues or otherwise, properly made by Messrs. Wilson, Brown & Co. and the defendant Dickinson, or either of them, before the 2nd of December 1857; regard being had to the circumstance that Messrs. Wilson, Brown & Co. were up to that date agents for the sale of the ship under the certificate of sale.

L.C. AND L.J. TURNER. Feb. 8; April 20, 21, 30; June 8.	{	THE LONDON, BRIGHTON AND SOUTH COAST RAIL- WAY COMPANY v. THE LONDON AND SOUTH- WESTERN RAILWAY COMPANY.
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**Railway Company—User of Joint Line
—Agreement for Lease of Railway.**

By virtue of an act of parliament, passed in 1847, a railway, from H. to P, and the station at P, became vested in the S. W. and S. C. Railway Companies as joint tenants, the joint line and station being under the management, as to expenses, &c. of a joint committee, appointed by the two companies. The D. P. Railway was afterwards completed, joining the S. C. Railway at a point a short distance from H. That short distance of the S. C. Railway the D. P. Company became entitled to use. In 1858 the S. W. Company agreed with the D. P. Company to apply for an act to enable the S. W. Company to accept a lease of the D. P. Railway for 999 years, at 18,000*l.* per annum; the S. W. Company in the mean time, until the act was obtained, working the D. P. Railway and paying that company at the rate of 18,000*l.* per annum. Shortly afterwards another agreement was made between the S. W. and D. P. Companies, alleged to be under the 87th section of the Railways Clauses Consolidation Act, 1845, for the regulation of tolls, &c., but providing that, out of the joint fund therein mentioned, there should be paid to the D. P. Company 18,000*l.* per annum, in priority to all charges. A third agreement was made in 1859, between the S. W. and D. P. Companies, which was stated to be a temporary arrangement respecting the user by the S. W. Company of the D. P. Railway until an agreement should be sanctioned by the Board of Trade, or an act obtained for a lease of the D. P. Railway to the S. W. Company. By this agreement the S. W. Company was to have the use of the D. P. Railway, and pay all expenses, &c., and should cause such an amount of traffic to pass over the D. P. Railway as should cause the payments under that agreement to the D. P. Company in respect of tolls to be after the rate of 18,000*l.* per annum at least. The S. W. Company attempted to use the joint station at P. for

the purposes of the traffic by them passed over the D. P. Railway. The S. C. Company objected to this, as the right of the S. W. Company to use the joint station was only in respect of traffic lawfully carried by them, and filed a bill for an injunction. Upon the motion for injunction being made Wood, V.C. refused it. Upon the motion being renewed, by way of appeal, it was directed to stand over, in order that the cause might be brought on by motion for decree, the evidence on both sides being in the mean time to be completed: and upon the cause being thus brought on, it was held, that the agreements between the S. W. and D. P. Companies being illegal, the injunction to restrain the use by the S. W. Company of the joint station for traffic passed over the D. P. Railway must be granted.

This case came on to be heard on the 8th of February, on motion by the plaintiffs for an injunction, Wood, V.C. having refused to grant it.

The case was then adjourned for further evidence, and to enable the cause to be brought on by way of motion for decree, and it was accordingly thus brought before the Court.

In 1847 the Brighton and Chichester Railway Company had a line of railway called the Portsmouth Extension, part of which ran between Havant and Portsmouth. It was agreed between the London and Brighton Company and the South-Western Company that they should jointly become the owners of this portion of the Portsmouth Extension, and accordingly an act was obtained, empowering the London and Brighton and the Brighton and Chichester Companies to sell, and the London and Brighton and the South-Western Companies to purchase, such parts as the companies should agree upon, of the portion of the Portsmouth Extension as lay next to the junction near Havant, between the line of the Extension Railway and the line of the then intended Direct London and Portsmouth Railway Company, and the stations, works and conveniences therewith; and the companies were to be at liberty to enter into and complete such contracts for the purposes aforesaid, and the sale and purchase might be upon such conditions,

&c. as the companies might agree upon. A form of conveyance was provided by the act, which enacted that the conveyance, when executed, should be effectual to vest the joint line, and all the rights, privileges, powers and authorities by any act relating thereto, jointly in the companies purchasing.

The 9th section provided for the appointment of a joint committee, consisting of three directors of each of the companies, for carrying the provisions of the act into execution.

The 12th section provided for the appointment, by the joint committee, of officers and servants for the joint line, but each of the two companies might, at the expense of such company, appoint its own booking-clerks, who were not to be removable by the joint committee.

The 13th section enacted that, subject to the control and management of such joint committee, and the provisions of any act relating to the joint line, or to the two companies, or either of them, each of the two companies might at all times thereafter use the joint line for the purposes of conveying passengers, &c. upon the same, and for all such other purposes as should be necessary for the traffic or business thereon of the same company.

The 18th section provided for the tolls to be demanded; and the 22nd section for the mode in which, after payment of expenses, the profits were to be divided, which was to be in equal shares.

The 27th section enacted that, notwithstanding anything therein contained, the two companies might from time to time enter into and carry into effect any contract between themselves with reference to the mode of ascertaining and dividing the profits of the joint line.

On the 9th of October 1848 the two companies entered into a contract under their common seals, which related to the profits of what was called "London traffic," as well as the profits of the joint line, and in which a division of profits was agreed upon different from the equal division directed by the act, and a definition of the term "London traffic" was there given. The 11th clause of this agreement provided that, by the term "London traffic," employed in the 9th and other articles of

this contract, should be meant, as regarded the Brighton Company, all passengers, animals and things conveyed or transmitted by the said company, and which, going northward, should pass over the joint line, or any part thereof, or any part of the said Portsmouth Extension of the Brighton and Chichester Railway, lying within three miles of the point at which the joint line crosses or nearest approaches the Sheet turnpike-road, and be delivered at any point within ten miles to the southward of the New Cross station of the London, Brighton and South Coast Railway, or at the same station, or at any point to the northward of the same station, or which going southward shall pass from any point to the northward of the same station or from any point within two miles to the southward of the same station. By the 12th article it was provided that "Except as regards passengers, animals and things carried on the joint line only, and London traffic as defined in the 11th article of this contract, each of the two companies shall be entitled for its own exclusive use to all such rates, tolls and charges as shall be received by the same respective company in respect of the joint line."

A provision was made by the 18th and 19th articles against the companies diverting traffic improperly to their own lines which would otherwise be common property, or acting at all against the spirit of the agreement. The 18th article provided, that the South-Western Company should not at any time thereafter make, or attempt to make, any arrangements, or hold out any inducements for the purpose, or with the tendency of unfairly and in any way contrary to the spirit of this contract and the intent of the Brighton Company in entering into the same, attracting or otherwise diverting to the line of the South-Western Railway running through Fareham to or from Gosport, any of the traffic which in the ordinary and regular course of business, and but for such arrangements or inducements would be traffic on the joint line or London traffic, defined by the 11th article as traffic of the Brighton Company. By the 19th article, it was provided, that neither of the two companies should at any time thereafter make, or attempt to make, any arrangements or

hold out any inducement for the purpose or with the tendency of unfairly, and in any way contrary to the spirit of the contract and the intent of the other of the two companies in entering into the same, attracting or otherwise diverting to the line of such respective company any traffic, whether coming or going by sea or by land, or partly by sea and partly by land, which in the ordinary and regular course of business, and but for such arrangement or inducement, would be or have been traffic on the joint line, or London traffic, as thereinbefore defined as traffic of such other company.

The conveyance under the act was executed on the 10th of March 1851, and by it, in consideration of 60,000*l.* paid by the South-Western Company to the Brighton Company, the portion of the Portsmouth Extension, which was called the joint line, was conveyed to the two companies, together with the stations, works, &c. In August 1852 the two companies arranged the terms of another agreement, not however under seal, and therefore not binding on them, but shewing their apprehension of their interests being affected by a new line of railway being formed in the district intermediate between the two lines, and their determination to co-operate in opposition to any such project. It was through this district that the Direct Portsmouth Railway was afterwards made. The power to make this railway was conferred upon the Direct Portsmouth Company, by an act passed in 1853, by which they were empowered to make a railway from Havant to Godalming. In 1858 this company obtained powers, by an amended act, to extend their line from Havant to Hilsea, but as in this extension of their line they would have to carry it the whole way by the side of the railway belonging to the South Coast Company, powers were given them of acquiring the right of using this portion of the South Coast Company's line; and also as to the joint line of the South Coast and South-Western Companies between Hilsea and Portsmouth, and their joint station at Landport. The 35th section of the amended act provided, that it should be lawful for the company, and all other companies and persons lawfully using the Portsmouth

Railway, to pass over and use with their respective engines and carriages the railways, or portions of railways thereafter mentioned, amongst others, so much of the railway of the London, Brighton and South Coast Railway Company as is situated between the point of junction with that railway in the parish of Havant on the Portsmouth Railway, and the point at or near Hilsea Redoubt, where the London, Brighton and South Coast Railway united with the line to Portsmouth, belonging to that Company and the London and South-Western Railway Company, or one of them, and also of the line of railway to Portsmouth belonging to the two last-mentioned companies, or one of them, between the before-mentioned point at or near Hilsea Redoubt and the terminus of the said railway at the Landport Road. Such powers of passage and of user were in each case to be exercised on such terms and conditions as, failing an agreement between the companies, should be settled by the principal engineers thereof, or if they differed by an umpire or by the Board of Trade, and all reasonable accommodation was to be provided within the station. It was provided, nevertheless, that (except as thereafter provided) nothing in this act contained should confer on the company, or on any such other company or person as aforesaid, any powers of user of the joint station at Landport, in the parish of Portsea, of the London, Brighton and South Coast, and London and South-Western Railway Companies for any purpose other than the transmission upon the lines of railway laid down in the said station of traffic conveyed on the public service. The 36th section provided, that the company and the owners for the time being of the said joint station at Landport might agree for the use by the company, or such other company or person as aforesaid of the said joint station, or any part thereof, for the general traffic of the company on such terms and conditions as should be mutually agreed on for the use of the joint station, and if no such agreement should be come to, then the company, before the expiration of a year, were to erect a station for themselves.

On the 23rd of December 1858 an agreement was entered into between the South-Western Company and the Portsmouth

Company to apply to parliament in the ensuing session to authorize the Portsmouth Company to grant, and the South-Western Company to accept, a lease of the Portsmouth Company's undertaking for a term of 999 years, from its opening for traffic, or until it should be merged in the South-Western Company, at a rental of 18,000*l.* a year, and it was further agreed that if they should not succeed in obtaining an act, they were to repeat their efforts in 1860. It was also agreed that the South-Western Company should work the Portsmouth undertaking in the mean time, keeping the same in good and efficient repair, and paying to the Portsmouth Company the sum of 18,000*l.* per annum.

By a second agreement, dated the 24th of December 1858, reciting that by the local act, 1 Vict. c. lxxi. s. 50, it was, after reciting that it would tend much to the convenience of the public if railway companies were empowered to enter into mutual arrangements so as to avoid the necessity of a change of carriages and other delays arising from a diversity of interest, enacted that the South-Western Company, and all other railway companies might enter into contracts for the division or apportionment of tolls or rates for the passage of engines or carriages over their respective lines of railway upon the payment of such tolls or rates, and under such conditions and restrictions as might be mutually agreed upon; that the Railways Clauses Consolidation Act, 1845, applied to the Portsmouth Company, and that under section 87. they had the ordinary power to make contracts with respect to the passage over their line of railway of the engines, coaches, waggons or other carriages of the South-Western Company upon the payment of such tolls and under such conditions and restrictions, as might be mutually agreed on between the two companies, and for that purpose to enter into any contract for the division or apportionment of the tolls to be taken on their respective railways; that by the Portsmouth Railway Amendment Act, 1857, power was given to the Portsmouth Company and the South-Western Company to enter into and carry into effect such agreements and arrangements as they might think fit in respect of the regulation and management by the Ports-

mouth Company and the South-Western Company, or either of them, of the traffic upon or over their respective railways, or either of them, or any part thereof; that it would tend to the convenience of the public and would be of mutual advantage to the two companies if arrangements were made with respect to the user by the South-Western Company of the railway of the Portsmouth Company and the regulation and management by the South-Western Company of the traffic thereon in connexion with the traffic of the railway of the South-Western Company, and that the two companies had accordingly determined to enter into the following agreement, which had been duly assented to by three-fifths of the shareholders of each of the two companies: it was witnessed that the agreement should continue in force from the 1st of January 1859 until either the Portsmouth Railway was leased to the South-Western Company or the two companies became united, or one of them was merged in the other; that the South-Western Company should be entitled during the continuance of this agreement to use the Portsmouth Railway for the passage over and along the same of their engines, &c., and that they should receive, collect and recover all tolls, fares, rates and charges receivable in respect of the traffic, and that during the continuance of the agreement all sums received or receivable by the Portsmouth Company in respect of the Portsmouth Railway, and the local traffic, and all sums received by the South-Western Company in respect of the tolls, fares, rates and charges for the traffic in respect of the South-Western Company's line of railway between London and Godalming, should form a joint fund to be divided and apportioned between the two companies half-yearly, paying thereout to the Portsmouth Company in the first place and as the first charge thereon the sum of 9,000*l.*, and after paying the two companies respectively their respective expenditure in working the traffic, and in wages, salaries and other matters therein particularly mentioned, the residue of the joint fund to be paid to the South-Western Company.

By a third agreement, dated the 24th of February 1859 (after the filing of the bill)

reciting that the two companies had agreed to enter into a temporary arrangement respecting the user by the South-Western Company of the Portsmouth Railway until a more extended agreement should have been approved by the Board of Trade, or until a bill then before parliament for authorizing an amalgamation or lease of the Portsmouth Railway with or to the South-Western Railway Company should have become law, it was witnessed that, in exercise of every power enabling them respectively in that behalf, the said companies mutually agreed (amongst other things) that the said reciting agreement should commence from the 1st of January 1859, and continue in force until a more extended agreement should have been approved by the Board of Trade, or until the before-mentioned bill should have become law; that the South-Western Company should be entitled during the continuance of this agreement to use the Portsmouth Railway for the free passage over and along the same of the engines and carriages of every kind of the South-Western Company; that they should pay all the expenses incident to the exercise of their rights in this respect, and pay to the Portsmouth Company the full maximum tolls demandable or receivable by the Portsmouth Company in respect of the same; that the South-Western Company should cause to pass over the Portsmouth Railway such an amount of traffic as should cause the payments to be made to the Portsmouth Company in respect of tolls, to be after the rate of 18,000*l.* per annum at the least, for the whole of the period during which the agreement should continue in force.

This suit was instituted by the South Coast Railway Company to restrain the South-Western Company from using the station at Landport and the joint line for the booking or transit of passengers or goods destined for or coming from the Portsmouth Railway or any part thereof. It was contended, by the South-Western Company, that they were entitled, under the act of 1847, to use the joint line and station for all purposes that were necessary for their traffic and business; and that having arranged with the Portsmouth Railway Company to pass their traffic over

that line, they had a right to use the joint line and station when the traffic arrived there. The South Coast Railway Company, on the other hand, insisted that the intention of the act of 1847 was, that the joint line and station should be used for that which was strictly the traffic belonging to the respective companies, and that it was never intended to enable either company to bring traffic to the joint line which had passed over another independent railway. They also submitted that the agreements of December 23 and 24, 1858, and February 24, 1859, which the South-Western Company had entered into with the Portsmouth Railway Company, by which the Portsmouth Railway was virtually transferred to the South-Western Company for an annual rent of 18,000*l.* per annum were illegal and void. The bill also prayed for an account. Wood, V.C. refused an injunction; but the agreements between the South-Western and the Portsmouth Companies were not before him.

Mr. Rolt, Mr. Willcock and Mr. J. H. Taylor were for the plaintiffs.

Sir R. Bethell, Mr. Giffard and Mr. Baggallay appeared for the South-Western Company; and,

Mr. C. T. Simpson, for the Portsmouth Company.

The arguments upon the hearing will sufficiently appear in the judgment.

The following cases were cited:—

The Great Northern Railway Company v. the Eastern Counties Railway Company, 9 Hare, 306; s. c. 21 Law J. Rep. (N.S.) Chanc. 837.

The South Yorkshire Railway and River Don Company v. the Great Northern Railway Company, 3 De Gex, M. & G. 576; s. c. 22 Law J. Rep. (N.S.) Chanc. 761.

The East Anglian Railway Company v. the Eastern Counties Railway Company, 11 Com. B. Rep. 775; s. c. 21 Law J. Rep. (N.S.) C.P. 23.

The Great Northern Railway Company v. the Manchester, Sheffield and Lincolnshire Railway Company, 5 De Gex & Sm. 138.

Sharp v. Taylor, 2 Phill. 801.

The Shrewsbury and Birmingham Railway Company v. the London and North-Western Railway Company,
16 Beav. 441; s. c. 4 De Gex,
M. & G. 115; 6 H.L. Cas. 113.

June 8.—The LORD CHANCELLOR, after stating the case, said—It appears quite clear that the 35th section of the Direct Portsmouth Company's act of 1858 does not intend to restrict in any way the user by the companies of their own lines, whether belonging to them separately or jointly, and that it is wholly directed to enabling the Portsmouth Company and the other companies to obtain the right of using these lines. The question, therefore, between the companies will be found not to depend upon this act, but upon entirely different grounds. Of course, this observation does not apply to the portion of the line between Havant and Hilsea; but of this the case may be entirely cleared, for though at the time of the filing of the bill there had been no agreement under the 35th section of the act of 1858, and therefore the plaintiffs prayed for an injunction to restrain the use of so much of their line, yet since the bill was filed the matter has been settled in the manner provided for by the act, and therefore this part of the relief prayed may be put out of consideration. The case which the South-Western Company make is this: they say, under the 13th section of the act of 1847, we are entitled to use the joint line, which includes the joint station, for the purpose of conveying passengers and goods upon the same, and for all such other purposes as shall be necessary for our traffic and business thereon. There is nothing in that act to confine us to the particular line of our railway which then alone existed. We might, by extending that line, or by throwing out branches, have brought down any increased quantity of traffic to the joint line. We have arranged with the Portsmouth Company to pass our traffic over their line, and when it arrives at the joint line we use that which is our own property, and which existed in us prior to the act of 1858. That act conferred no powers upon us as to this joint line, which

would have been wholly unnecessary, because we possessed all the powers we required without its aid. The South Coast Company, on the other hand, say that the intention of the act of 1847 was that the joint line should be used for that which was strictly the traffic which belonged to the railways of the respective companies; that this did not exclude the legitimate extension of those railways, but that it never was intended to enable either company to bring traffic to the joint line, which had passed over another and independent railway; that this would be unjust to them, as they have to bear a moiety of the expense of maintaining the joint line; and yet, if the traffic comes on to the joint line, having commenced on some part of the Portsmouth line, or proceeds upon the joint line, and is destined only for some place on the Portsmouth line, they would not be entitled to a share in the profits of the conveyance of the passengers or goods; and they contend that the agreements which the South-Western Company have entered into with the Portsmouth Company are illegal and void, and therefore they are either not lawfully using the Portsmouth Railway, or at all events the traffic which depends on these agreements cannot be the traffic or business contemplated by the act of 1847, which must be the lawful traffic or business of the South-Western Company. I have already intimated my opinion that the act of 1858, as to companies lawfully using the Portsmouth Railway, does not apply to the London and South-Western Company. But the other question remains, and it is a very important one, whether the circumstances under which that company has acquired the use of the Portsmouth Railway enables them to claim the traffic which passes over it as their traffic and business. To determine this question it will be necessary to examine the agreements which have been entered into between the two companies. They consist of three different instruments: one called "the Heads of Arrangement," dated the 23rd of December 1858; and another an agreement for traffic arrangements, dated the 24th of December 1858; and the third an interim agreement for the user by the South-

Western Company of the Portsmouth Railway, dated the 24th of February 1859. I think that all these must be deemed and taken to be one agreement, under which the use of the railway is transferred to the South-Western Company. What, then, is the nature of these instruments? They are nothing more or less than an abandonment of the management and use of their line by the Portsmouth Company to the South-Western Company, in consideration of a sum of 18,000*l.* a year. They are ingeniously and carefully worded, with the object of evading the objection, which must be well known to exist, to the transfer by one railway company to another of the rights and powers conferred by the legislature. The last of these instruments, which was entered into after the bill was filed, viz., on the 24th of February 1859, has been properly described as the result of a selection of the least objectionable parts of the former agreements for the purpose of more completely colouring the real objects of the parties, but it has been argued that this last agreement at least must be valid, because it is a mere interim arrangement which it is expressly provided shall only continue in force until a more extended agreement shall have been approved by the Board of Trade, or until a bill before Parliament for authorizing an amalgamation or lease of the Portsmouth Railway to the South-Western Company shall have become law. But surely this cannot be maintained. If the sanction of the Board of Trade or of the act of parliament is necessary to render the agreement good, any agreement made before the authority is obtained, which is essential to its validity, must be bad, and we are dealing with such an agreement. Can then these agreements, by which the management of the line and the benefit of the traffic of the Portsmouth Company are virtually transferred to the South-Western Company for a fixed sum annually, be held to be legal and binding on the two companies? If not, the conveyance under this agreement of passengers and goods, which would otherwise belong to the Portsmouth Company, cannot make them part of the traffic and business of the South-Western Company. I think that the illegality of this agreement is established by the cases which

were cited in the course of the argument, particularly by the cases of *The Great Northern Railway Company v. the Eastern Counties Railway Company*, and *The East Anglian Railway Company v. the Eastern Counties Railway Company*, and by *The Shrewsbury and Birmingham Railway Company v. the London and North-Western Railway Company*, in the House of Lords, where the Lord Chancellor, Lord Cranworth, in advising the House, said, "There is abundant authority to shew that there are many contracts into which, without express authority, a railway company cannot enter. The Railway Clauses Consolidation Act (8 Vict. c. 20. s. 86.) authorizes every such company to run carriages, and generally to act as a carrier on its own line of railway, and by the next section the company is enabled to make arrangements with other companies having continuous railways for the use of their respective lines, for their mutual benefit. All this would have been unnecessary if it had not been considered that, but for such enactments, no such power would have existed under the mere incorporation of the company for the purpose of making and maintaining a railway." I cannot better express my opinion of this agreement than in the language of Lord Justice Turner, when Vice-Chancellor, in the case of *The Great Northern Railway Company v. the Eastern Counties Railway Company*: "It is framed in total disregard of the obligations and duties which attach upon these companies; and is an attempt to carry into effect, without the intervention of parliament, what cannot lawfully be done except by parliament in the exercise of its discretion with reference to the interests of the public." But it is said, supposing the agreements are illegal, why is the South Coast Railway Company to interfere? If they are in violation of the act of parliament, or are against public policy, it is the duty of the Attorney-General, and not of private parties, to question them. If they involve an application of the funds of the company to a purpose foreign to those for which it was incorporated, it is for the shareholders to complain. But the South Coast Railway Company do not attempt to impeach these agreements on account of their ab-

abstract illegality, but merely urge their illegality for the purpose of shewing that the South-Western Company can acquire no rights under them which can affect their interests or property. So long as the South-Western Company confine themselves to the limits of the Portsmouth line the South Coast Company have no interest in the question of the validity of these agreements. It is only when they are attempted to be connected with the use of the joint line that they become complicated with the rights of the South Coast Company. But it is argued on behalf of the South-Western Company that whatever may be thought of traffic which commences or terminates upon the Portsmouth line, in connexion with the joint line, yet the traffic which begins on any part of the South-Western, or which ends on any part of that line, although the Portsmouth line is used in the course of its transit, must at all events be regarded as traffic of the South-Western Company, and that the South Coast Company can have no right to inquire by what means it arrived at the joint line, or how it is carried from the joint line to its destination on the South-Western Railway. This has always appeared to me to be the only difficult part of the case; but after carefully considering it, I have arrived at the conclusion that, as all the traffic which passes over the Portsmouth line is carried over it under the agreements, which are illegal, it is immaterial where it comes from or what is its ultimate destination, and that none of it can be regarded as traffic and business of the South-Western Company within the meaning of the 13th section of the act of 1847, upon which the whole question depends. It was suggested that the South Coast Company were opposing the user of the line by the South-Western Company to their own disadvantage, as the additional traffic which would be brought upon it would increase their own profits; but it is obvious that, under the definition of London traffic in the agreement entered into in pursuance of the act of 1847, a great portion of traffic might be brought on the joint line, in the benefits of which it would not be entitled to participate, and at the same time the increased wear and tear of the line in which they partici-

pate they must contribute to make good. But whatever may be the prudence or propriety of this proceeding on the part of the South Coast Company, they are clearly entitled to resist all use of the joint line and station for anything not part of the legitimate traffic and business of the South-Western Company. I think, therefore, that it will be proper for the Court to make a declaration that the South-Western Company are not entitled to use the joint station at Landport for passengers or goods carried or conveyed under the agreements of the 23rd and 24th of December 1858, and the 24th of February 1859, and to grant an injunction restraining them from using the joint station for the booking or transit of passengers or goods destined for or coming from the Portsmouth Railway, or any part thereof, until further order. This will leave the question open to the South-Western Company, if they obtain valid agreements, or, of course, if they obtain any powers under an act of parliament, to come again to the Court. With respect to the application for an account, I think that that cannot be granted. As the joint committee are to fix the amount of tolls, there can be no account taken unless they have performed their office in that respect; and, therefore, the Court can give no relief in that particular. With respect to the costs, of course as to the first part of the prayer the injunction to restrain the South-Western Company from using the portion of the Portsmouth line between Havant and Hilsea, the plaintiffs were perfectly right at the time the bill was filed; therefore, at all events, under any circumstances, they would be entitled to their costs of that, but we think also that the South-Western Company ought to pay the costs of this appeal. With regard to the Portsmouth Railway Company, we say nothing as to the costs with respect to it.

LORD JUSTICE TURNER.—The principal question remaining to be decided in this case is, whether the South-Western Company are entitled to use the station at Landport belonging jointly to them and the plaintiffs, the South Coast Company, for the booking and transit of passengers or goods destined for, or coming from, the Portsmouth Railway or any part thereof,

except for the transmission of traffic conveyed on the public service to or from the line belonging to the Crown leading to the Dockyard or other public establishments at Portsea or Portsmouth. The bill raises the same question as to the right of the Portsmouth Company to the use of the Landport station, but they have not claimed, and do not claim, any such right, and this part of the case may, therefore, be laid out of consideration. There is a subordinate question, which it will be necessary to dispose of, as to the accounts which are prayed for by the bill. The defendants, the South-Western Company, having entered into agreements with the Portsmouth Company with respect to the use of their line and to the traffic upon it, claim the right to use the Landport station for the booking and transit of passengers and goods destined for, and coming from, the Portsmouth Railway, under the provisions of an act of parliament passed in the year 1847. On the other hand, the plaintiffs insist that this act of parliament gives the South-Western Company no such right, and they also, in the first instance, insisted on some agreements entered into between them and the South-Western Company, as having precluded the exercise of such right, if in fact given by the act; but they afterwards abandoned that ground, and relied upon those agreements, merely as expounding, as it was said, the act of 1847. They further insisted, however, that the South-Western Company were precluded from this user of the Landport station by another act of parliament, passed in the year 1858, and they contended that the South-Western Company were not lawfully using the Portsmouth Railway within the meaning of that act, the agreements entered into by them with the Portsmouth Company being, as the plaintiffs insisted, illegal and void. But the South-Western Company, on the other hand, contended, that the act of 1858 did not in any way affect their rights, and that the agreements between them and the Portsmouth Company were valid, and they insisted that, at all events, the plaintiffs were not entitled to question the validity of those agreements. The first question to be considered, therefore, is whether the South-Western Company are

entitled to use the Landport station for the purposes in question, by virtue of the act of 1847. By this act, after reciting that it would be of public advantage to vest in the South-Western Company and the plaintiffs so much of the Portsmouth Extension of the Brighton and Chichester Railway as was or might be constructed between Havant and Portsmouth, which Extension Railway the plaintiffs are mentioned in this recital to have contracted to purchase, powers are given, by section 2, to the plaintiffs to sell, and to the South-Western Company and the plaintiffs to purchase, such part of the portion of the Extension Railway lying westward of the junction near Havant, between the line of the Extension Railway and the line of the then intended Direct Portsmouth Railway, as the companies should define and agree upon, and the stations and other works and conveniences connected with the same portion, and the parts so to be defined and purchased, and the stations, works and conveniences connected therewith, are mentioned to be thereafter referred to as "the joint line"; and after providing for the conveyance to be made upon the completion of the sale and purchase, it was enacted, by section 5, that the conveyance, when executed, should be effectual to vest the joint line, and all the rights, privileges, powers and authorities, by any act or acts of parliament relating thereto or otherwise given to or vested in the companies selling, or either of such companies, with reference to the same, with the appurtenances, jointly in the companies purchasing; and, by section 6, that when the conveyance should have been executed, all the powers, rights and privileges by any act or acts of parliament, or otherwise given to or vested in the Brighton and Brighton and Chichester Companies, or either of them, and for the time being in force, should, so far they might relate to the joint line, apply to and be vested in the South-Western and Brighton Companies jointly, and might be used, exercised and enjoyed by the same companies jointly, and by such joint committee as thereafter provided for respectively. It was further enacted, by section 9, that for the better management of the joint line, a joint committee, consisting of three directors of

each of the two purchasing companies, should be appointed for carrying the provisions of the act, so far as the same related to the making and maintaining the joint line and to the other things to be done by the joint committee as therein provided, into execution, and that the joint committee should have the like powers, privileges and indemnities as might have been exercised by the companies selling, or either of them, if they had not sold. By section 11, that the joint committee should be subject to all such by-laws, regulations and provisions as might from time to time be agreed upon by the board of directors of the two purchasing companies respectively, and that, except so far as should be otherwise provided by such by-laws, regulations and provisions, the majority present should at all meetings of the joint committee bind the minority and all absent members, and the chairman should be selected alternately from among the members appointed by each of the boards and should have a casting vote, and three members of the joint committee should form a quorum, with a proviso that such three members should not be those appointed by one of the boards, except in certain cases therein mentioned arising from the default of the other board. By section 12. it is enacted, that the joint committee should appoint the officers and servants to be employed, but with power to each of the companies to appoint their own booking-clerks. Section 13. I shall have occasion to refer to presently. By section 14, that the joint and several funds of the two purchasing companies should be liable for the payment and satisfaction of all liabilities incurred by the joint committee. By section 15, that an equal half-part of the cost and expenses of making, maintaining and managing the joint line should be paid by each of the two purchasing companies. By section 18, that the rates, tolls and other charges to be demanded and received from and by the two companies respectively in respect of passengers, animals and things conveyed by the same companies respectively upon the joint line, or any part thereof, and for the use of carriages and engines or other power supplied by the same companies respectively thereon, should from time to

time be determined by the joint committee; and by section 20, that the joint committee might demand and receive from any other railway company or railway companies who might use the joint line, or any part thereof, such rates, tolls and charges for the use thereof as such joint committee should from time to time think fit and determine. It was also enacted, by section 22, that the profits to be received by each of the purchasing companies in respect of the joint line should be paid to the joint committee, and after payment of the expenses payable by the joint committee in respect of the joint line, should be paid by the joint committee to the two companies in equal shares. By section 23. all the expenses incurred in respect of the joint line, exclusive of those which are incurred by the two purchasing companies, or either of them, in the conveyance on that line, and the liabilities which may be incurred in respect thereof, all those expenses are to be paid by the joint committee, and the surplus of those funds is to be paid in equal shares between the two companies. By section 23. provision is made for a deduction to be made by each company for the working of the joint line. By section 27. there is power to the companies to agree with each other for different terms than those prescribed by the act. Under the provisions of this act, the South-Western Company and the plaintiffs purchased part of the Extension Railway lying westward of the point of junction of the intended Direct Portsmouth Railway, referred to in the act, and the part thus purchased was conveyed to the South-Western and Brighton Companies accordingly. This purchased part of the Extension Railway lies between Hilsea and Portsmouth, at the western or Portsmouth end of the Extension Railway. It is not in immediate connexion with the point of junction of the Direct Portsmouth Railway above referred to, there being a part of the Extension Railway not included in the purchase, which intervenes between the part of it which has been purchased and the above-mentioned point of junction, and which intervening part now belongs to the Brighton Company. The purchased part of the Extension Railway is, however, connected with the South-Western Railway at

Cosham, near Hilsa. The Landport station, which is in question in this suit, is at the Portsmouth end of the purchased part of the Extension Railway. Since this purchase was made, the Direct Portsmouth Railway, mentioned in the act as having been then intended to be made and to join the Brighton Railway near Havant, has been completed. It belongs to the defendants, the Portsmouth Company, and it may be convenient here to mention that, at the time of the filing of this bill, the defendants, the Portsmouth Company, had no right to carry passengers or goods over the intervening part of the extension railway, above mentioned as belonging to the Brighton Company, and were, therefore, cut off from any connexion with the joint line belonging to the South-Western and Brighton Companies, and that one object of this bill was to restrain the South-Western and Portsmouth Companies from using this portion of the Extension Railway, but that since the filing of the bill the Portsmouth Company, and as it was said in the argument and not denied, the South-Western Company also, have acquired the right to use that intervening portion of the extension railway by virtue of an award, made under the provisions of the act of 1858; and this part of the plaintiffs' case therefore was admitted at the Bar to be at an end, thus reducing the case to the question as to the right to use the Landport station. The South-Western Railway Company, who have entered into agreements with the Portsmouth Company, which must presently be mentioned, claim the right to use the Landport station, both for the purposes of their own traffic carried over the Direct Portsmouth Railway, and for the purpose of the traffic of the Direct Portsmouth line carried by them, upon two grounds: first, that the act of 1847 created a joint tenancy between them and the Brighton Company in the joint line, including, of course, the Landport station, and that every joint tenant is entitled to the full use and enjoyment of the joint property; and, secondly, that this right is expressly given to them by the 13th section of the act of 1847. As to the first point, whatever might have been the effect of the act of 1847, had the case depended upon the earlier sections of it, the 9th and subse-

quent sections seem to me sufficiently to shew that it was not the intention of the legislature that the joint ownership of the joint line by the two purchasing companies should be attended with the incidents of joint tenancy to the extent contended for by the defendants, the South-Western Company, for, by the 9th and subsequent sections, not only is the management of the joint line vested in the joint committee comprised, it is true, of an equal number of the directors of each company, but empowered, it is to be observed, to act when the companies are not equally represented, but the profits to be derived by each of the two purchasing companies are made, in a great measure, to depend upon what may be done under the exercise of the powers vested in the joint committee; and several sections of the act, and more especially the 13th section, refer to and provide for the separate interests of each of the two companies. I think, therefore, that the rights of the two companies must depend upon the provisions of the acts, and not upon the incidents of joint tenancy, and that the argument on the part of the South-Western Company, so far as it is founded on the joint tenancy, cannot be maintained. Then as to the claim of the South-Western Company to the user of this station under the provisions of the act: the question seems to me to depend upon the construction of the 13th section; for, if we lay out of consideration the right depending upon joint tenancy, I see nothing in the act which can give the right contended for unless it be given by that section. The words of the section are, no doubt, very wide and extensive. They are that, subject to the control and management of the joint committee and the provisions of any and every act of parliament for the time being relating to the joint line, or to the two companies, or either of them, each of the two companies may at all times thereafter use the joint line for the purpose of conveying passengers, animals and things upon the same, and for all such other purposes as shall be necessary for the traffic or business thereon of the same respective company. But wide and extensive as these words are, they must receive a just and reasonable interpretation. This is an act of parliament, which, as I view it, not

only empowered the South-Western and Brighton Companies to purchase the part of the extension line, which was purchased by them, but also gave effect to an agreement between these two companies with reference to that purchase and the mode in which the property, when purchased, was to be held and dealt with between them. If we look at the act, with reference to the agreement between the two companies, it is surely unreasonable to suppose that these general words were intended by either of them to extend to the user of the joint line, including, of course, the Landport station, for the conveyance of passengers, animals or things which either of the two companies was not lawfully entitled to convey, or to traffic or business which either of the two companies was not lawfully entitled to carry on; and if we take into account the intervention of parliament in giving effect to this agreement, it is, I think, still more difficult to suppose that parliament could have intended, by these general words, to authorize or sanction the user of the joint line for any such conveyance or traffic. It seems to me, therefore, that, even admitting that these general words extend to authorize the user of the joint line, including this station, for the conveyance of all passengers, animals and things, which either of these companies was or might lawfully be entitled to convey, and for traffic or business which either of these companies was or might be lawfully entitled to carry on; and I am not prepared to say that this extended meaning ought not to be given to the words: we are bound in construction to limit them to passengers, animals and things lawfully conveyed and to traffic or business lawfully carried on. It may be said that this act of parliament contains no such limitations of these general words, but I should be sorry to hold that express provision was necessary in an act of parliament in order to prevent general words from operating as sanctioning an infringement of the law. Where the words of an act of parliament extend to what is lawful and to what is unlawful, I apprehend that, in the absence of express provision or necessary construction, they can only be applied to what is lawful. Express provision or necessary construction is, I think, required to extend the

general words, and make them operate to authorize what is unlawful, not to prevent them from being so extended. This being my view of the construction of this act, we have to look into the agreements between the South-Western and Portsmouth Companies, for the purpose of seeing, not merely whether the South-Western Company are lawfully using the Portsmouth Railway within the meaning of the act of 1858, but whether they are lawfully carrying the traffic in question so as to bring the case within the act of 1847. These agreements are three in number: the first of them is dated the 23rd of December 1858: by this agreement the two companies are to apply to parliament the then ensuing session for an act to authorize the Portsmouth Company to grant, and the South-Western Company to accept, a lease of the Portsmouth Company's undertaking for a term of 999 years from its opening for traffic, or until it should be merged in the South-Western Company, at a rental, payable half-yearly, of 18,000*l.* a year, commencing on the 15th of January 1859; and the third clause of the agreement was as follows:—"The application to parliament, mentioned in article 1, shall be at the joint and equal expense of the two companies, and shall, in the event of failure, be repeated in 1860, at the like expense, and the South-Western Company shall, exclusively as regards the Portsmouth Company and all others claiming under their licence, or by contract with them, work and use the Portsmouth undertaking in the mean time, keeping the same in good and efficient repair and working order, and paying, half-yearly, to the Portsmouth Company a clear sum, at the rate of 18,000*l.* a year, and the outgoings which would have been payable in respect of the time of such working by the South-Western Company, according to article 1, if the intended lease had been authorized and executed, and so in proportion for any less period than a year." I think this is an agreement which these two companies were not lawfully entitled to enter into. It is an agreement by the South-Western Company, if not to become tenants to the Portsmouth Company of their undertaking, at all events to work and use their undertaking in the mean time, until parlia-

ment should determine whether they should be authorized to become tenants of it or not—and I am not aware of any power given by law to railway companies to take upon lease or to work or use the lines of other railway companies either permanently or temporarily. It is an agreement, as it seems to me, beyond the powers of the incorporation of either of these companies. The second agreement is dated the 24th of December 1858. It recites that, by a local act of the first of Her present Majesty it was, after reciting that it would tend much to the convenience of the public if railway companies were empowered to enter into mutual arrangements, so as to avoid the necessity of a change of carriages and other delays arising from a diversity of interest, enacted, that the South-Western Company, then called "The London and Southampton Railway Company," and all other railway companies, might enter into contracts for the division or apportionment of tolls or rates, or for the passage of engines or carriages over their respective lines of railway upon the payment of such tolls or rates, and under such conditions and restrictions as might be mutually agreed upon. Then it recites that the Railway Clauses Consolidation Act, 1845, applies to the Portsmouth Company, and under section 87. thereof they have the power to make contracts with respect to the passage over their line of railway of the engines, and so on, of the South-Western Company, upon the payment of such tolls, and under such conditions and restrictions as may be mutually agreed on between the two companies, and for that purpose to enter into any contract for the division or apportionment of the tolls to be taken on their respective railways. Then it recites the Portsmouth Railway Amendment Act of 1857, by which power is given, as it is said in this recital, "to the Portsmouth Company and the South-Western Company to enter into and carry into effect such agreements and arrangements as they may think fit, in respect of the regulation and management by the Portsmouth Company and the South-Western Company, or either of them, of the traffic upon or over their respective railways, or either of them, or any part thereof, and with respect to the divi-

sion and apportionment between those companies of the expenses incurred and of the tolls, rates and charges received in respect of such traffic," wholly omitting a condition which was annexed to that clause in the act of parliament itself, that the agreement should not operate until approved of by the Board of Trade. Then it recites that "It would tend to the convenience of the public, and would be of mutual advantage to the two companies if arrangements were made with respect to the user by the South-Western Railway Company of the railway of the Portsmouth Company, and the regulation and the management by the South-Western Company of the traffic thereon, in connexion with the traffic of the railway of the South-Western Company, and the two companies have accordingly determined to enter into the agreement hereinafter appearing, but subject and without prejudice to the rights of all other companies." Then the first clause of the agreement is, that "This agreement shall commence and take effect as on and from the 1st day of January 1859, and shall continue in force until either the railway, as hereinafter defined, is leased to the South-Western Company, and the two companies become united or one of them is merged in the other," the lease or the union being with the sanction of parliament. By section 3, local traffic, wherever hereinafter used, means and includes traffic of all kinds originating and terminating on the Portsmouth Railway, and all other traffic on the Portsmouth Railway not coming from or proceeding to any railway of the South-Western Company, or over which they are entitled to pass and run independently of this agreement. And, by article 4, "The expression, 'through traffic,' wherever hereinafter used, means and includes all other traffic on both the Portsmouth Railway and any railway of the South-Western Company respectively to which this present agreement relates." Article 5, the word 'traffic,' wherever hereinafter used, "means and includes both local traffic and through traffic." Article 11, "The South-Western Company may and shall, during the continuance of this agreement, demand, receive, collect and recover all tolls, fares, rates and charges receivable in respect of

the traffic, "including, therefore, both the through traffic and the local traffic," and the Portsmouth Company will do and concur in all such things as may be necessary or reasonably required for enabling the South-Western Company, by themselves or in the name of the Portsmouth Company, to demand, collect and receive the same." Article 15, "All sums received or receivable during the continuance of this agreement by the Portsmouth Company for or in respect of the Portsmouth Railway, and the local traffic whatsoever, and the through traffic whatsoever respectively thereon, and all sums received or receivable during the continuance of this agreement by the South-Western Company for or in respect of the tolls, fares, rates and charges for the local traffic whatsoever, and the through traffic whatsoever respectively, for or in respect of the South-Western Company's line of railway between London and Godalming, and the traffic whatsoever thereon shall form a joint fund, to be divided and apportioned between the two companies, according to this agreement." Then, by article 17th, "The amount of the joint fund shall from time to time be divided or apportioned between the two companies half-yearly during the continuance of this agreement, the half-years ending respectively on the 30th day of June and the 31st day of December in every year, as follows, that is to say, there shall be paid thereout to the Portsmouth Company, in the first place, and as the first charge thereon, the sum of 9,000*l.*, and all arrears, if any, thereof not paid for any preceding half-year; but if this contract shall expire or determine during any half-year, the payment for the broken half-year shall be only a due proportion." So that there is first an agreement to pay out of the joint funds 18,000*l.* a year, without any reference whatever to the expenses of working the joint line, and then the joint fund is to be applied in payment of the costs and charges of working the joint line, and then the surplus is not to be divided between the two companies, but, subject to all these charges, is to be paid to the South-Western Company. Now, this second agreement seems to me to be, if possible, more vicious than the first. It

is, indeed, more artfully drawn, for the purpose of making it appear that what was contemplated was a mere arrangement of tolls; but the effect of it is to transfer all the tolls of the Portsmouth Company, both for what is called the through traffic and what is called the local traffic, to the South-Western Company, they paying 18,000*l.* a year to the Portsmouth Company, out of a joint fund, constituted of their own tolls and of the tolls of the Portsmouth Company, to be received by them in priority to all charges on the joint fund,—the South-Western Company thus not only taking all the tolls of the Portsmouth Company, but charging their own tolls with the payment of the 18,000*l.* a year. Little was said at the Bar in support of either of these agreements, but much reliance was placed on the third agreement, which is dated the 24th of February 1859, after the filing of this bill. By that agreement, after reciting that the two companies have agreed to enter into a temporary arrangement respecting the user by the South-Western Company of the Portsmouth Railway until a more extended agreement shall have been approved by the Board of Trade, or until a bill now before parliament for authorizing an amalgamation or lease of the Portsmouth Railway with or to the South-Western Railway Company, and for other purposes, shall have become law; it is witnessed by article 1, "This agreement shall commence and take effect as on and from the 1st day of January 1859, and shall continue in force until a more extended agreement shall have been approved by the Board of Trade, or until the before-mentioned bill shall have become law." By article 2, "The South-Western Company shall be entitled, during the continuance of this agreement, to use the Portsmouth Railway for the free passage over and along the same of the engines and carriages of every kind of the South-Western Company." Article 4, "The South-Western Company, during the continuance of this agreement, shall fairly and efficiently work their traffic upon and over the Portsmouth Railway, and make proper and sufficient arrangements for all the exigencies thereof." Article 5, "The South-Western Company shall, during the continuance of this agreement, pay all

the expenses of and incident to the exercise of their rights under this agreement, and will indemnify the Portsmouth Company from and against the same and all claims and demands in respect thereof." Article 7, "The South-Western Company, in respect of their user of the Portsmouth Railway under this agreement, will pay to the Portsmouth Company the full maximum tolls demandable or receivable by the Portsmouth Company in respect of the same." Article 10, "The South-Western Railway shall cause to pass over the Portsmouth Railway such an amount of traffic as shall cause the payments to be made to the Portsmouth Company under this agreement for and in respect of tolls as aforesaid, to be after the rate of 18,000*l.* per annum at the least for the whole of the period during which this agreement shall continue in force." Article 12, "Either of the companies may, at any period of the year, without regard either to the date of the commencement of this agreement or any half-yearly day of payment, determine this present agreement by giving notice in writing under their common seal of such their desire to the said company." And then there is a provision for the service of the notice. If this agreement stood by itself, and was clearly confined to the traffic of the South-Western Company carried over the Portsmouth line, it might perhaps, and I say no more than perhaps, be maintained upon the authority of the case which was referred to in support of it, *The South Yorkshire Railway Company v. the Great Northern Railway Company*. I give no opinion upon that point, but it seems to me that this was not a *bond fide* agreement,—that it was a mere subterfuge for carrying into effect what had before been illegally agreed upon. It is to be observed that this agreement, when referring to the South-Western traffic, speaks of their traffic; and I am by no means satisfied that those words, "their traffic," were not intended to include the traffic of the Portsmouth Railway, treated as belonging to them under the previous agreement. If so, this last agreement must, as it seems to me, be vicious, upon the same grounds as apply to the other agreements; but if, upon the other hand, the

words "their traffic" were not meant to include, and do not include, the traffic of the Portsmouth Railway, then the defendants, the South-Western Company, as they are undoubtedly carrying the traffic of the Portsmouth line, must be working under all the agreements, and not under the last agreement alone, and the three agreements constitute together but one agreement, and the case cannot fall within the 87th section of the Railway Act. In the argument on this part of the case some reference was made to a local act, the 1st of Victoria, and to the Portsmouth Railway Amendment Act, 1857; but it does not appear to me that the case of the South-Western Company is aided by either of these acts. The former of them clearly does not extend to authorise the working of the traffic of the Portsmouth line, and the latter of them expressly provides that no agreement or arrangement made under it shall have any effect until approved by the Board of Trade, and no such approval has been given.

It was much insisted upon on the part of the South-Western Company that the plaintiffs could have no right to inquire whether the traffic which was carried by the South-Western Company was or was not lawfully carried by them, but if the act of 1847 gives no rights to the South-Western Company, except in respect of traffic lawfully carried, the right to have the question determined, whether the traffic was lawfully carried or not, seems to me to follow upon the construction of the act. It was said that the plaintiffs could not be entitled to stop the trains of the South-Western Company and inquire whence the passengers and goods had come, and whether they had lawfully come upon the South-Western line, but this seems to me to be only a difficulty in working out the act. No doubt there may be great difficulties in working it out, but it does not, I think, follow, that because there may be cases in which it may be difficult, or perhaps impossible, to prove the infringement of the right, the Court ought to hold its hand when that infringement is established. Another argument which was advanced on the part of the South-Western Company was this, that as they had acquired by the award the right to bring their pas-

sengers and goods down to the joint line, it could not be said that their traffic was unlawful; but although the award may legalize the traffic so far as the passing over the Brighton line is concerned, it cannot, I think, legalize it in other respects and render traffic carried under unlawful agreements lawful traffic. Upon the whole, therefore, the conclusion at which I have arrived is, that the act of 1847 does not give to the defendants the right contended for by them, and I think, therefore, that the injunction prayed by this bill as to the joint station is due. But I think it should be granted only until further order, with liberty to apply. In the view which I have taken of this case, it has not been necessary to consider the effect of the agreements between the plaintiffs, the Brighton Company, and the South-Western Company, or the question whether the South-Western Company ought or ought not to be considered as a company lawfully using the Portsmouth Railway within the meaning of the act of 1858, although I very much incline to agree with the opinion of the Vice Chancellor and of the Lord Chancellor on that point; but with reference to the act of 1858 it may be right to observe, that independently of the question whether the South-Western Company falls within its provisions, it seems to me to afford an argument of some importance in favour of the plaintiffs' case. That act proceeds upon the assumption that the Portsmouth Company were not then entitled either to the use of the joint line of railway, or to bring their traffic into the joint station, and after enabling them to acquire the use of the joint line of railway, it positively excludes them from the joint station except by agreement with the owners of that station, the South-Western and South Coast Companies; and provides that if no such agreement shall be come to within the time mentioned in the act, they shall purchase land and build a station of their own. The legislature having thus empowered the Portsmouth Company to acquire the use of the joint station by agreement with the two companies, and having rendered it compulsory upon them to build a station of their own if no such agreement was come to, it can hardly be taken to have supposed that they were

already authorized to acquire the right to use the joint station by agreement with one of the companies. This observation, it may be true, applies to the Portsmouth Company and not to the South-Western Company; but then it is to be observed, that according to the terms of the act, an agreement with one of the two companies, the joint owners of the joint station, could not absolve the Portsmouth Company from building a station of their own; and if, notwithstanding such an agreement, they were bound to build their own station, it would seem that their traffic must, notwithstanding such an agreement, have been intended to be carried into that station. Looking to the frame of this record and the absence of the joint committee, I do not think we can direct the accounts prayed by this bill, and the decree, therefore, must be confined to the injunction. I think the South-Western Company must pay the plaintiffs' costs of the suit, and that there should be no costs to the Portsmouth Company.

STUART, V.C. }
June 4. } *Re GROVE'S TRUSTS.*

Annuity—Right to Corpus.

A testator bequeathed all his money and securities for money to his executors upon trust to employ 400l. or 500l. in purchasing a house, and allow L. to reside therein and have the use thereof for her separate use, and after her decease the same to go to her children (if any) equally. He further requested his said trustees to invest sufficient money in their names to produce 40l. per annum, and to pay the same, quarterly, to the said L. to her separate use. The Court refused, upon the petition of L. to direct the corpus of the fund to be paid to her, but declared her entitled to an annuity for her life only, and to have a sufficient fund appropriated to answer such annuity.

C. H. Grove, by his will, dated in 1843, bequeathed to the executors therein named all his money and securities for money whatsoever, upon trust to employ 400l. or 500l. in purchasing a house, and to allow Miss Matilda Lloyd to reside therein, and to have the use thereof for her sole and

separate use; after her decease the same to go to her children, if any, equally. He then requested his trustees aforesaid, after buying the house aforesaid, to invest in government securities sufficient money in their names to produce 40*l.* per annum, and to pay the same, quarterly, to the said Matilda Lloyd, for her sole and separate use, free from the debts and engagements of any husband with whom she might intermarry, her receipt alone to be a good discharge for the same, not by way of anticipation.

The testator, after bequeathing certain other legacies, gave the residue of his property to J. Grove.

The executors had proved the will, and invested a sum sufficient to produce 40*l.* a year.

The petition was that of the legatee, Miss Matilda Lloyd, claiming to have the corpus of the annuity paid to her.

Mr. Rogers, in support of the petition, cited—

Heron v. Stokes, 2 Drn. & W. 89.

Kerr v. the Middlesex Hospital, 2 Do Gex, M. & G. 576; s. c. 22 Law J. Rep. (N.S.) Chanc. 355.

Mr. Locock Webb, for the residuary legatee, was not called upon.

STUART, V.C. referred to *Savery v. Dyer* (1) and *Yates v. Madden* (2), as settling the rule that where, as in this case, an annuity not existing before (that is, an annuity not existing at the date of the will, but created by the will) was given to a legatee, he took it only for life, and observed that there was in the context of the will nothing to affect the application of the ordinary rule, or to indicate an intention to give the legatee the corpus of the fund, or more than an annuity for life. There must, therefore, be a declaration that the petitioner was entitled to the annuity for her separate use, during her life, and entitled also to have a sufficient fund appropriated to produce the annuity.

(1) 1 Amb. 159; s. c. 1 Dickens. 162.

(2) 3 M. & G. 582; s. c. 21 Law J. Rep. (N.S.) Chanc. 24.

M.R.
Jan. 18, 19, 21; } SPARROW & FARMER.
April 18.

Building Society—Termination—Mortgage—Redemption—Deficient Fund—Members—Continuing Liability.

Members of a building and investment society, which contemplated equal advantage to all, cannot borrow from the fund of the investing members without returning the benefits held out to them by the rules.

*A period fixed for the termination of a building society expired by effluxion of time; the funds, however, were insufficient to pay the investing members the sum it was by the rules calculated they ought to receive upon their shares:—Held, that the borrowing members were, by their rules, entitled to have the deeds relating to property purchased by them with the borrowed money delivered up at the end of the time fixed for the termination of the society, and also to have a receipt indorsed on the deed mortgaging the property to the society, acknowledging the payment of all monies intended to be secured thereby; but as the object of the society was not complete, that all the members still continued liable to pay monthly subscriptions to the funds until they were sufficient to pay to each investing member the sum he was to receive per share if the calculations had realized the proposed objects of the society.**

The British Building and Investment Company was established in 1845, under the provisions of the 6 & 7 Will. 4. c. 32. It was duly enrolled, and rules for the government of the company and its members were prepared; these were approved of by the barrister appointed to certify the rules, and a duplicate was sent to the clerk of the peace for the city of London. It was represented that the company was formed upon a simplified and improved plan. Each of the members was to hold one or more shares in the company, and each of these shares was to be of the value of 120*l.*, that sum being the amount which, from the monthly payments of 10*s.* per share, it was calculated each investing member would be entitled to receive, at the expiration of thirteen years from the formation

of the company. The members consisted of two classes: the advanced or borrowing members, who received an advance on their shares out of the funds of the company, upon the security of property purchased by them, and mortgaged to the trustees; and the unadvanced or investing members, who received no advances from the company, but who made their monthly payments with a view to obtain 120*l.* per share at the termination of the company. These monthly payments were made by the advanced and the unadvanced members in the same manner. The company was carried on up to September 1858, when it was to have expired by effluxion of time; it was, however, found that the calculations on which the company was based, and had been carried on, had failed, and that the funds of the company were insufficient for the payment to each of the unadvanced or investing members of the sum of 120*l.* per share.

Samuel Lewis Sparrow became a member of the company in 1850; he, subsequently, became the purchaser of a leasehold messuage and premises, No. 43, Charrington Street, Somers Town, and to enable him to pay for the same he obtained from the company a sum of 336*l.*, which was advanced to him by way of anticipation out of their funds in respect of four shares and four-fifths of another share which he held in the company.

By an indenture, dated the 25th of April 1850, and made between S. L. Sparrow of the first part, and the trustees of the company of the other part, after reciting that the plaintiff was possessed of the premises in Charrington Street for the residue of a term of seventy-eight years, subject to certain covenants, and that the company had been duly formed, certified, allowed, confirmed and enrolled, and that the plaintiff was entitled to receive out of the funds of the company, by way of anticipation, the sum of 336*l.* in respect of shares held by him; it was witnessed that, in consideration of such sum, S. L. Sparrow assigned to the trustees the said messuage and premises upon trust from time to time, so long as S. L. Sparrow, his executors, administrators and assigns should duly make the several payments, and observe and perform the

regulations prescribed in the articles of the company in respect of the shares, and also perform all the covenants therein contained, to permit him or them to hold the premises and receive the rents for his and their benefit, but if he or they should at any time thereafter fail to perform and keep all or any of the covenants, or neglect or refuse for three monthly meetings to pay, observe and perform all or any of the subscriptions, payments and regulations on his or their part, then upon trust at any time thereafter that the trustees for the time being of the company should appoint a person to collect the rents and profits; but if the same should be insufficient to satisfy the before-mentioned purposes, then to sell the premises upon special or other conditions, with power to buy in the same, and to rescind any contract, and, after payment of the expenses, to retain and reimburse themselves, as trustees for the company, all sums of money which should be due and which might afterwards become due and payable by S. L. Sparrow in respect of his shares in the company, by virtue of the rules or otherwise howsoever, it being thereby agreed that in case such sale should take place, all monies which could at any time afterwards have become due from him or them according to the subsisting rules of the company, should be considered as then actually due, and the same or so much thereof as might be lawfully demanded should be fully deducted and paid out of the money received by virtue of the power and trusts, and upon trust to pay the residue of the trust money to S. L. Sparrow, or as he should appoint. The deed then declared that the receipts of the trustees should be good discharges for all monies received by them. S. L. Sparrow then covenanted with the trustees of the company for the time being, that he would pay the subscriptions and interest payable on his shares according to the rules of the company on the days and in manner therein mentioned, and abide by and perform the rules thereof in respect of the shares. S. L. Sparrow further covenanted for the title, and also to insure the premises in such office as the trustees should appoint; and also to become tenant at will to the trustees at the rent of 30*l.* a year, payable

quarterly, with power of entry on non-payment.

S. L. Sparrow, up to the time fixed for the termination of the company, paid all sums which became due from him in respect of his shares in the company; he then requested that the title-deeds might be delivered up to him, and he also required the trustees to indorse a receipt thereon, acknowledging that they had received all money secured by the mortgage. This they refused to do; and insisted that the borrowing members were liable to continue their payments until each investing member had received the sum of 120*l.*; that the mortgage, notwithstanding the expiration of the thirteen years, was a valid and available security for enforcing these payments.

S. L. Sparrow then filed this claim against William Farmer, James Staley, Frederick Packmain and Henry Underhill, the trustees of the company, stating that he was entitled to the equity of redemption of the premises originally mortgaged to secure the monthly payments on his shares; that he had paid all monies secured and intended to be secured by the mortgage, and had become owner and proprietor of the premises: he, therefore, prayed that the trustees might indorse on the mortgage a receipt that all the money had been paid, and might deliver up the title-deeds to him.

Mr. R. Palmer and *Mr. Roxburgh*, for the plaintiff, insisted that the company had expired, and that, as all subscriptions and payments had been made, the plaintiff was entitled to have his title-deeds delivered up to him, and a discharge indorsed on his mortgage-deed, releasing him from all further liability on his shares in the company.—

Mosley v. Baker, 6 Hare, 87; s. c. 17 Law J. Rep. (n.s.) Chanc. 257; 1 Hall & Tw. 301; 18 Law J. Rep. (n.s.) Chanc. 457.

Fleming v. Self, 3 De Gex, M. & G. 997; s. c. 24 Law J. Rep. (n.s.) Chanc. 29.

Mr. Lloyd and *Mr. Welford*, for the trustees of the company, contended that there was a continuing liability in the bor-

rowing members, who otherwise would obtain an advantage at the expense of the investing members; that the company would not terminate until the investing members had received their shares; and that the powers in the mortgage-deed and in the rules were still applicable to raise the continuing subscriptions of borrowing members.—

Burbridge v. Cotton, 5 De Gex & Sm. 17; s. c. 21 Law J. Rep. (n.s.) Chanc. 201.

Seagrave v. Pope, 1 De Gex, M. & G. 788; s. c. 22 Law J. Rep. (n.s.) Chanc. 258.
10 Geo. 4. c. 56.

Mr. Palmer, in reply.

April 18.—THE MASTER OF THE ROLLS.
—The plaintiff claims to have the title-deeds of his property delivered up to him, and to have a receipt indorsed upon his mortgage-deed by the trustees of the company, acknowledging that they have received all monies which it was intended to secure. The company resist this claim, and allege that the subscription of 10*s.* per month per share is payable by the members up to the termination of the company, which they also allege does not terminate with the expiration of the term of thirteen years, the funds of the company being insufficient to pay the 120*l.* per share to the unadvanced or investing members. The trustees, therefore, insist that they are entitled to retain the mortgage-deed executed by the plaintiff as a security for the subscriptions which still remain payable. The latter part of rule 21. can scarcely have any other meaning than that which the plaintiff seeks to put upon it. The answer of the defendants is, that the rules of the company specify that the advanced member is to pay the subscriptions as long as the company endures, and that its duration may be greater or less, but that it is to continue until it shall be in a position to pay to the unadvanced members 120*l.* per share. It has been argued upon the whole scope of the rules, particularly upon the 2nd, 32nd and 33rd, that it was apparent that a perfect equality was to be maintained among the members, that it was the fundamental principle to be

worked out, and that the company was to terminate only when the advanced members had been paid 120*l.* per share. It was also argued that the rules constituted a partnership, the duration of which was to continue until the object of the society was completely worked out, and that it applied to withdrawing members, who were to receive back their subscriptions, with the addition of a per-centage, according to the scale in Table 2. attached to the rules. It must be considered that the thirteen years were merely named as the probable duration of the company, but this was open to extension or diminution, which was to be regulated by the success with which the operations of the company were conducted. This, however, by no means disposed of the question as to what was the contract which the plaintiff entered into with the trustees of the company? The express words of rule 21. cannot be lost sight of. The contract has been entirely performed by the plaintiff; and it is impossible to say that the defendants are not to perform it on the ground that it is inconsistent, not with the express language, but with the assumed spirit of the rules. It was argued that if two rules were in conflict, you must look to their general scope to ascertain which of them was to prevail, and that effect must be given to the rule most in accordance with the scope and general object of the rules. I assent to the argument, but it does not apply. It was necessary to limit the duration of the company; unless it were so, no power of redemption could be reserved to any members of the company; for this purpose, and to give members the option of an earlier redemption, the duration of the company was fixed at thirteen years. Rule 21. was framed with this object; it does not determine the duration of the company, but it does determine the terms of the contract entered into between advanced members and the company, and the conditions upon which a mortgagee is to be allowed to redeem his property, and this Court must act upon it in favour both of the mortgagee and the company. In a case of *Farmer v. Smith* (1) the trustees of the company brought an action, in the Court of Ex-

chequer, against an advanced member, upon a covenant contained in his mortgage-deed for the payment of subscriptions subsequent to the expiration of the thirteen years, the anticipated termination of the company, and it was held, that the company did not terminate at the expiration of the term of thirteen years, and that every member must continue to pay the subscriptions until the termination of the company, viz., until the funds are sufficient to pay the sum of 120*l.* per share to each of the unadvanced members. But the mortgagor, on complying with rule 21, is entitled to have his title-deeds handed over to him, with a receipt indorsed thereon, acknowledging satisfaction. Assuming, therefore, that the plaintiff may be required to pay his subscription for a further period, I still think that he is entitled to the benefit of the contract he has entered into, and I must make a decree in terms according with rule 21, but without prejudice to any action which the defendants may be advised to bring against the plaintiff in respect of subscriptions claimed to be due subsequent to the 12th of September 1858, the period when the thirteen years expired. The claim must, therefore, be allowed, with costs.

Extracts from the Rules.

Rule 1. "The first subscription shall be due in September 1845; and all future subscriptions shall be paid at the respective places and times named in Rule 2, or at such other places and times as the board shall from time to time appoint, until the object of this company be fully accomplished."

2. "The object of this company is, by the payments of its shareholders, to form a fund, from which money may be advanced, to enable them to purchase freehold or leasehold property, and for this purpose every shareholder shall be entitled to receive out of the funds of this company, the sums mentioned in Table I. for every share he may subscribe for, and so on in proportion for any fractional part of a share.

"The subscriptions shall be 10*s.* per month per share.

"Every shareholder shall, at the first subscription meeting, commence paying his or her subscription money, or sum of 10*s.*, for each and every share he or she may hold, and shall afterwards continue paying the said subscription money, of 10*s.* per share per month, with all fines that may be due from him or her, at every succeeding monthly meeting, or at latest before the third Monday or Thursday in every month, until the objects of the company shall be fully accomplished: such payments to be made to the treasurer, directors, manager or secretary, at the office of the company, between the

(1) 28 Law J. Rep. (N.S.) Exch. 226.

hours of seven and nine o'clock in the evening, or at such other times and places as may from time to time be appointed for that purpose. Every shareholder neglecting to pay his or her subscriptions shall, after the third Monday or Thursday in every month, be fined for each share as follows: 6d. for the first month, 6d. for the second month, 1s. for the third month, 1s. for the fourth month, 2s. for the fifth month, and 2s. for the sixth and subsequent months. Any shareholder (not having executed a mortgage to the company as hereinafter mentioned) continuing to neglect the payment of his or her monthly subscriptions until the fines incurred thereby shall equal all the monies actually paid by him or her, exclusive of the entrance fees, shall thereupon cease to be a shareholder, and forfeit all his or her interest therein.

"Shareholders paying subscriptions in advance, shall be allowed a discount on such payments after the rate of 4 per cent. per annum."

6. "Any shareholder who shall be desirous of withdrawing from this company any share or shares on which he or she has not received an advance, shall be allowed to do so on giving one month's notice in writing or his or her intention to the board for the time being, at any monthly meeting of the company, and shall receive on each share the sums mentioned in Table II.

"If more than one shareholder shall give notice to withdraw at one time, they shall be paid in rotation, according to the priority of notice; but widows and children of deceased members shall always have priority.

"In case of the withdrawal of shares, all fines incurred previously to any such application shall be deducted from the amount which the shareholder shall be entitled to receive."

21. "If any shareholder having received an advance on any share or shares, and secured the repayment thereof upon his or her premises, shall sell such premises, it shall be lawful for the purchaser to take the same, chargeable with the debt due to the company; and the purchaser shall thenceforth become answerable to the company for the payment of the subscriptions and other charges as the same shall become payable; and the trustees shall, at the request and cost of such shareholder, release him or her from all future liability, in respect to such share or shares, if they see no objection.

"If any shareholder shall be desirous of having his or her property discharged from such debt, it shall be lawful for the holder of such share or shares, or so much thereof as shall be then unpaid, to transfer the same to some other premises of adequate value, either belonging to himself or herself, or to any other party willing to take the transfer of the shares so advanced, and give security for the same, to be approved of by the Board, on the report of the Survey Committee or the surveyor of the company. And upon having such share or shares, or so much as shall be then due in respect thereof, secured on other premises, the trustees for the time being shall, at the cost of the shareholder, release and convey the premises for which other premises shall be substituted, and make such indorsement as hereafter mentioned; and, in the first-mentioned event, shall also (but at the cost of such member) release him or her, if they see no objection, from all

future liabilities in respect of the monies hereafter payable upon the shares purchased from the said company, and secured upon the premises sold as before mentioned. And under this rule the trustees shall be empowered (by direction of the Board), at any period of the company, to release any portion of the property so mortgaged, on being satisfied, in manner before mentioned, that the remaining portion of the property is sufficient security to this company.

"If any shareholder in this company, who shall have received his or her share or shares, or any of them, shall be desirous of paying and satisfying the security or securities which shall have been given for the same, he shall be at liberty to do so, by paying to the directors the subscriptions that would have become due on the shares advanced on such property, up to the end of the thirteenth year of this company, and shall be allowed on such payments discount at 4 per cent. per annum. And on payment thereof, together with all fines due in respect of such shares, the Board shall direct the trustees to deliver all deeds and other documents in their custody, relating to the security, to the shareholder; and, at his or her cost, to indorse a receipt or acknowledgment on such mortgage, according to the 6 & 7 Will. 4. c. 32. s. 6."

32. "When it shall appear by the books of the company that there is sufficient to pay each unadvanced share 120l., then all arrears of subscriptions, fines, and other payments, shall become due and shall be payable immediately, and the trustees shall enforce the payment as before expressed in these rules."

33. "When the sum of 120l. for each unadvanced share, with all other expenses and liabilities of the company, shall be fully realized, the accounts shall be finally audited, printed, and sent to each shareholder, and the company terminate; and the trustees, with the advice of the solicitors of this company, shall deliver up to each shareholder, or his or her legal representatives, the title-deeds and other documents which shall have been deposited with them by such shareholder, as a security to this company, and shall and will, at his or her request or expense, indorse on his or her mortgage a receipt for all the monies intended to be secured thereby, pursuant to the 6 & 7 Will. 4. c. 32. s. 9. And that then three-fourths in number of the shareholders present at any meeting specially convened, by giving seven days' notice to each member, shall have full power to declare this company at an end, and all the accounts thereof be finally closed, and such resolution shall be effectual at law, and in equity, as a release from all the shareholders."

Three tables were attached to the rules. They were headed—Table 1. as "Shewing the amount shareholders are entitled to receive on each share they may hold, for building or purchasing property." Table 2. as "Shewing the amount shareholders are entitled to receive on each share if they withdraw from the company." In this table it was calculated that the shareholder, at the end of the thirteenth year, having paid in 78l., might draw out 120l. Table 3. as "Shewing the discount to be allowed on payments made in advance." The Appendix contained the following form of receipt, to be altered as occasion might require. This was to be indorsed upon mortgages:—"We, the under-

signed, being the trustees for the time being of the within-mentioned company, do hereby acknowledge to have received of and from the within-named _____, his heirs, executors, administrators or assigns, all monies intended to be secured by the within-written deed. As witness," &c.

STUART, V.C. }

1858.

April 30;

May 4.

FULL COURT OF
APPEAL.

1859.

May 2, 3, 12. }

ODDIE v. BROWN.

Will—Construction—Remoteness—Uncertainty—Thellusson Act.

A testator, by his will, directed his trustees to accumulate the income of his residuary personal estate, "until the principal and accumulations should amount to the sum of 3,000l., or thereabouts," and then to pay the income of the fund to A, B, C, D, E, F. and G. during their lives and the life of the survivor; and after the death of the survivor to pay the principal sum unto and equally among the issue of the said A, B, C, D, E, F. and G. who should be then living. At the end of twenty-one years from the death of the testator (the period allowed by the Thellusson Act) the residue and the amount of accumulations of the income thereof, fell far short of the sum of 3,000l.:—Held, per Stuart, V.C., that the whole fund thus produced belonged to those who were next-of-kin of the testator at the time of his death: but, upon appeal, it was held, that the gift was not void for remoteness; but that the income of the fund, between the termination of twenty-one years from the testator's death and the time when the fund became divisible, belonged to the next-of-kin; Lord Justice Knight Bruce, however, dissenting from each construction of the will.

John Oddie, by his will, dated in September 1821, after directing that all his just debts, funeral and testamentary expenses, should be paid out of personal estate in the manner therein mentioned; and after bequeathing specific and pecuniary legacies, gave all the rest, residue and remainder of his personal estate and effects

whatsoever which he should die possessed of, or be in any manner entitled to, unto trustees, their heirs, executors and administrators, upon trust to convert the same, or such part thereof as should not be in ready money or placed out at interest, into ready money (except as in the will mentioned), and to pay and discharge all his just debts, &c.; and after payment thereof to place out the same at interest on good securities, and lay out the interest thereof at 4l. per cent. per annum, for the use of Christopher Oddie Tomlinson for his life; and after his death to pay the sum of 40l. unto and equally amongst all his children which should be then living, and the lawful issue of such of them as should happen to be then dead, such issue to take no more than his, her or their parent's share thereof respectively; and also upon trust to pay and apply so much of the residue of his personal estate, and so much of the yearly interest thereof, as they, his said trustees, should think proper and necessary for the maintenance and bringing up of Nancy Howson, daughter of Richard Howson, deceased, and granddaughter of Anne or Nancy Tomlinson; and as to all the rest, residue and remainder of his personal estate and effects, not before disposed of, upon trust that they, his said trustees, or the survivor of them, his executors, administrators or assigns, should put and place out the same at interest, upon Government, real, or some other good and sufficient security or securities, or in some banker's or bankers' hands, and suffer the interest arising from the same to accumulate until the principal, together with the accumulation of interest thereon, should amount to the principal sum of 3,000l., or thereabouts; and when and so soon as the said principal sum and interest should amount to the said sum of 3,000l., or thereabouts, then upon trust to put and place out the same at interest, upon such security or securities as aforesaid, and pay and apply the yearly interest, dividends and profits thereof from time to time, as the same should become due, unto and equally between or amongst Christopher Oddie Tomlinson, John Howson, Robert Howson, and Nancy Howson, children of the said Richard Howson, deceased, and grandchildren of the said Anne or Nancy

Tomlinson, and Jane Wilson, William Oddie, and Joseph Oddie the younger, children of his nephew, John Tatham Oddie, in equal shares and proportions, during their several and respective natural lives, and the life of the survivor of them; and in case any of them should happen to die leaving lawful issue, the said testator willed and directed that such issue should be entitled to the same share of and in the said interest, dividends and profits of his said personal estate and effects which his, her or their parents would, if living, have been entitled unto; and from and immediately after the decease of the survivor of them, the said Christopher Oddie Tomlinson, John Howson, Robert Howson, Nancy Howson, Jane Wilson, William Oddie, and Joseph Oddie the younger, then upon trust to pay and apply the said principal sum of 3,000*l.*, or thereabouts, so placed out as aforesaid, and convey and assure his close of land called Fitzdale, &c. therein-after devised to his said trustees, unto and equally amongst the lawful issue of the said Christopher Oddie Tomlinson, John Howson, Robert Howson, Nancy Howson, Jane Wilson, William Oddie, and Joseph Oddie the younger, which should be then living, their executors, administrators and assigns for ever, share and share alike, as tenants in common; but in case any of them should be then dead leaving lawful issue living, it was his will and mind, and he thereby ordered and directed that such issue should be entitled unto and take the part or share, parts or shares, of and in the said trust-money which the parent or parents of such issue would, if living, have been entitled unto, and not more or otherwise, anything in his said will contained to the contrary notwithstanding.

The testator died in the year 1822.

In March 1851 the present suit was instituted for the administration of the testator's estate.

In December 1857 the chief clerk, by his certificate, made pursuant to certain orders made and inquiries directed in the suit, certified (*inter alia*) that, after taking the accounts, the residuary personal estate and the accumulations thereon were found not to have amounted to nearly 3,000*l.* within twenty-one years from the testator's death.

Upon the cause coming on to be heard for further directions, it was contended, on behalf of the residuary legatees and their issue, that, as the accumulations exceeded the limits prescribed by the act, 39 & 40 Geo. 3. c. 98, such accumulations were void only for the excess, and that the residuary legatees named in the will were entitled to receive the income arising from the residue of the personal estate, and from the accumulations of the income thereof from the end of twenty-one years from the testator's death, up to the death of the survivor of such residuary legatees; and that after the death of such survivor the aggregate fund arising from the residue, and the accumulations of income thereof for twenty-one years, would be divisible amongst the issue.

On behalf of the next-of-kin at the testator's death or their representatives, it was contended, first, that the whole gift was void for uncertainty of subject-matter by reason of the use of the words "or thereabouts;" and, secondly, that, if that were not so held, the gift was void for remoteness, independently of the Thellusson Act, inasmuch as the sum of 3,000*l.*, or thereabouts, was not raised by means of the accumulation, within the period allowed by the rule against perpetuities. The following authorities were referred to:—

Boughton v. James, 1 Coll. 26.

Lord Southampton v. the Marquis of Hertford, 2 Ves. & B. 54.

Marshall v. Holloway, 2 Swanst. 432.

Bateman v. Hotchkiss, 10 Beav. 426; s. c. 16 Law J. Rep. (N.S.) Chanc. 514.

Phipps v. Kelynge, 2 Ves. & B. 57, (n), b.

Tregonwell v. Sydenham, 3 Dow, 196.

Browne v. Houghton, 14 Sim. 369; s. c. 15 Law J. Rep. (N.S.) Chanc. 391.

Longdon v. Simson, 12 Ves. 295.

Shaw v. Rhodes, 1 Myl. & Cr. 135.

Evans v. Hellier, 5 Cl. & F. 114.

Mr. Elmsley, Mr. Bacon, Mr. Malins, Mr. C. Barber, Mr. Birkbeck, Mr. Sidney Smith, Mr. Prendergast and Mr. Freeling appeared for the different parties.

STUART, V.C. said, the testator had directed that when and so soon as the ac-

cumulation of his residuary property should amount to 3,000*l.*, or thereabouts, then the income arising from the sum so accumulated should be paid to certain tenants for life, and after the death of the survivor of such tenants for life that the said sum should be distributed. That was a gift of a sum of 3,000*l.*, or thereabouts, as to which there were to be no tenants for life, and no distribution until that amount should have come into existence. It was a well-known rule of law, that a gift to be valid must vest within a life or lives in being and twenty-one years. If by any means it could possibly happen that the gift might not vest within that period, the gift would fail of operation entirely. Now, it was clear that, in the present case, 3,000*l.*, or thereabouts, the subject-matter of the gift, might not come into existence before the expiration of that period. In fact, it had not then come into existence. It followed, therefore, that the gift must fail. If the subject-matter of the gift might not come into existence until the termination of a period too remote, it could not be said that, because the objects of the gift were found and were in existence, therefore the gift was good. The Thellusson Act had nothing to do with the question: it was simply a case of remoteness. There must, therefore, be a declaration that the property belonged to those who were next-of-kin of the testator at his death.

From this decision those who would have been entitled if the gift were not void for remoteness appealed; and the appeal was, in the first instance, argued before the Lords Justices, who desired that the question might be re-argued before the full Court.

Mr. Bacon and *Mr. Birkbeck* appeared for the appellants.

Mr. S. Smith, for other parties in the same interest.

Mr. Elmsley, *Mr. Chapman Barber* and *Mr. Freeling*, for the next-of-kin.

Mr. Malins and *Mr. Prendergast*, for the executors.

Mr. Bacon was heard in reply.

In addition to the authorities cited in the court below, the following were referred to:—

As to the question of remoteness—

Williams v. Lewis, 5 Jur. N.S. 323; ante, p.

Blease v. Burgh, 2 Beav. 221; s. c. 9 Law J. Rep. (N.S.) Chanc. 226.

Saunders v. Vautier, Cr. & Ph. 240; s. c. 10 Law J. Rep. (N.S.) Chanc. 354.

Lord Dungannon v. Smith, 12 Cl. & F. 625.

Martin v. Margham, 14 Sim. 230.

Speakman v. Speakman, 8 Hare, 180.

Elborne v. Goode, 14 Sim. 168; s. c. 13 Law J. Rep. (N.S.) Chanc. 394.

Nettleton v. Stephenson, 3 De Gex & Sm. 366; s. c. 18 Law J. Rep. (N.S.) Chanc. 191.

Bourne v. Buckton, 2 Sim. N.S. 91; s. c. 21 Law J. Rep. (N.S.) Chanc. 193.

As to the construction of the words "or thereabouts"—

Curtis v. Lukin, 5 Beav. 147; s. c. 11 Law J. Rep. (N.S.) Chanc. 380.

Cherry v. Mott, 1 Myl. & Cr. 123.

Scale v. Scale, 1 P. Wms. 290.

May 12.—The LORD CHANCELLOR, after stating the case, said—The Vice Chancellor was of opinion that this bequest was void for remoteness, and, consequently, that the next-of-kin were entitled; and the present appeal was brought by the parties who claim in case the gift was valid. The object of construction, in cases like the present, was to ascertain the intention of the testator. In the present case it was not easy to determine what the real intention of the testator was; and, therefore, the only safe guide in construing his will was to take the language employed by him in its primary and obvious sense. Did he then, by the words which he used, indicate his intention to give the residue to the persons named, with a subsidiary direction to accumulate, or was the gift of the residue dependent on the previous accumulations? The latter appeared to be the correct conclusion. It was to be observed that the testator gave the residue, not to the persons proposed to be benefited, but to trustees; and not to the trustees in trust for the persons named in the first instance, but upon trust to invest until the principal and accumulations

amounted to 3,000*l.*, or thereabouts. So far, there was no gift to any one, except the trustees; but the will proceeded—when and so soon as the principal sum and interest should amount to 3,000*l.* or thereabouts, then upon trust to pay the same as in the will mentioned. It was said that the words “when and so soon” were flexible words, and always bent to the intention of the testator. Perhaps it would be more correct to say that their construction depended upon whether they ought to be regarded as annexed to the substance of the gift, or to the period of payment. In the present case, these words were not merely contained in the direction to pay and apply, but they introduced the gift itself, and, therefore, must be taken as of the substance of the gift, unless any indication of the contrary could be gathered from the context. The distinction between this case and *Saunders v. Vautier* appeared to be that, in that case, there was an immediate gift of the fund, which was separated from the estate and vested in trustees to accumulate, until the testator’s great-nephew attained twenty-five. Here, there was no fund to which the gift could apply, until created by the accumulation directed. When the accumulated sum should amount to 3,000*l.* or thereabouts, then, and not till then, the interest was to be applied. What, then, was the effect of the direction to accumulate? It was said that the gift was void for uncertainty, on account of the words “or thereabouts” being used each time that the sum of 3,000*l.* was mentioned. His Lordship was not satisfied, however, that these superadded words introduced such uncertainty as to make the gift void. He thought they were inserted merely to meet the difficulty which there would be in accumulating exactly a particular sum, so that the words were introduced to render any surplus liable to the same trusts. *Curtis v. Lukin* was cited on this point, but in that case the word “nearly,” there used, did not create the uncertainty. Assuming, however, that the gift in the present case was not uncertain, was it void for remoteness? The testator died in 1822, and thirty-seven years after his death the fund amounted to 1,600*l.* only. If the question were independent of the Thellus-

son Act, the trust for accumulation would have been throughout within the prescribed limits, as the testator had not postponed the enjoyment of the principal sum beyond the period within which it was required by law that it should vest. For it appeared to his Lordship that the testator had manifested an intention that, upon the death of the survivor of the persons who were to have the interest of the accumulated fund, those who would be entitled to the fund itself were to have it amongst them, whatever might be its amount, and, therefore, the accumulation could not have been carried on beyond a life or lives in being. But the Thellusson Act did not allow the accumulation of property beyond the life of the grantor or settlor, or twenty-one years after his death, and provided, that where any accumulation should be directed otherwise, the income of the property directed to be accumulated should, so long as the same should be directed to be accumulated contrary to the act, go to the persons who would have been entitled thereto if the accumulation had not been directed. It was argued, by Mr. Emsley, that the act could not apply to the form of the gift contained in this will, upon the ground that the accumulation was not to be measured by the number of years. Perhaps the best answer was the case of *Elborne v. Goode*, in which the accumulation was to take place until the decease of the survivor of certain annuitants, and also *Bourne v. Buckton*. In each case the statute applied and stopped the accumulation at twenty-one years. The accumulated fund, however, here could not be divided until the death of the survivor of the seven tenants for life; and these persons could not then have the benefit intended, because the fund had not reached the amount which was a preliminary condition to their becoming entitled. The interest of the fund between the period of twenty-one years from the death of the testator and the time when the fund becomes divisible, would clearly belong then to the next-of-kin. There would, therefore, be a declaration that the trust for accumulation was good to the extent of twenty-one years from the death of the testator; and that from that period the income belonged to the next-of-kin until the death of the survivor of the lega-

tees, and then that the amount of the accumulation for twenty-one years after the death of the testator, would be divisible among the issue of the seven first-named persons then living.

LORD JUSTICE KNIGHT BRUCE said he respectfully dissented from the view of the Vice Chancellor, and also of the Lord Chancellor and Lord Justice Turner. As to the phrase "3,000*l.*, or thereabouts," the expression was in each of the two instances in which it was used, too loose, vague and uncertain to be acted upon. His Lordship took the testator's meaning to have been a sum of 3,000*l.*, or some amount near that sum, more or less, and that the will ought not to be construed more favourably for accumulation than if a blank had been left in it for the extent and amount of accumulation of which it speaks. The question was, did the testator mean the amount to be essential? did he mean the gifts to be dependent on the accumulation to that extent? In his Lordship's judgment he did not. While the direction to accumulate failed, the trusts of the property, which the testator had directed to be accumulated, took effect, notwithstanding that failure, and the tenancies for life took effect as if, without a word on the subject of accumulation, the clear residue had been given to trustees to pay and apply the yearly interest, &c., to the persons named; consequently, if he were right, there never had been, there was not, and possibly there would not be, any intestacy either as to capital or income. In saying this it was assumed that the testator was survived by the seven tenants for life. He considered by the expression "put and place out," &c., the testator meant his residuary personal estate; and that the phrase "3,000*l.*, or thereabouts," where it occurred the third time, meant neither more nor less than "my residuary personal estate." If this view were correct, there were two questions which might arise: one, what, until the death of the surviving tenant for life was to become of the share of the income of any of the tenants for life who had already died, or should die without leaving issue, or a child?—and the other, what if, at the death of the surviving tenant for life, there should be a failure of

issue, or of children and grandchildren of each of the seven tenants for life, was then to become of the capital of the residuary personal estate?

LORD JUSTICE TURNER said that the case presented three points: first, whether the will at all disposed of the residue of the testator's estate and the accumulations, in the event which had happened, of their not amounting to 3,000*l.* within the period of accumulation allowed by law; secondly, whether, assuming the residue to be disposed of by the will, although it did not, with the accumulations, amount to 3,000*l.*, the direction to accumulate was void, upon the ground of the uncertainty arising from the words "or thereabouts"; thirdly, assuming the dispositions made by the will not to be invalid on either of these two grounds, were they invalid on the ground of remoteness? As to the first point, where, as in this case, funds were given to trustees to be held by them upon trust, directions must, of course, be given to them as to the time and manner in which they were to deal with the funds. Words imposing conditions or contingency might be used for a wholly different purpose, merely to convey directions to the trustees. The Court, therefore, looked to the intention of the gift, rather than to the words. *Love v. L'Estrange* (1) and *Saunders v. Vautier* might be referred to, as bearing out this view. It could not be doubted in this case that the testator meant the residue to go to the persons he had named. The words, therefore, relied on by the next of kin as importing contingency, might be regarded merely as a direction to the trustees, not as operating to prevent the vesting. Their argument on the first point, therefore, failed. On the second point, his Lordship considered that the words "or thereabouts" were not sufficient to make the gift void for uncertainty. If it were necessary to put a precise meaning on the words, the nature of the trust enabled one to do so. Thirdly, the gift was not void for remoteness. The Vice Chancellor considered that it was void because the sum named might not be accumulated until after the period allowed by law: but

(1) 5 Bro. P.C. 59.

in arriving at this conclusion, he proceeded on the footing that nothing vested until 3,000*l.* was accumulated. As his Lordship construed this will, the residue and accumulations, whatever the amount might be, would vest at the death of the survivor of the tenants for life: and there was no suspension, therefore, of the vesting beyond the period allowed by law. The true question was, whether a direction to accumulate until a certain sum was produced was void at law, independently of the act? No case went that length; and his Lordship saw no principle on which to make such a decision. The mischief which the rule as to remoteness was intended to prevent was, that property should not be rendered inalienable by the suspension of vesting: where the property vested, this injury did not arise. *Tregonwell v. Sydenham* had an important bearing on this point. It was upon the invalid disposition of the fund to be accumulated, and not upon the invalidity of the trusts for accumulation that that decision proceeded. *Bateman v. Hotchkiss* was also in favour of the validity of the gift here. *Curtis v. Lukin* had no application to this case; for, as to remoteness, the declaration proceeded on the ground that none of the trustees could be said to take vested interests in any ascertained shares of the fund to be accumulated. The conclusion, therefore, at which he arrived was, that independently of the *Theellusson* Act, the dispositions of this will were valid; and then the consequence was this: the act stopped the accumulation at the end of twenty-one years from the testator's death; and the income of the then accumulated fund went to the next-of-kin, until the fund would, if the accumulation had proceeded, have amounted to 3,000*l.* or thereabouts; or until the death of the remaining tenant for life, if it should turn out that it should not have amounted to that sum before the happening of that event. The right course, therefore, would be to pay the income which had accumulated since the expiration of twenty-one years to the next-of-kin; and order the future income to be paid to them until the death of the surviving tenant for life, or until further order. What ought to be considered as being "3,000*l.*, or thereabouts," it was not necessary to say at

present. The costs of the cause would be apportioned as in *Eyre v. Marsden* (2).

L.C. }
May 4, 5, 26. } JOLLY v. ARBUTHNOT.

Mortgage — Receiver — Attornment — Pleading — Disclaimer.

A receiver of an estate was appointed by a mortgagor and mortgagee. They both joined in the appointment, and gave him power of distress and entry, and the mortgagor attorned as tenant to the receiver at a rent of 3,500*l.* The deed recited all the facts relating to the mortgage, and provided that nothing in the deed should abridge the rights of the mortgagee. The mortgagor afterwards became bankrupt, and the receiver distrained for 3,500*l.* Upon this being claimed by the mortgagee, by a party under a bill of sale and by the assignees of the mortgagor, it was held, (reversing the decision of the Court below,) that the validity of the distress depended upon the existence of a tenancy to the receiver; that such a tenancy was created, pursuant to the intention of all parties, by the attornment of the mortgagor to him, with the consent of the mortgagee, and that the express power of distress was not a power in gross, but annexed to the tenancy; and that the distress was valid, entitling the mortgagee to the produce of it.

Three parties claimed a fund, and a suit was instituted by one of them against the other two: one of the co-defendants disclaimed, but contended, that the Court upon deciding against the plaintiff could not go on to declare the rights of his co-defendant. — Held, (affirming the decision of the Master of the Rolls,) that the disclaiming defendant ought to have brought his case before the Court, and that as he had disclaimed, the Court would decide the question between the two other claimants as if they were the only litigating parties.

This was an appeal, by the plaintiff, from the decision of the Master of the Rolls, reported *ante*, p. 274. Under a deed

(2) 4 Myl. & Cr. 231; n. c. 7 Law J. Rep. (n. s.) Chanc. 220.

dated the 12th of October 1855, the plaintiff claimed the benefit of a distress for 3,500*l.*, which was made on the 28th of April 1857, on the goods of Col. Waugh, he having become bankrupt on the 15th of April 1857. The money produced by the sale under this distress was by consent paid into a bank to abide the decision of the Court. The bankrupt Waugh was the owner of Branksea Island and Castle, at Poole, in the county of Dorset. The plaintiff was the mortgagee of this property: it had previously been mortgaged to other persons, but the plaintiff paid off the prior mortgages; and on the 12th of October 1855, all the mortgages, amounting to 30,000*l.*, were vested in him. On the same day the deed was executed which gave rise to the question in the present case. It was made between Waugh of the first part; Jolly, the plaintiff, of the second part; Aplin, of the third part; and Faulkner and Bonner (trustees), of the fourth part. After reciting the mortgage for 30,000*l.* to the plaintiff, and the covenant for payment of the mortgage-money, on the 12th of April then next, and in default for payment of 5*l.* per cent. interest by half-yearly payments; and that it had been agreed, that for securing the regular and punctual payment of the interest of the said sum of 30,000*l.*, and also for providing a fund for the better securing the gradual repayment of the principal sum, Aplin should be appointed receiver of the rents and profits of the hereditaments and premises comprised in the mortgage securities; and reciting that the said hereditaments were then in the possession and occupation of Waugh, and that it was agreed that he should attorn as tenant in respect of the same to Aplin, at the yearly rent of 3,500*l.*, part of which (1,500*l.*) was intended to be by way of securing the punctual payment of the interest on the said mortgage debt, and 2,000*l.*, the remaining part thereof, was intended to be applied in forming a fund for the ultimate discharge of the principal sum of 30,000*l.*; Waugh and Jolly appointed Aplin to be their receiver, agent and attorney, to ask, demand and receive of and from all the present and future tenants and occupiers of the said hereditaments, all the yearly and other rents, &c.

then due, and thereafter to become due, for or in respect of the same premises, and in default of payment thereof to use and exercise all such remedies by entry, distress, or otherwise, and generally to do all such other acts as should be requisite or expedient for the receiving and recovery of the rents, &c. The deed then further witnessed, that in pursuance of the agreement, Waugh attorned in respect of such parts of the hereditaments as were then held and occupied by him, at the yearly rent of 3,500*l.*, clear of all deductions, by half-yearly payments. And it was thereby agreed and declared, that 1,500*l.* should be considered as the rent payable in respect of such parts of the hereditaments as were specified in the 2nd schedule thereto, and that the sum of 2,000*l.* should be considered as the rent payable in respect of the other parts of the hereditaments. Then there was a proviso, for entry in default of payment of the principal sum of 30,000*l.* and interest thereon, by which Jolly, the mortgagee, was to enter, and upon his entry the tenancy created by the aforesaid attornment should absolutely cease. There was afterwards a proviso that if the annual rent should be punctually paid, then it should be reduced to 2,000*l.*, but without prejudice to the right of Jolly to require payment of the full rent of 3,500*l.* at any subsequent time when default should be made; and a proviso that it should not be lawful for Aplin, or any future receiver to be appointed, to act in the execution of his office of receiver, unless default should be made in payment of the annual rent or sum of 3,500*l.*, or some part thereof, but no such tenant or occupier should be bound to take notice of this proviso. It was then provided, that nothing therein contained should lessen the rights of Jolly under the indentures of mortgage, or prevent him from realizing the mortgage security either by foreclosure, sale or otherwise. On the 2nd of November 1855, Waugh executed a covering security on the estate, which was subject to the plaintiff's mortgage, to the London and Eastern Banking Corporation, under which 244,000*l.* ultimately became due. On the 14th of March 1857, Waugh gave a bill of sale to the same bank, of furniture and effects on the Branksea estate. On the 15th of April 1857,

Waugh was declared bankrupt, and on the 28th of April, Aplin levied by distress £500^l. for a year's rent, up to the 12th of April. This sum was paid, as before mentioned, to a joint account, to abide the decision of this suit. The Master of the Rolls held, that the attornment to the receiver did not create the relation of landlord and tenant, the receiver having no reversion in him; and that, the truth appearing in the recitals of the deed, the mortgagor's assignees were not estopped from denying the tenancy. His Honour also considered that the power of distress was a mere licence to enter and seize the mortgagor's goods, and was, after his bankruptcy, inoperative against his assignees.

Mr. R. Palmer, Mr. Bevir and Mr. Quain, for the plaintiff, the appellant, contended that the distress was valid, as the relation of landlord and tenant had, under the circumstances, been created. The case was similar to that of a demise by a receiver appointed by the Court of Chancery, where the receiver had no reversion, but still had power to distrain—

Pitt v. Snowden, 3 Atk. 750.

Hughes v. Hughes, 1 Ves. jun. 161.

Wilkinson v. Colley, 5 Burr. 2694.

Doe d. Marsack v. Read, 12 East, 57.

Dancer v. Hastings, 12 J. B. Moore, 34; s. c. 4 Bing. 2; 5 Law J. Rep. C.P. 3.

Bennett v. Robins, 5 Car. & P. 379.

A mortgagor in possession could distrain as the bailiff of the mortgagee—*Trent v. Hunt* (1). This might be considered strictly as a case of licence, and the mortgagor or those representing him could not object that there was no estate—

Chapman v. Beecham, 3 Q.B. Rep. 923; s. c. 12 Law J. Rep. (N.S.) Q.B. 42.

Freeman v. Edwards, 2 Exch. Rep. 732; s. c. 17 Law J. Rep. (N.S.) 258.

Jolly, having the legal estate, allowed of a demise to Waugh by Aplin, and therefore Waugh was the tenant of Jolly, Aplin being his agent or bailiff. This was similar

to the case of a *cestui que trust* demising—*Vallance v. Savage* (2).

They cited also—

Pinhorn v. Souster, 8 Exch. Rep. 763;

s. c. 22 Law J. Rep. (N.S.) Exch. 266.

West v. Fritch, 3 Exch. Rep. 216;

s. c. 18 Law J. Rep. (N.S.) Exch. 50.

Doe d. Dixie v. Davies, 7 Exch. Rep.

89; s. c. 21 Law J. Rep. (N.S.)

Exch. 60.

Doed. Garrod v. Olley, 12 Ad. & E. 481;

s. c. 9 Law J. Rep. (N.S.) Q.B. 379.

Doe d. Snell v. Tom, 4 Q.B. Rep. (N.S.)

615; s. c. 12 Law J. Rep. (N.S.)

Q.B. 264.

Shep. Touchst. 81.

Mr. Selwyn, Mr. Giffard and Mr. J. Brown, for the assignees of Col. Waugh, contended that no tenancy had been created by the deed of October 1855. The rights of landlord and tenant existed only in that relation, or possibly in some cases of the Crown's rights, and also where there was a rent-charge—

Saffery v. Elgood, 1 Ad. & E. 191;

s. c. 3 Law J. Rep. (N.S.) K.B. 151.

Johnson v. Falkner, 2 Q.B. Rep. 925;

s. c. 11 Law J. Rep. (N.S.) Q.B. 193.

Here Col. Waugh had no estate on which the deed could operate; he had parted with the entire legal estate to Jolly, and that prevented his being able to grant a rent-charge—*Shep. Touchst.* 243. This deed was not in the form of a demise, and it was not the case of an attornment proper—*Cornish v. Searell* (3). The deed could only be said to operate by way of contract on the one side and of licence on the other. Where a receiver was appointed by the Court of Chancery, the relation of landlord and tenant was not created. The receiver was no more than the agent of the party who applied for his appointment—*Thomas v. Brigstocke* (4). The case of *Dancer v. Hastings* was not reconcileable with the other cases.

They also cited the authorities relied upon in the court below.

(2) 5 Mo. & P. 576; s. c. 9 Law J. Rep. C.P. 181.

(3) 8 B. & C. 471, 476; s. c. 6 Law J. Rep. K.B. 255.

(4) 4 Russ. 64.

(1) 9 Exch. Rep. 14; s. c. 22 Law J. Rep. (N.S.) Exch. 318.

Mr. Follett and Mr. Tyndale, for the parties representing the London and Eastern Banking Company.

Mr. Rodwell, for J. Thomson.

Mr. Dickinson, for Aplin.

Mr. Palmer, in reply, contended that it was the intention of the parties to the deed that a tenancy should be created; the recitals and the use of the words "tenant," "rent," &c., were sufficient to shew that this was so. If this had been a mere contract, it would have been simply so provided. He referred to *Bac. Abr. tit. 'Lease,' K, 816.*

May 26.—The LORD CHANCELLOR, after fully stating the provisions of the deed of the 12th of October 1855, said—The first point to be ascertained is, what were the intention and object of the parties to be collected from the language of the deed? It is quite evident that their object was to secure the punctual payment of the interest on the mortgage, and to provide for the gradual reduction of the principal sum. This they intended to accomplish by means of a tenancy which was to be created between Col. Waugh and Aplin. That this was their intention appears clearly from the recital that it had been agreed that Col. Waugh should attorn as tenant to Aplin, by the clause of attornment itself, by which Waugh attorned, and became tenant from year to year to Aplin, and by the proviso for re-entry, by which it was provided that upon the plaintiff entering upon the premises whereof Waugh attorned tenant, the tenancy created by this attornment should absolutely cease and determine. There being, therefore, no doubt as to what the parties meant to do, it is next to be considered whether there is any legal objection to the means they adopted for carrying their intention into effect. For this purpose it will be necessary to bear in mind the nature of the relation which exists between a mortgagor and a mortgagee at law. A mortgagor who remains in possession after the execution of the mortgage, and continues to enjoy the profits of the land, is not considered as a tenant from year to year to the mortgagee, nor even as a tenant at will. He receives the profits for his own use, and not as agent or bailiff of the

mortgagee; and when he has once received them he is absolutely entitled to keep them as his own. This is stated by Mr. Baron Alderson in the case of *Trent v. Hunt*. But he may at any time be treated as a trespasser by the mortgagee, who may maintain ejectment against him without any previous notice or demand of possession. Such being the precarious dependence of the mortgagor upon the will of the mortgagee, it is competent to them to enter into an agreement by which the mortgagor's possession may be rendered more secure by the creation of a tenancy. This is sometimes effected by a stipulation in the mortgage-deed itself. Thus, in *West v. Fritch*, a mortgage-deed, which was executed by the mortgagor only, contained a clause by which, for the more effectual recovery of the interest, the mortgagor attorned and became tenant to the mortgagee, at a yearly rent of 40*l.*, payable half-yearly, so long as the principal sum remained secured. The mortgagor, having remained in possession, and made several of these half-yearly payments, the Court of Exchequer held, that the subsequent occupation connected with the covenant constituted the relation of landlord and tenant, so that the mortgagee could distrain. So in *Doe d. Garrod v. Olley* it was agreed that the mortgagor, during his occupation of the mortgaged premises, should pay the mortgagee the yearly rent or sum of 50*l.* half-yearly, and that it should be lawful for the mortgagee to use such remedies of distress and sale for the recovery of rent as landlords have on common demises, provided the reservation of such rent should not prejudice the mortgagee's right to enter and evict the mortgagor at any time after default made in payment of the money secured, or any part thereof. The Court of Queen's Bench seems to have been of opinion that there was a tenancy created with which the power of distress was connected; but they decided the case upon the proviso for entry and eviction by the mortgagee, which they held not to be waived by the proceedings for the recovery of the rent by distress. This case was recognized and acted upon in *Doe d. Snell v. Tom*, where a mortgagor attorned as tenant to a mortgagee, and there was also a power of entry

in default of payment; and the same law was also laid down by the Court of Exchequer in the case of *Pinhorn v. Souster* (5). Of course it can make no difference whether agreements of this description between mortgagor and mortgagee are contained in the mortgage-deed itself, or in a separate deed; and, therefore, if Col. Waugh had, in the deed of the 12th of October 1855, attorned as tenant to the plaintiff instead of Aplin, there could have been no doubt that the relation of landlord and tenant would have been established between them. But it is contended that the attornment to Aplin had no operation,—not by agreement, because he had no interest in the land to which it could apply, nor by estoppel, because the deed sets forth the rights and interests of all parties, and shews, therefore, that he had no reversion in the premises to which the power of distress would be incident. It appears to me, however, that the truth of the case appearing by the deed is a reason why the agreement between the parties should be carried into effect, either by giving effect to the intention of the parties in the manner they have prescribed, or by way of estoppel to prevent their denying the acts they have authorized to be done. If the attornment to the mortgagee would be good to create a tenancy in the mortgagor, which seems to be provided for by the 11 Geo. 2. c. 19, why should not an attornment to a third person, with the consent of the mortgagee, operate to create a tenancy or to estop all parties from denying that such tenancy exists? The statement in the deed of the character in which Aplin was to be clothed in order to carry into effect the object of the parties, and the proof it affords of his having no previous title in the land, appears to me to furnish no sufficient objection to the validity of the distress in question. In *Cornish v. Searell* an instrument, by which a party became a tenant to the plaintiffs described as two of the sequestrators in the writ of sequestration issued in the suit in Chancery, to hold the same for such time and on such conditions as may be subsequently agreed upon, was held to amount to an

agreement for a tenancy; and in *Dancer v. Hastings* a demise by a receiver appointed by the Court of Chancery was determined to be a good lease to entitle the lessor to distrain and to estop the lessee from pleading *non tenuit*. The Master of the Rolls, however, distinguished the case of *Dancer v. Hastings* from the present by observing, that in that case the person distrained upon had accepted a lease from the receiver of the Court of Chancery *simpliciter*, and the Court of Common Pleas held that he could not afterwards say that the receiver had not demised the land to him; but his Honour added, "Here Col. Waugh has attorned to the receiver, but he has done so under the deed, which sets forth and explains the rights and interests of all parties, and by so doing it shews that the relation of landlord and tenant did not actually subsist between Col. Waugh and Mr. Aplin." And, again, advertng to the difference between the deed in *Dancer v. Hastings* and the deed creating a right to distrain in the present case, his Honour says, "The deed in that case must be inferred from the case itself to have been a simple demise from one person as owner to another person as tenant. The deed is not set out, but I infer that must have been so from the terms of the case. But here the recitals and covenants contained in the deed shew that the real owner at law was the plaintiff, and in equity Col. Waugh's right was subject to the mortgage vested in the plaintiff." His Honour's attention seems to have been directed solely to a report of the case of *Dancer v. Hastings* in 4 *Bingham*. Had the contemporaneous report of it in 12 *Moore* been brought to his notice he would have found that the lease was not merely, as he might naturally have been led to infer from the statement in *Bingham*, a simple demise from one person as owner to another as tenant, but it set out the title of the lessor as the receiver appointed by the Court of Chancery, and made the rent payable to the lessor or any future receiver or receivers, shewing thereby most clearly that the lessor had no interest in the land. What effect this corrected view of the character of the lease in *Dancer v. Hastings* might have had upon his Honour's judgment, it is impossible for me to imagine, but if that

(5) 8 Exch. Rep. 188; s.c. 22 Law J. Rep. (n.s.) Exch. 18.

case is good law (and I am not aware that it has ever been questioned) it does seem to be a strong authority in favour of the establishment of the tenancy in this case, notwithstanding that the deed sets forth and explains the rights and interests of all parties. Of course, if a tenancy were created, the right to distrain would follow as an incident to it. But it is said there can be no power to distrain, because Aplin had no reversion to which it could belong, and cases were cited, such as *Preece v. Corrie* (6) and — v. *Cooper* (7), to shew that where the lessor parts with his whole interest, upon non-payment of rent he cannot distrain because there is no reversion. There may possibly, however, be a difference between these cases and the present, where a person attorns or acknowledges himself to be tenant to another, as in this latter case it may be considered that the law, which estops him from denying the tenancy, may also prevent him disputing that a reversion exists in his land. But it is unnecessary to press this distinction, if it exists in the present case. In the cases cited upon this point there was no express right to distrain reserved or created. This appears to have been so in *Preece v. Corrie*. In — v. *Cooper* it was stated that in the clause of assignment there was no power of distress, and in *Pascoe v. Pascoe* (8), although the whole of the original lessee's title and interest in the premises were transferred, yet no doubt was suggested that the power of distress might have been given; the only question being whether the reference to the arbitrator gave him authority to confer that power. In the deed in question in this case the remedy by distress is expressly conferred upon Aplin; and therefore even if the creation of the tenancy did not admit of the scintilla of a reversion, yet there seems to be nothing to prevent the power of distress being exercised where it is given in express terms, although there may be no reversion in the person to whom another attorns as tenant. It may be right to take some notice of other arguments which were brought forward. It was sug-

gested that if the deed were not sufficient to create a tenancy, it might amount to a grant of a rent-charge. This, however, cannot be, because Col. Waugh had no estate in him out of which such a right could arise. It is only necessary, in support of this view, to refer to what was said by Mr. Justice Patteson in *Doe d. Garrod v. Olley* and the case of *Freeman v. Edwards*. It was also contended that if no tenancy were created between Col. Waugh and Mr. Aplin, yet at least one was established between Waugh and the plaintiff, and it was compared to the case of a demise by a *cestui que trust*, of which the trustee was at liberty to claim the benefit and treat the *cestui que trust* as his agent, as in the case of *Vallance v. Savage*, and I observe the Master of the Rolls says, "The deed shews that the relation of landlord and tenant existed, if at all, between the plaintiff and Col. Waugh; but if no tenancy exists between Waugh and Aplin, I cannot see how any can be established between him and the plaintiff." In *Vallance v. Savage* the trustee was no party to the lease. Here it was the intention of all parties that a tenancy should be created between Waugh and Aplin. If this failed of effect for any reason, how can a different tenancy be presumed which is not only not in accordance with, but directly contrary to, such intention? I am, therefore, of opinion that the validity of the distress depends entirely upon the existence of the tenancy to Aplin, that this is created in pursuance of the intention of all the parties by the attornment of Col. Waugh as tenant to him, with the consent of the plaintiff, and that the express power of distress is not what might be termed a power in gross, but one annexed to the tenancy, and that the distress made is valid, and entitles the plaintiff to the produce of it. It was stated on the part of the defendant that, the interest on the mortgage having been paid down to the 12th of October 1856, the distress for a year's rent was far too much, as there could only be half a year's due; but the effect of the payment of interest was merely to reduce the rent from 3,500*l.* to 2,000*l.*, so long as the interest was duly and punctually paid, and is not to be taken as actually payment of rent. There may,

(6) 5 Bing. 24; a. c. 6 Law J. Rep. C.P. 205.

(7) 2 Wils. 375.

(8) 3 Bing. N.C. 898; a. c. 6 Law J. Rep. (n.s.) C.P. 322.

therefore, have been a year's rent due from the preceding 12th of April down to the time of the distress, although the half-year ending on the 12th of October 1856 is only at the rate of 2,000*l.*, on account of the punctual payment of interest for that period, and for the subsequent half-year at the full rent of 3,500*l.* This would make the year's rent due under the deed 2,750*l.*, instead of 3,500*l.*, the amount distrained for. This sum I think the plaintiff is entitled to out of the proceeds of the distress. The decree, therefore, of the Master of the Rolls must be varied so far as it declares that the official assignee and the creditors' assignee of Col. Waugh are entitled to the sum of 3,500*l.* and interest which has accrued upon it, and directs the payment of that sum and interest to them, and also as to the order to pay to the official assignee and the creditors' assignee so much of their costs as have been occasioned by the plaintiff's claim to that sum of 3,500*l.* and interest; and it must be declared that the plaintiff is entitled to the sum of 2,750*l.* out of the 3,500*l.* standing in the joint names of the defendants Coleman, Bell and Aplin, in the London and Westminster Bank, and all interest which has accrued or which shall accrue due upon the same.

There was a second appeal by the persons representing the London and Eastern Banking Company against the decision of the Master of the Rolls, on the ground that he had erroneously decided that the assignees were entitled to the sum in dispute, and that his Honour ought simply to have dismissed the bill.

Mr. Follett (with whom was *Mr. Tyndale*) contended that the disclaimer put in by these defendants had only reference to the plaintiff's claim, and not to that of the co-defendants. If, therefore, the Court should decide against the plaintiff in such a case, the bill should be simply dismissed, leaving it for the co-defendants to raise between themselves the questions affecting their several interests—

Cottingham v. the Earl of Shrewsbury, 3 Hare, 627.

Chamley v. Dunsany, 2 Sch. & Lef. 690, 709.

Chervet v. Jones, 6 Madd. 267.

NEW SERIES, XXVIII.—CHANC.

The decree now to be pronounced should not go beyond a declaration, as to the right of the plaintiff to that portion of the fund representing his interest—*Mitford*, 318.

The LORD CHANCELLOR (without hearing counsel for the assignees).—It appears to me, in this case, that the application is not well founded. There is no doubt that the rights of co-defendants cannot be decided upon a bill filed, except in cases where either it is necessary to decide those rights in order to determine the right of the plaintiff himself, or where those rights are established by such clear and satisfactory evidence, that the Court is convinced that no further evidence can be produced by the defendants in any subsequent proceedings, so that the case is entirely ripe for decision between the co-defendants as well as for deciding the right of the plaintiff in the suit. Now, in this case, it was virtually a suit which was instituted for the purpose of deciding the right of the plaintiff to a sum of 3,500*l.*, which was part of the proceeds of a distress which had been put in by him on the goods of Col. Waugh, who had become bankrupt. The assignees claim to be entitled to that 3,500*l.*, and the London and Eastern Bank also claim under a bill of sale which had been given by Col. Waugh to them for a very large sum of money which was due from him to them. It was arranged that this sum of 3,500*l.* should be paid into the London and Westminster Bank in the names of certain parties who were to represent the persons who claimed to have an interest in his money; Mr. Coleman representing the London and Eastern Bank, Mr. Bell the assignees of the bankrupt, and Mr. Aplin the party who made the distress, in fact Mr. Jolly, the plaintiff. Under these circumstances the bill was filed, and the claim which was made by the bill, and the rights of the parties stated in it were these:—The plaintiff, under the terms of the indenture of the 12th of October 1856, claimed to be entitled to receive the sum of 3,500*l.*, and the interest which has accrued due thereon, in part payment of the monies due to him upon his mortgage. The official manager of the banking corporation and the defendants Bell, Hughes, Jay and Pearce dis-

puted the plaintiff's right to the money, and the official manager claimed to be entitled to receive the same under the alleged bill of sale, the other defendants claiming to be entitled to receive the same as assignees of Waugh as part of his estate, on the ground that the alleged bill of sale was an act of bankruptcy on the part of Waugh, and that the goods were in his order and disposition at the time of his bankruptcy. I consider, therefore, that the suit was really instituted for the purpose of determining who was the person who was really entitled to the proceeds of this distress to the extent of the sum of 3,500*l.*, and the suit had no ulterior object. Well, under these circumstances the defendants, who were the representatives of the London and Eastern Banking Company, put in their answer. By that answer they, as it appears to me, most distinctly and clearly disclaimed all right and interest in the subject-matter of the suit, because it is impossible to read the paragraph of their answer to which reference has been made without coming to that conclusion. They say, "We deny it to be true that we, the defendants, or either of us, dispute, or have ever disputed, the plaintiff's right to the said sum of money in question in this suit," admitting that the right to the 3,500*l.* was the real question in dispute. They might have stopped there, and if they had chosen to frame their answer merely with an admission of the plaintiff's rights to the money, or a statement that they did not dispute his right, there might have been some ground for the arguments which have been addressed to me on the part of the defendants, who represent the London and Eastern Banking Company. But they go on and say, "Or that we claim, or have ever claimed to be entitled to receive the same under the said bill of sale, or otherwise, and we disclaim all right, interest and claim to the said sum of money, and we claim to be dismissed this suit with costs." Now, what is the meaning of that? Does that, or does it not, amount to a disclaimer? Mr. Follett has said, that the ordinary form of a disclaimer, where it is an answer and disclaimer, is to give a particular heading, "the answer of A. B. and his disclaimer;" but I put the question to him, whether, supposing an answer and disclaimer were

put in without that heading, which he says is necessary, and there had been in the body of the answer a distinct and positive disclaimer, that would be insufficient upon the ground of the want of what he calls the proper heading. As I understand the answer he gave me, he was compelled to admit that a disclaimer in those terms, although not pointed to by the heading in the answer, would be perfectly sufficient. Well then, this, in my opinion, is a disclaimer of the most positive and distinct kind. It was admitted, by Mr. Follett, that this paragraph of the answer might have been framed in this way: "We do not dispute the plaintiff's right to the sum of money, nor do we claim to receive the same under the bill of sale, except in the event of its being decided that the plaintiff is not entitled to the fund." The defendant might have put in an answer of that kind; he has not chosen to do so, and he has in the most distinct terms stated, that he has no interest, that he disclaims all right, interest and claim to the said sum of money, which cannot be confined to a disclaimer, so far as the plaintiff's interests are concerned, but is the most general and unqualified disclaimer of any right whatever in that sum of money, which is the subject-matter of the suit. Then, what was the Judge to do under these circumstances? It is quite true that upon the notice which has been given it was not competent to the defendants, the assignees, to have read the answer of Mr. Follett's clients against them, but the matter was before the Judge, the answer is brought to his notice by the plaintiff, and he finds that the defendant, a party who has been made a defendant in the cause, who was supposed to assert a right to the sum of money which is the only subject-matter of dispute, positively disclaims any right to that sum of money. Then, it is said, that he was not dismissed as he ought to have been at once by the Court upon that disclaimer, but he stood before the Court, and that, therefore, it was the duty of the Master of the Rolls to have taken care of his interest, so far that he should have made a decree which would have left it open to him to discuss and dispute his right as between himself and the assignees of the bankrupt; but I apprehend that, although he was not technically

dismissed from the suit, he was virtually no longer a party to it, he had renounced all his right to claim any interest whatever in that which was the subject of discussion, and which was to be decided by the Court; and therefore it appears to me that the Master of the Rolls had no other course to pursue than to decide the matter as it then stood between the only parties who were the litigant parties as between themselves. When Mr. Follett's client withdrew in the manner which seems almost to be admitted he has done, he having put himself out of the suit as far as he could, at all events out of any interest in the subject-matter of the suit, the only litigant parties who remained were the plaintiff on the one hand, and the assignees of the bankrupt on the other. It appears to me, under those circumstances, that the suit was just in the same position as it would have stood if originally the only parties to it had been these parties, the plaintiff on the one side and the assignees of the bankrupt on the other, and that the Master of the Rolls ought only to have regarded the rights and interest of those parties as between themselves. He had nothing to do with any claim or any right which might possibly have existed on the part of the other defendant to dispute the question with the assignees of the bankrupt; therefore, it appears to me, when his Honour decided the question at once as between the plaintiff and the assignees, that the assignees were entitled to this sum of 3,500*l.*—the only question then remaining to be decided before him being, which of those two parties was to be entitled—I think his Honour made the only decree that it was possible for him to make. Under these circumstances the defendant, having unfortunately taken a course by which it is said upon the form of the decree as it now stands, or as it must be varied, that he will be precluded from any right to assert that he is entitled to the surplus of the sum of 3,500*l.*, the 750*l.*, I am afraid all I can say upon it is, that he having chosen to disclaim in the distinct manner which he has done, I ought not, under the circumstances, to interfere in any way to assist him to open that question as between him and the assignees. Under these circumstances, I think that this appeal must be

dismissed with costs. With regard to the claim to costs on the part of Mr. Coleman, I think, inasmuch as but for that claim of the London and Eastern Banking Corporation, Mr. Coleman would never have been one of the stakeholders; that when they themselves disclaimed any right or interest in this money, they shewed that they never ought to have intervened at all; that Mr. Coleman ought not to have been made a party; that it is their act and they must take the consequences of it, by which he has been appointed as one of the parties to represent them. Mr. Coleman must get his costs from them if he can, but he certainly ought not to have them out of the estate. So far as the decree is concerned, I shall make a declaration that the assignees of the bankrupt are entitled to the 750*l.*

KINDERSLEY, V.C. }

1858.

July 8.

ROYOU v. PAUL.

Specific Performance—Notice to rescind Contract—Return of Deposit.

A purchaser raised certain valid objections to his vendor's title, which the vendor refused to satisfy. The vendor gave notice, that if the purchaser refused to complete within five days, he should re-sell and charge the purchaser with the expenses. The purchaser thereupon gave the vendor notice, that he should bring an action for the deposit, if the requisitions were not complied with within a week. The action was commenced, and the vendor some time subsequently agreed to satisfy the requisitions at the purchaser's expense. Upon the purchaser's refusal, a bill was filed by the vendor for specific performance. The Court held, that the notice by the vendor of an intention to re-sell, was equivalent to a declaration that he would not seek specific performance of the contract, and that the purchaser's action to rescind was effectual, and the bill was dismissed, with costs.

Power of the Court to order the return of the deposit where the vendor's bill is dismissed, he having given an undertaking.

This cause was heard on motion for a decree. The bill was filed for the purpose of enforcing specific performance by the

defendant of two contracts entered into by him with the plaintiff at a sale by public auction, which took place on the 18th of September 1856, by one of which contracts the defendant agreed to become the purchaser of a freehold messuage and premises, being No. 3, Royal Place, New Road, Peckham; and by the other, of two leasehold messuages and premises, described as Nos. 1, and 2, Royal Place, aforesaid.

The conditions of sale provided, that the respective purchases should be completed on or before the 11th of October 1856, and for payment of interest in case of non-completion on that day, without prejudice to the vendor's right to rescind the contract, and that compensation should be allowed for any error or misdescription in the particulars of sale. The plaintiff delivered abstracts of title to the freehold and leasehold premises to the defendant's solicitor on the 26th of September 1856; and on the 3rd of October following the defendant's solicitor delivered requisitions on both the titles, in which he required compensation on behalf of the defendant, on the ground that, with respect to the leasehold premises, there was a further rent of 18s. reserved for insurance, in addition to the rent stated in the particulars of sale; he also insisted that a prior mortgage having been made by way of under-lease, the concurrence of Kellaway, the mortgagor, was necessary in the assignment to the defendant; and he further required the plaintiff to point out with respect to the freehold lot where the deeds not in the defendant's possession could be produced. The vendor's solicitors sent their answers to the purchaser's requisitions on the 8th of October, denying the purchaser's right to an assignment from Kellaway, and generally refusing to comply with the purchaser's requisitions. After some correspondence upon the subject, the plaintiff's solicitors wrote, on the 5th of November, to inform the defendant's solicitor, that unless the defendant proceeded to complete the purchase within five days they should re-sell the premises, and hold him liable for the deficiency; and by a letter, dated the 6th of November 1856, the defendant's solicitor informed the plaintiff's solicitors that unless the deeds required were produced within a week,

and the other requisitions complied with, the defendant would commence an action to recover the deposits. The plaintiff's solicitors still refusing to comply with the defendant's requisitions, on the 17th of November 1856 the defendant commenced an action against the plaintiff for the recovery of his deposits. The plaintiff's solicitors, in February 1857, sent in further answers to the requisitions, offering to comply with them at the purchaser's expense, but the purchaser declined to accept these answers. On the 28th of March 1857 the plaintiff filed his bill for specific performance of both contracts; and in this suit he obtained an injunction to restrain the defendant from proceeding with his action, on the plaintiff submitting to abide by any order the Court might make respecting the deposits, or the costs of the action.

Mr. Baily and *Mr. Bovill*, for the plaintiff.

Mr. Glasse and *Mr. W. D. Lewis*, for the defendant, contended that the purchaser's requisitions, being valid ones, and the vendor having distinctly refused to comply with them, the purchaser was entitled by a short notice to declare the contracts at an end after the time fixed for completion. The following authorities were cited:—

Parkin v. Thorold, 16 Beav. 59; s. c.

22 Law J. Rep. (n.s.) Chanc. 170.

Roberts v. Berry, 3 De Gex, M. & G.

284; s. c. 22 Law J. Rep. (n.s.) Chanc. 398.

Harford v. Purrier, 1 Madd. 532.

Crosse v. the Duke of Beaufort, 5 De Gex & Sm. 7.

Nott v. Piccard, 25 Law J. Rep. (n.s.) Chanc. 618.

KINDERSLEY, V.C. said, that he did not think the plaintiff was entitled to a decree. The contracts ought to be considered as separate contracts, for it was possible that a decree might be made compelling specific performance of one contract, and dismissing the bill as to the other. At the same time, he thought it was right to make them the subject of one suit. He would consider the case first as to the leasehold. The requisitions were delivered on the 3rd of October, and with regard to the dif-

ence in the amount of rent reserved, it appeared that the purchaser had admitted this to be a matter for compensation. But the second requisition on the leasehold title, as to the reversion in Kellaway, the mortgagor, was clearly a proper and substantial requisition, for, by the conditions of sale, the vendor had agreed to sell the whole term in the lease to the purchaser. In his answer, however, the vendor completely rejected the requisition. This was not a proper answer, and yet this rejection of the requisition ran through the whole of the communications. On the 20th of October there was a further requisition on the point, and the reply was in the same terms as before. On the 23rd of October the purchaser's solicitor again insisted, by letter, on the reversion being got in; and on the 24th of October he received an answer, in substance resisting the requisition. It might be remarked that the time allowed by the vendor to the purchaser to waive his requisition, by the letters of the 24th of October and the 5th of November, in the latter of which the vendor threatened to re-sell, was a very short period. What became of the question, as to the production of the deeds of the leasehold property, did not appear. Upon the whole, he considered the letter by the purchaser's solicitor, of the 6th of November, giving the vendor notice of his intention to commence an action, was a sufficient notice to consider the contracts rescinded. It had been argued that, there being two contracts, the notice required that something should be done as to each, or that both would be rescinded; but it was evident that the vendor had throughout treated the contracts as though they were one contract: the notice was really meant to be a distributive notice, and would so have been understood. However, by a letter sent two days afterwards, the vendor still adheres to his refusal. The defendant then commenced his action. It would be observed, that only one action was commenced, but no attempt was then made to file a bill. On the 26th of February further answers to the requisitions were sent in. The parties were at arm's length on the 6th, or at latest on the 14th of November, and three months and a half afterwards the vendor says, "Kellaway's

representatives will join;" but adds, "that the expense must be borne by the purchaser." The question was, whether the purchaser's notice as to the leaseholds was too short. He thought that it was not. If time was required in order to answer the requisition, then the purchaser should give a reasonable time, and that would depend upon the circumstances. In such case, a week would be too short, but where the vendor was saying, "I'm not bound to do it, I won't do it," there no time was required; it was then a matter of indifference. The Vice Chancellor therefore considered the notice good as to rescinding the contract. Even if afterwards there had been acquiescence on the part of the purchaser, it would have made no difference. Secondly, as to the contract respecting the freeholds; there had been an inquiry for the deeds, and it was ascertained that the person in whose custody the deeds were supposed to be could not be found. Notwithstanding this, however, the vendor's solicitor, in his letter of the 5th of November, threatened to re-sell; and he afterwards alleged that the requisition was not made in time; so that, in effect, no answer was given to the requisition as to the deeds. If the vendor had said that he required time to find the deeds, then clearly a notice of a week would not have been sufficient; but it was not necessary that a longer notice should be given, when the parties were at arm's length. The vendor, from the time of writing his letter of the 5th of November, seems to have said, "I don't mean to ask you for specific performance." Under these circumstances, His Honour considered that the bill ought to be dismissed, with costs. As to the deposits and costs at law, and the undertaking, the Vice Chancellor said that, if the action should not go on, the Court ought to dispose of the deposits and costs; and, after conferring with the registrar, said that having regard to the undertaking, notwithstanding the dismissal of the bill, he could order the return of the deposits by the plaintiff, but that he would leave the defendant to decide whether he would go on with the action or not, for the costs. The defendant agreed to receive the deposits.

FULL COURT
OF
APPEAL. } MORTIMORE v. MORTIMORE.
July 2.

Trustee — Investment — Railway Mortgage.

A testator directed his trustees to invest in the funds, or on Government securities, "or upon the security by way of mortgage of any freehold, copyhold or leasehold hereditaments in England or Wales":—Held, that this did not authorize the investment upon the security of railway mortgages made in conformity with the 8 Vict. c. 16. s. 38, or in Great Northern Railway Debenture Stock.

William Mortimore, by his will, dated the 14th of September 1858, after various devises and bequests, gave all his residuary real and personal estate to trustees upon trust to realize the same, and to stand possessed of the monies arising therefrom, upon trust thereout to pay his debts and funeral and testamentary expenses, and out of the residue of the said monies to "lay out and invest the sum of 20,000*l.* sterling in their or his names or name, in some or one of the public stocks or funds of Great Britain, or at interest upon Government securities, or upon the security by way of mortgage of any freehold, copyhold or leasehold hereditaments in England or Wales, or of a life interest in any property, real or personal, coupled with a policy of assurance on the life or lives for which such interest is holden, with power from time to time, at discretion, to vary the same stocks, funds or securities." The trusts of this fund were then declared to be for the testator's widow for life or until her re-marriage, and afterwards as therein mentioned. The trusts for investment of other portions of the residue were declared by reference to those relating to the 20,000*l.* The testator died on the 14th of October 1858, without having altered that part of the will which is hereinbefore stated. This special case was brought before the Court to obtain an opinion, first, whether the investment of the monies to arise from the sale and conversion of the residuary real and personal estate of the said testator, or of any part of such monies,

upon the security of railway mortgages made in conformity with the provisions in that behalf contained in the Companies Clauses Consolidation Act, 1845, was an investment sanctioned by the trusts of the will; and, secondly, whether the investment of such monies, or any part thereof, in the purchase of Great Northern Railway Debenture Stock, created pursuant to the provisions in that behalf contained in the "Great Northern Railway Company's Increase of Capital Act, 1853," was an investment sanctioned by the trusts of the will.

As to the first question, the 38th section of the Companies Clauses Consolidation Act, 1845," (8 Vict. c. 16.) enacted as follows:—"If the company be authorized by the special act to borrow money on mortgage or bond, it shall be lawful for them, subject to the restrictions contained in the special act, to borrow on mortgage or bond such sums of money as shall from time to time, by an order of a general meeting of the company, be authorized to be borrowed, not exceeding in the whole the sum prescribed by the special act, and for securing the repayment of the money so borrowed, with interest, to mortgage the undertaking and the future calls on the shareholders, or to give bonds in manner hereinafter mentioned." The interpretation clause in the same act provided, that "the expression 'the undertaking' shall mean the undertaking or works, of whatever nature, which shall by the special act be authorized to be executed."

With regard to the second question the 19th section of the Great Northern Railway Company's Increase of Capital Act, 1853, provided that it should be lawful for the company, from time to time, with the consent of three-fifths the votes of the shareholders present in person, or by proxy, at any general meeting of the company, convened with due notice of that object, to resolve that any portion of the borrowed capital of the company then subsisting on the security of outstanding mortgages or bonds, or any debenture or other security for which, or for the interest whereof the company were lawfully liable, not exceeding an amount to be defined in and by such resolution, might be converted into stock of the com-

pany of like amount, either by agreement with the holders of such mortgages or bonds, or other security respectively, before the same respectively became due, or by paying off the same respectively when due, and issuing stock of a corresponding amount, instead of re-borrowing the sums so paid off, and also with the like consent from time to time to resolve that the whole or any part to be defined in and by such resolution, of the monies which the company should have authority to raise by borrowing under the powers of any of their acts, and which should not then have been raised, should or might be raised by the creation and issue of stock of a corresponding amount, instead of borrowing the same; and also, with the like consent, to attach to the stock so authorized to be created and issued for any of the purposes aforesaid, a fixed and perpetual irredeemable yearly dividend or interest, at any rate not exceeding the rate of 4*l.* for every 100*l.* thereof, payable in equal half-yearly portions; and it should thereupon be lawful for the directors of the company to carry into effect such resolution or resolutions by the creation and issue of so much stock as might from time to time be necessary for that purpose, having such fixed rate of interest or dividend as aforesaid; and the stock so created and issued should be a charge upon the tolls and undertaking and lands, tenements and hereditaments of the company, but should be distributable, transmissible and transferable as, and in other respects have the incidents of, personal estate, and the said interest or dividend should for ever have priority of payment over all other dividends or any other stock or shares of the company, whether ordinary or preference or guaranteed, and the stock when so created should be termed "Great Northern Railway Debenture Stock."

Mr. Eddis appeared for the trustees, and submitted the questions to the Court, the trustees being willing to act in the matter according to the direction of the Court. He referred to *Mant v. Leith* (1).

(1) 15 Beav. 524; a. c. 21 Law J. Rep. (n.s.) Chanc. 719.

Mr. Palmer and *Mr. Shee*, for the persons beneficially interested in the fund, contended that the nature of the security, either under the Companies Clauses Consolidation Act, or the 19th section of the Great Northern Railway Act of 1853, was such as to come within the fair scope and object of the will. The security of the undertaking was a real security. They referred to—

Robinson v. Robinson, 1 De Gex, M. & G. 247; a. c. 21 Law J. Rep. (n.s.) Chanc. 111.

Doe v. St. Helen's and Runcorn Gap Railway Company, 2 Q.B. Rep. 364; a. c. 11 Law J. Rep. (n.s.) Q.B. 6.

[LORD JUSTICE KNIGHT BRUCE inquired whether the recent decisions on the Mortmain Act had any bearing on the subject.]

Mr. Palmer said that they had, and that they were rather in favour of the view he had submitted to the Court.

The LORD CHANCELLOR was of opinion that neither of the securities proposed was an investment sanctioned by the trusts of this will. Those securities might come within the operation of the Mortmain Act, and, in some sense, they were real securities, but they did not come within the meaning of the testator's words. The testator pointed out a security by way of mortgage in the common and usual sense of the words, whereby a certain and clear remedy would be given for the recovery of the money. In the security now proposed the remedy was uncertain; and there was no certainty that any funds would be forthcoming if a receiver of the tolls were to be appointed. All that was decided in *Robinson v. Robinson* was, that the trustees in that case were not guilty of a breach of trust in continuing in their actual state of investment part of the assets which consisted of turnpike bonds. That was, however, no authority to shew that what it was proposed to invest this money upon was a security "by way of mortgage of freehold, copyhold or leasehold hereditaments in England or Wales," within the meaning of the trusts of this will.

LORD JUSTICE KNIGHT BRUCE also thought that the questions must be answered in the

negative, guarding himself, however, to this extent, that if the trustees had found among the testator's property railway mortgages or debenture stock of this description, and had not realized, then it might be that the Court would not have thought the trustees guilty of error so clear and manifest as to consider them guilty of a breach of trust. But the case was different when the Court was asked to change securities into those now proposed to be taken; and his Lordship was of opinion that both questions must be answered in the negative. The contention having been raised with a view to the increase of the income of the tenant for life, she should pay the costs.

LORD JUSTICE TURNER concurred.

FULL COURT
OF
APPEAL
July 2, 9.

COLLARD v. ROE.

Vendor and Purchaser—Concurrence of Dower Trustee—Practice—Appeal for Costs.

A suit was instituted by a vendor for the specific performance of a contract to purchase an estate which, by deed, dated in 1841, was limited to the use of the vendor for life without impeachment of waste; and after the determination of that estate by any means in his lifetime, to the use of a trustee and his heirs during the life of the vendor, in trust nevertheless for the vendor and his assigns; and after the determination of the estate so limited to the trustee and his heirs, to the only use and behoof of the vendor, his heirs and assigns for ever. One of the Vice Chancellors held, upon objection taken by the defendant, that he was entitled to a conveyance of any interest which might have become vested by forfeiture or otherwise in the dower trustee, but no costs of suit were given to either party up to the hearing. The defendant appealed on account of the decree not giving him costs, and of his having to pay interest from a certain date on his purchase-money. The appeal was dismissed, with costs.

Semble—that the rule as to there being

no appeal on the subject of costs alone is practically not now in force.

This was an appeal, by the defendant, from the decision of Stuart, V.C. (reported 27 *Law J. Rep.* (n.s.) Chanc. 295), upon two grounds:—first, that interest had been erroneously directed to be paid by the defendant upon his purchase-money from a certain day; and, secondly, because, although the Vice Chancellor allowed the validity of the defendant's objection as to the dower trustee, he had given him no costs.

The bill prayed that the defendant might be decreed specifically to perform a contract which he had entered into to purchase certain freehold estates from the plaintiff.

At the date of the contract, the estates in question stood limited by an indenture, dated in December 1841, to the use of the plaintiff and his assigns for and during the term of his natural life, without impeachment of waste; and after the determination of that estate, by any means in his lifetime, to the use of G. J. Pitman and his heirs during the life of the plaintiff, in trust, nevertheless, for the plaintiff and his assigns; and, after the determination of the estate so limited in use to the said G. J. Pitman and his heirs during the life of the plaintiff, to the only proper use and behoof of the plaintiff, his heirs and assigns for ever, to the intent that the then present or any future wife of the plaintiff should not be entitled to dower out of the same hereditaments.

The purchaser refused to complete the purchase unless the dower trustee, G. J. Pitman, who was in Australia, whither he had gone to reside prior to the date of the contract, concurred in executing the deed of conveyance; and the bill was filed to enforce specific performance without such concurrence. The Vice Chancellor considered the defendant's objection was frivolous and vexatious, but that in strict practice he was bound to yield to it. The decree was accordingly made; no costs up to the hearing to be given on either side.

Mr. Craig and Mr. Southgate, in support of the appeal, contended that their

view of the practice had been held by the Vice Chancellor to be correct, and that therefore their costs ought to have been given to them. If it were objected, that this was substantially an appeal for costs alone, the case of *Norton v. Cooper* (1) was sufficient authority for the course which had been taken.

[LORD JUSTICE KNIGHT BRUCE said, that he understood that the rule as to there being no appeal on the subject of costs alone was practically not in force.]

Mr. Craig and Mr. Southgate argued, at some length, the question of the necessity for the dower trustee's concurrence, it being contended that the whole subject of the suit was open upon their appeal.

Mr. Malins and Mr. Kerlake, for the plaintiff, were not called upon.

The LORD CHANCELLOR was sorry to find the money of suitors squandered in such litigation, and the time of the Court wasted by such a frivolous and vexatious objection, which the defendant was fighting out as if the fate of the empire depended upon it. The Vice Chancellor had come to a right conclusion, that neither party should pay costs; and this appeal must be dismissed with costs.

LORD JUSTICE TURNER concurred.

LORD JUSTICE KNIGHT BRUCE agreed that the defendant's objection was frivolous and vexatious; but his voice would have been for giving the costs of the suit against the appellant.

KINDERSLEY, V.C. }
Feb. 11. } VERITY v. WILD.

Solicitor — Lien for Costs — Fund in Court.

A solicitor has no lien for his costs upon a fund in court, which is the subject of the suit, as against other parties than his client; but he has a right to prevent his client from receiving any sum recovered by his exertions until his costs are paid. Such right, however, cannot preclude a fair compromise between the parties.

This was a petition presented by Mr.

(1) 5 De Gex, M. & G. 728.

NEW SERIES, XXVIII.—CHANC.

Downs, who had been the plaintiff's former solicitor in the suit, praying for an order that no decree for disposing of a sum of 800*l.*, which had been ordered to be brought into court, should be made, without the petitioner's costs being provided for; or that no such order should be made without previous notice to the petitioner.

The bill was filed, by the plaintiff, Mr. Verity, on the 23rd of May 1858, to enforce the execution of the trusts of a creditors' deed, under which he had assigned his property to the defendant Wild and others, upon trust for the benefit of his creditors, with a resulting trust in favour of himself.

The bill alleged various breaches of trust; and in June 1858 a motion was made on behalf of the plaintiff for a receiver and injunction; and an order was made upon the motion that a receiver should be appointed, and that a sum of 800*l.* in the hands of the trustees should be brought into court; and also that a sum of 35*l.* should be paid to the plaintiff as costs in respect of certain affidavits which had been improperly filed on behalf of the defendants. The petitioner had been solicitor for the plaintiff up to the time of the motion for a receiver, but had then been changed by the plaintiff; and his costs were still due and owing. A compromise was subsequently come to, whereby, after providing for the costs of the trustees, the surplus was to be paid to the creditors.

The petition now impeached this compromise as fraudulent and collusive against the petitioner; and it alleged that the plaintiff and the defendants had agreed not to bring the money into court, and were arranging the terms of the compromise without making any provision for the petitioner's costs.

Mr. Drewry, in support of the petition, contended that Mr. Downs had a lien upon the fund which was ordered to be brought into court in respect of his costs, and that any compromise which did not provide for his costs was a fraud upon him. He cited *Pelly v. Wathen* (1).

Mr. Ward appeared for the plaintiff.

(1) 7 Harv. 351; a.c. 18 Law J. Rep. (N.S.) Chanc. 281.

Mr. J. H. Palmer and Mr. Langworthy,
for the creditors; and
Mr. Sheffield, for the trustees.

KINDERSLEY, V.C.—This is a petition, praying that no order may be made for the disposition among the parties to the suit, or any of them, of a sum of money ordered to be brought into court without providing for the petitioner's costs; or that no such order should be made in respect of the fund without previous notice to the petitioner. It appears to me that this petition is founded in error. The facts are very simple; and the suit might have been a very proper one, although it might not have entirely succeeded. On the application for a receiver, it seems that the defendants themselves suggested that the 600*l.* in their hands should be brought into court; and as the plaintiff did not object, an order to that effect was made. During these proceedings Mr. Downs was acting as the plaintiff's solicitor, and there is no suggestion that he was not rightly performing his duty. It appears that the parties to the suit are now proposing to come to an arrangement, under which the fund is to be appropriated in payment of the trustees' costs, and, as far as it goes, in satisfying the creditors. This arrangement is said by the petitioner to be fraudulent and collusive as against him; but I can see no ground for that contention. There is no doubt in the case as to how the law stands at the present time, whatever questions might formerly have been raised. A solicitor has no lien on the fund, which is the subject of the suit, as against other persons; but he has a right that whatever he can recover for his client shall not be paid to him until his costs are satisfied. That, however, is not a lien upon the particular fund in court; but the petitioner prays that prior to the rights of all parties this general fund shall not be dealt with until the solicitor's costs are paid. That is a misapprehension of the law. If any part of the fund is payable to Mr. Verity personally, or to him in respect of costs, then the petitioner has a right to say that it shall not go into his pocket until the costs are paid to the solicitor, by whose labour it was procured for his client; but it is not consistent with any principle

that the right of a solicitor should preclude any honest and fair arrangement between the parties. If such is the effect the sooner the right is abolished the better. It appears that the sum of 35*l.* has been actually ordered to be paid to the plaintiff by way of costs; and to this extent, I think, the petitioner's application is justified, and, so far, he may have an order, but only to prevent that particular sum from being dealt with, because that sum ought to have been applied in payment of the solicitor's costs. I think also that no order should be made in the suit, by way of compromise or otherwise, for the payment of any sum to Mr. Verity, without notice being given to the petitioner. The petitioner must pay the trustees and the other creditors the costs of this application, as he can have no equity against them; but the plaintiff must pay his own costs. The order was made accordingly.

WOOD, V.C. }
Feb. 9. } WYCHERLEY v. BARNARD.

Practice—Summons to Vary the Chief Clerk's Certificate—51st Order of the 16th of October 1852.

A summons to vary the chief clerk's certificate is a sufficient application within the 51st Order of the 16th of October 1852, and therefore, where such summons was obtained within eight days from the filing of the certificate, although not returnable within the eight days, it was held to be in time.

In this case the chief clerk's certificate had been signed by the Judge on the 24th of July and filed on the 28th. The plaintiff, on the 3rd of August, took out a summons to vary the certificate returnable on the 6th, on which day it was ordered to stand over until the hearing on further consideration.

Mr. Willcock and Mr. H. Stevens, for the defendant, now objected that the eight days within which the application must, according to the 51st Order of the 16th of October 1852 be made, had expired before application made, and, therefore, the certificate had become absolute. They pointed out the difference between the wording

of the 49th Order, which allows four clear days for obtaining a summons to take the opinion of the Judge on the certificate signed by the chief clerk, and that of the 51st Order, which allows eight clear days within which an application may be made by summons to vary a certificate signed by the Judge, and contended that the application must be considered to be made when the summons is returnable, and not when it is obtained. They cited *Howell v. Kightley* (1).

Mr. W. M. James, amicus Curiae, referred to *Barlow v. Osborne* (2).

Mr. Roll and Mr. J. W. De Longueville Giffard, for the plaintiff, were not called upon.

WOOD, V.C. considered that the words of the 51st Order were satisfied by an application for a summons being made before the expiration of eight days, and that the summons having been obtained within that time, although not returnable until afterwards, was sufficient to suspend the confirmation of the certificate until the summons was disposed of.

LORES JUSTICES }
May 11. } STACEY v. SPRATLEY.

Costs—Issue *devisavit vel non*.

The costs of an issue devisavit vel non are in the discretion of the Court; and, therefore, where an heir-at-law obtained an issue to try the validity of the will (which, as to personality, had been established in the ecclesiastical court,) the Court, after the verdict had been returned against the heir-at-law, directed each party to pay his own costs.

This case came before this Court, by arrangement, in order to dispose of the costs of an issue *devisavit vel non*, in which the verdict had been given against the heiress-at-law. The case is reported in 27 *Law J. Rep.* (N.S.) *Chanc.* 725. The will had been previously established as to personality in the ecclesiastical court.

(1) 25 *Law J. Rep.* (N.S.) *Chanc.* 341.

(2) 6 H.L. Cas. 556; s. c. 27 *Law J. Rep.* (N.S.) *Chanc.* 308.

Mr. Malins, Mr. Hislop Clarke and Mr. Needham, for the plaintiff, insisted that the will having been previously established as to personality in the ecclesiastical court, the heiress-at-law ought to have rested satisfied, and not insisted on a trial as to the real estate, and that, having failed in her opposition to the will, she ought to pay the costs. Her conduct had been vexatious. The following cases were cited:—

Webb v. Claverden, 2 Atk. 424.

Scaife v. Scaife, 4 Russ. 309.

Grove v. Young, 5 De Gex & Sm. 38;

s. c. 21 *Law J. Rep.* (N.S.) *Chanc.*

95; 20 *Ibid.* (N.S.) *Chanc.* 167.

Tatham v. Wright, 2 Russ. & Myl. 1.

Roberts v. Kerslake, 1 Kay & J. 751;

s. c. 23 *Law J. Rep.* (N.S.) *Chanc.*

337.

Mr. Bacon and Mr. Godfrey, for the heiress-at-law.

Mr. W. J. Bovill, for the defendant Spratley.

LORD JUSTICE KNIGHT BRUCE.—When this Court directed an issue we must have thought, and I believe we did, that the proceedings at law might, by possibility, terminate in the effectual displacement of the will of the testator, as to his real estate, otherwise we should not have directed an issue. As Mrs. Handley was a party to the proceedings in the ecclesiastical court, and before the Privy Council, merely in respect of the personal estate of Thomas Eldridge, and not as his heiress-at-law, she was not bound by those proceedings, as Lord Justice Turner had observed, in disposing of the application for the issue. That she was at all affected by those proceedings, was owing to the accident that she was also interested in the personal estate. If the persons interested in the real and personal estate had been different, the other proceedings would have amounted to nothing; and he agreed that they were equally ineffectual where the person interested in the real and personal estate was one and the same person. It was impossible, however, not to see that this lady had asked for the issue with notice of the circumstances which rendered her success improbable. The ceremonies required by

law for the due execution of a will were now the same as to real estate as they were with respect to personal estate, and in the circumstances in which the will had been established as to the personal estate, she incurred considerable risk in asking for the issue. In that state of things, I do not think it is a case for allowing to the heiress-at-law the costs of the issue. But although I think that she ought not to have her costs, her liability to pay the costs of the defendant is a different thing. For in addition to her not being bound by the proceedings which took place with reference to the personal estate, considering the strange and suspicious circumstances in which the will had been obtained, considering the objectionable nature of the devisee's conduct, and the uncertainty of the testator's intellect, independently of his habits of drunkenness, it is impossible to say that this lady was wholly unreasonable in thinking she might be able at law to displace the will as to the real estate, and I am not at all surprised that she should have adopted the course of trying to do so. I do not therefore think that, although she has set up insanity and fraud, there is such a case against her as that she should be made to pay the costs of the issue. The case that she set up was completely balanced by the indescribable nature of the circumstances under which the will was made, and I think that each party should be left to bear their own costs of the issue.

LORD JUSTICE TURNER said that it was a question in the discretion of the Court, whether the heir-at-law should have, or pay, the costs of an issue; or whether he should receive no costs. If his conduct were vexatious or improper, he might be made to pay all the costs. But in estimating the question of vexatious conduct, great regard must be paid to the nature of the contest. If the Court had to deal with a document which was open to grave suspicion,—and beyond all doubt the document in this case was open to great and grave suspicion,—an opportunity should be given of sifting the evidence with respect to it; and there were opportunities of sifting evidence at law which did not exist in the ecclesiastical courts. Then there had been new evidence given both by the heiress-

at-law and the devisee; and as it was a very reasonable case for sifting the evidence, it was not to be said that this lady ought to be saddled with the costs of the proceedings at law. On the other hand, the will had been established, and the heiress must be considered as having asked for the issue for her own satisfaction, and as she failed, she was not entitled to be paid her costs.

FULL COURT
OF
APPEAL.
July 23.

BUCKMASTER v. BUCKMASTER.

Practice—Receiver's Accounts—Fees.

In the case of a receiver who was managing a business under the direction of the Court, a special order was made that, instead of the further fee payable under the Order of the 30th of January 1857, in respect of his gross receipts, the fee should be payable in respect of the net profits; and a sum previously paid in respect of gross receipts was directed to be allowed in the payment of subsequent fees.

Mr. Schomberg in this case applied that the fees payable in the Judge's chambers on passing the receiver's accounts might be payable in respect of the net proceeds instead of the gross receipts. The Order of the 30th of January 1857, which was identical in this respect with that of the 23rd of October 1852, provided that the following fees should be paid:—"For every certificate or report, 1*l.*; for every certificate upon the passing of a receiver's or consignee's account, a further fee in respect of each 100*l.* received of 10*s.*" In the present case a business was being carried on, the gross receipts being very large, but the outlay also considerable. In similar cases the Court had taken such facts into consideration, and reduced the scale of fees—*Wells v. Wales* (1).

Mr. J. H. Taylor, for the Suitors' Fee Fund, submitted that these fees had been established upon their present scale as a

remuneration for the time occupied in investigating the accounts.

The LORD CHANCELLOR directed that the fees should be payable on the net profits.

Mr. Schomberg then asked that 145*l.*, which had already been paid in respect of the fees on gross receipts might be repaid.

Their LORDSHIPS, however, directed that this sum should be allowed to the receiver in respect of subsequent fees (2).

L.C. }
June 6, 8. } RABETH O. SQUIRE.

Devise—Occupation—Cross-Remainders—Implication.

A testator desired that his two sons might have the use and occupation of certain lands, they paying a stated rent, and that, in default of payment, or if they converted the arable land into tillage, they should no longer have possession thereof:—Held, affirming the decision of the Master of the Rolls, that the personal use and occupation was not necessary, and that they might underlet the property.

A testator gave his residuary real and personal estate to trustees, upon trust, as to one-fifth, for each of the testator's five children for life, and after his or her decease for his or her children which he or she should leave at his or her decease; but provided, that if any child should die without leaving any child at his or her death, such share was to go to the testator's other children for their lives and the issue of any then dead, as before directed; and after the death of his five children in trust for their children equally, per capita. One of the testator's children died, leaving a son, who died before the last of the testator's children:—Held, affirming the decision of the Master of the Rolls, that the persons claiming through the son had no interest in the rents and income during the lives of the

surviving children of the testator; that that one-fifth was undisposed of, and that cross-remainders were not, in the event which had happened, to be implied.

This was an appeal from the decision of the Master of the Rolls, on the 6th of December 1854, reported 24 *Law J. Rep.* (N.S.) Chanc. 203, and 19 *Beav.* 70, 77.

Thomas Squire, by his will, dated the 23rd of November 1803, gave to his wife Mary all his real and personal estate during her life, if she should so long continue his widow, she committing no waste; and after her decease he gave to his brother Jacob Squire and Robert Marsh, their heirs, executors and administrators, all his real and personal estate, upon trust to pay the interest, dividends, rents and proceeds, &c. The testator then gave one-fifth of such interest, &c., to each of his children, Jacob, Thomas, Lawrence, Sarah and Ann, in the same terms, and the share given to Sarah, upon which one of the questions now arose, was as follows:—

“And as to the interest, rents and proceeds of one other full, equal, undivided fifth part and share of my said real and personal estate, in trust for my daughter Sarah, the wife of John Hogben, and her assigns, for and during the term of her natural life, and from and after her decease then upon trust to pay the same interest, dividends, rents and proceeds unto all and every the child and children, both male and female, of my said daughter Sarah which she shall leave at the time of her decease, equally to be divided between them, share and share alike.”

The testator then proceeded—“Provided always, that in case either or any of my said children shall happen to die without leaving any child or children at the time of his, her or their respective deaths, then I declare that the said trustees shall stand and be seized of such part and share of my said real and personal estate of such of my said child or children so dying without issue as aforesaid, to the use and behoof of all and every other of my said children during the term of his, her or their natural lives, and the issue of either of them that shall be then dead, in manner as I have before directed, equally to be divided

(2) See *Neave v. Douglas*, 26 *Law J. Rep.* (N.S.) Chanc. 756.

between them; and from and immediately after the decease of my said five children, and when they shall be all dead, then I give, devise and bequeath all my real and personal estate and effects unto my said trustees, upon trust to pay the interest, dividends, rents and proceeds thereof unto all and every the sons and daughters of my said five children lawfully begotten, in equal shares and proportions, share and share alike, and to their heirs, executors, administrators and assigns, for ever, without any regard to the proportion or number of children which any one of my said children may have, it being my will that all my said grandchildren shall share equally alike."

The testator further in his will said—"Provided also, and it is my will and intention and express desire, that after the decease of my wife, my two sons Jacob and Lawrence shall, if it is their desire, have the joint use and occupation, or they may divide the same as they can agree, of all my marsh lands at Newchurch and Bonnington, now in my own occupation, during their joint natural lives, and that also the survivor of them shall have the whole thereof during his natural life; and in case my said son Thomas shall survive and outlive my said sons Jacob and Lawrence, then he shall have the use and occupation of the same lands during his natural life; and if either of my said sons Jacob or Lawrence shall decline such use and occupation, then the other shall have the whole use and occupation thereof, they, my said sons, paying and allowing rent for the same, by half-yearly payments, whilst they may be respectively in such use and occupation, at and after the rate of 1*l.* per acre per annum, and also paying all manner of taxes and assessments for the same, and the sum of 8*s.* per acre per annum for wall scots, and waterings for the same lands; but in case the same shall exceed the sum of 8*s.* per acre per annum, the surplus of such scots and waterings as aforesaid shall be paid by my trustees out of my said estate, and I direct my trustees to keep all the fences in good and tenantable repair and condition; and in case my said sons, who from time to time shall be in possession of my said lands, shall fail or

make default in payment of the said rent for three months after the same shall become due, or shall plough, break up or convert into tillage or arable land any of the said lands, then it is my will and desire that such son or sons shall no longer have possession of my said lands or any part thereof, and shall quit the same on the 11th day of October then next following such breach in payment of the said rent, after one month's notice and making default therein, or ploughing, breaking up or converting such land into tillage or arable land, and such son or sons from and after the said 11th day of October shall not any longer use or occupy the said lands. And in order to enable my said sons Jacob and Lawrence to take and use the said lands, I direct that an appraisement and valuation shall be made to them or him who shall wish to use the said lands, of all my stock of cattle, sheep and lambs that I may have at the time of my decease, by four indifferent persons, one to be chosen by each of my said sons, and the other two by my said brother Jacob and Robert Marsh, and for the amount of a moiety of such valuation each of my said sons Jacob and Lawrence shall enter into a separate bond and give such other security as in their power to my trustees for securing the repayment of each of their said moieties of such valuation, together with interest for the same at the rate of 4*l.* per cent. per annum, which interest is to be considered as part of my estate and to be half-yearly paid and applied as before directed."

The testator died on the 19th of February 1810.

Upon the death of his widow, on the 29th of September 1817, the testator's two sons Jacob and Lawrence Squire entered upon the marsh lands and made a partition of them, and each continued in the use and occupation of his share for eleven years. The lands far exceeded in value the rent of 1*l.* per acre and the other outgoings. At Michaelmas 1829, Lawrence Squire let his portion of the lands to divers persons, and on the decease of his brother Jacob Squire, on the 2nd of June 1849, he in like manner let the whole of the testator's marsh lands, which were of gavelkind tenure.

The testator's daughter Sarah Hogben died on the 23rd of April 1829, leaving Squire Hogben her only child surviving, and he died on the 7th of August 1852, without issue, having by his will, dated the 27th of July 1852, devised all his estate to his wife (since deceased) for life, with remainder to the defendants Jacob Squire, John Squire and eight other persons, and their heirs, executors and administrators, as tenants in common.

Two questions were raised upon the will of Thomas Squire: the first question was whether the use and occupation of the marsh lands was given to the testator's sons upon the condition of their personally occupying them; and this the Master of the Rolls decided in the negative. The second question was, whether, upon the decease of Squire Hogben, the income arising from the one-fifth of the testator's estate passed to his devisees until the decease of the surviving child of the testator Thomas Squire, or whether it became divisible amongst the other children of the testator, or whether it had descended and was divisible amongst his three sons, who were his heirs in gavelkind. The Master of the Rolls held, that the persons claiming through the daughter's son had no interest in the rent and income during the lives of the surviving children of the testator; that cross-remainders between the testator's children could not be implied, and that the interest in the one-fifth share during the lives of the surviving children of the testator, was undisposed of by the will.

Mr. Selwyn and *Mr. Swanston, jun.* appeared in support of the appeal.

Mr. Lloyd and *Mr. W. D. Lewis*, for some of the defendants; and

Mr. Follett and *Mr. G. Simpson*, for other parties.

Mr. Swanston, jun. was heard in reply.

The following cases were cited:—

As to the question upon use and occupation—

The King v. the Inhabitants of Easington, 4 Term Rep. 177.

Whitome v. Lamb, 12 Mee. & W. 818; s. c. 13 Law J. Rep. (n.s.) Exch. 205.

Fillingham v. Bromley, Turn. & R. 530.

As to the second question—

Vanderplank v. King, 3 Hare, 1; s. c. 12 Law J. Rep. (n.s.) Chanc. 497.

Pearce v. Edmunds, 8 You. & C 246; s. c. 8 Law J. Rep. (n.s.) Ex. Eq. 61.

Malcolm v. Martin, 3 Bro. C.C. 50.

Doe d. Gorges v. Webb, 1 Taunt. 234.

Clache's case, Dyer, 330, b.

The LORD CHANCELLOR said, that the appeal was upon two questions, quite distinct and independent of each other. The first question was, whether a condition was annexed to the gift of the marsh lands, that the two sons should personally occupy the lands. If a clear and undoubted intention could be collected from the will, the Court would be bound to give it effect. But if the testator had left it doubtful, it would be impossible to put a construction upon the will by which an intention might be attributed to the testator contrary to his meaning. In this clause there was clearly given to Jacob and Lawrence an equitable interest for their lives. This must be cut down or qualified by some condition to prevent its having its proper effect. Was there anything then in the clause so clearly stated as to shew that the sons were not to have these lands unless they personally occupied them? It was said that it was impossible to put a construction upon the clause unless the sons were personally to occupy the lands. The words "use and occupation" occurred more than once in the will—[His Lordship referred to other parts of the will as to the occupation of a house.]—These lands were to be subject to rent and taxes. It might be that the sons might not like to burden themselves with this, and therefore the testator gave them an option, not given to them with regard to the house. Then he said that, "if either of his said sons Jacob and Lawrence should decline such use and occupation, then the other should have the whole." What was meant by declining the use and occupation? But whatever was meant, he made no provision for both declining. Upon the view of "decline," in the sense of "renounce," suppose both accepted and entered, and one of them,

after a year, let his part or went away: that was not a declining, and no provision was made for this event. Then, there was no absolute gift over, except in case of Thomas surviving his two brothers, so that here the testator seemed to contemplate that after his two sons had not declined, they would continue to have the use and occupation during their lives, and then it was to go over to Thomas, in the event of his surviving. Again, the testator had been considering events which might occur, in which it would be desirable to terminate the interest given to his sons. If the rent were unpaid by the sons, &c., then they were no longer to continue in possession. The testator was, therefore, contemplating events in which the interest of the sons was to cease; but he did not mention the event of their ceasing personally to occupy the lands. And why, then, was the Court to say that the intention was so clear as to involve a forfeiture of the son's interest upon their ceasing to occupy? Although there appeared to be an argument in favour of the necessity for a personal occupation, derived from the provisions as to appraisal; yet those provisions were capable of a double interpretation. It appeared that the sons were to have the benefit of the stock during the continuance of their interest, viz., during their lives. On the whole, then, on the first question, the decision of the Master of the Rolls was correct.

As to the other question, it arose upon a clause in the will relating to the share of Sarah Hogben, who died, leaving her only son Squire Hogben. Squire Hogben was dead, and the period had not arrived for distribution. It was contended that Squire Hogben took an estate *pour autre vie*, that was, until the period of distribution. His Lordship quite agreed with the view of the Master of the Rolls. The children of the testator's children were to come in the place of their parents. Cross-remainders were directed as applied to the children dying without leaving children. Were then cross-remainders to be implied in the event which had happened. Implication was to be derived from the expressions used; the Court was not to imagine, suppose or conjecture. If the words in-

volved something necessarily implied in the expression, the Court must carry into effect the intention. The clause here said—"In case either or any of my said children shall happen to die without leaving any child or children at the time of his, her or their respective deaths, then I declare that the trustees, &c. shall stand and be seized of such part and share of my said real and personal estate of such of my said child or children so dying without issue as aforesaid, to the use and behoof of all and every other of my said children during the term of his, her or their natural lives and the issue of either of them as shall be then dead, in manner as I have before directed, equally to be divided between them." These limitations were expressly confined to the case of children dying without leaving a child or children living at the time of their respective deaths. Mrs. Hogben died leaving a son, which son had since died. It was said that these cross-remainders should apply in the case which the testator had not provided for, as it was his intention to extend the benefit to the children's children. If the testator had had in mind the possibility of the event which had occurred, he might very probably have provided as it was now contended he had. His Lordship could not, however, speculate on probabilities. He must take the expressions as he found them, and if the testator had omitted anything he could not supply the omission. The view of the Master of the Rolls was not impeached by *Vanderplank v. King*. In this case there was but one class to which the question could apply. The children were to come in the place of the parent, and the children formed one class. Where the testator had said "In one event I direct cross-remainders between my children," was it open to the Court to say, "I will suggest another event, in which cross-remainders should be directed, and I will enlarge your expression so as to apply it to that other"?

Appeal dismissed, with costs.

KINDERSLEY, V.C. }
 Jan. 18; } LAMBARDE v. PEACH.
 March 8.

Devise—Shifting Clause.

A testator devised his real estates to his only daughter for life; remainder to her husband for life; remainder to their second son for life, and afterwards to his first and other sons in tail; remainder to his daughter's eldest son for life; remainder to trustees to preserve contingent remainders; remainder to his second and other younger sons in tail; remainder to the plaintiff (his eldest granddaughter) for life; remainder to trustees to preserve; remainder to her sons and daughters in tail. The will contained a shifting clause, that in case any tenant for life or in tail should become entitled to the Turton estates, then in possession of the husband of the testator's daughter, the limitations in favour of such person should cease, as if he or she were dead, and the estates so limited were to go to the person next entitled in remainder, it being the testator's intention that both estates should not vest in the same person. In the events that happened, the eldest son of the testator's daughter became entitled to the Turton estates, and he was the person next entitled to the devised estates, in case the shifting clause did not take effect. He had only one son:—Held, that the effect of the shifting clause was to divest him of the devised estates; that the Court would effectuate the testator's intention, that the property should go to the unborn sons of the tenant for life whose estate had so ceased; that the trustees to preserve took the estate, as the persons next in remainder, to support contingent remainders; and that the intermediate rents accruing between the time when the estate of the tenant for life ceased, and the birth of a son entitled under the limitations, belonged to the residuary devisees or heir-at-law.

This suit was instituted for the purpose of carrying into effect the trusts of the will of Robert Bell Livesey, dated the 19th of May 1830, whereby he gave and devised his manor of Kildale, in the county of York, with the advowson and manor-house, messuages, farms, lands, tenements and hereditaments in possession, reversion, re-

mainder or expectancy, unto the Rev. James Cleaver and the Rev. John Cleaver, their executors, administrators or assigns, for the term of 1,000 years, upon certain trusts therein mentioned, and subject thereto, to the use of his wife, Jane Livesey, and her assigns, during her life, without impeachment of waste; with remainder to the use of his daughter, Marianne, the wife of Edmund Turton, during her life, for her separate use and benefit; with remainder to the use of her husband, the said Edmund Turton (in case he should survive her), and his assigns, during his life; with remainder to the use of Robert Conssett Turton, second son of the said Edmund Turton and Marianne Turton, and his assigns, during his life, without impeachment of waste; with remainder to trustees, to support the contingent uses thereafter limited; with remainder to the use of the first and all and every other the son or sons of the said Robert Conssett Turton, severally, successively and in remainder, one after another, according to their respective seniorities, in tail male; with remainder to the use of the third, fourth, and all and any other the younger son and sons then or thereafter to be born of the said Edmund and Marianne Turton, severally and successively, and in remainder, one after another, according to their respective seniorities, in tail male, with remainder to the use of Edmund Henry Turton, eldest son of the said Edmund and Marianne Turton, and his assigns, during his life, without impeachment of waste, with remainder to trustees, upon trust to support the contingent remainders thereafter limited, with remainder to the second, third, fourth, and all and every other the younger son and sons of the said Edmund Henry Turton, severally, successively and in remainder, one after another, according to their respective seniorities, in tail male, with remainder to the use of the first and all and every other the son and sons of the said Marianne Turton, by any future husband, severally, successively, and in remainder, one after another, according to their respective seniorities, in tail male, with remainder to the use of Marianne Terese Lambarde (then Marianne Terese Turton), eldest daughter of the said Edmund and Marianne Turton and her as-

signs during her life, without impeachment of waste, with remainder to trustees to preserve, with remainder to the use of the first and all and every other the son and sons of the said Marianne Terese Turton, severally, successively, and in remainder, one after another, according to their respective seniorities, in tail male, with remainder to the use of the second and all and every other the daughter and daughters, then or thereafter to be born, of the said Edmund Turton and Marianne Turton, severally, successively, and in remainder one after another, according to their respective seniorities, in tail male, with remainder to the use of the first and all and every other the daughter and daughters of the said Marianne Turton, by any such future husband, severally, successively and in remainder, one after another, according to their respective seniorities, in tail male, with remainder to the use of the first and all and every other the daughters of the testator's grandsons and granddaughters in tail general successively, in every respect the same as was therein declared as to the issue male, *mutatis mutandis*, it being his intention that after failure of male issue of his grandsons and granddaughters, the said settled hereditaments should revert to the female issue of his second and every other grandson and granddaughter in tail, in the same manner as was therein declared as to the male issue, with remainder to the use of his (the testator's) nephew John Bell, for life, with a subsequent limitation to the second, third and other sons of John Bell, in tail male, with remainder to the use of James Cleaver and his heirs, in tail general, with the ultimate remainder to the use of the testator's own right heirs for ever; and the testator thereby declared, that in case the said Robert Consett Turton, or the heirs of his body, or any other tenant for life, or in tail, should become seised of the settled family estates of the said Edmund Turton, then and from thenceforth the limitations thereby made in his or her or their favour should from time to time, on his, her or their so becoming seised, cease and determine, and be absolutely void, as if he, she or they were dead, and the said thereby devised hereditaments and real estate, with the appurtenances, should go over to the person next entitled in

remainder, under and by virtue of his said will, it being his express wish and intention that both the said estates should not vest in the same person, except as otherwise thereinbefore provided for.

The bill stated the facts, and prayed that the trusts of the will might be carried into execution, and that it might be declared that on the death of Edmund Turton, Edmund Henry Turton having become seised of the family estates of his father, the limitations in the will in his favour became void, as if he were dead, and that the plaintiff, Marianne Terese Lambarde, became entitled, as tenant for life next in remainder, to the estates devised by the will.

Sir R. Bethell, Mr. Glasse and Mr. Welford appeared for the plaintiff.

The Solicitor General and Mr. Hobhouse, for Edmund Henry Turton.

Mr. Baily and Mr. Chichester, for the trustees.

The following authorities were cited during the argument:—

Doe v. Heneage, 4 Term Rep. 13.

Stanley v. Stanley, 16 Ves. 491.

Carr v. Lord Errol, 6 East, 58.

Morrice v. Langham, 11 Sim. 260;

s. c. 8 Mee. & W. 194; 10 Law J.

Rep. (N.S.) Chanc. 38.

Monypenny v. Dering, 2 De Gex, M.

& G. 145; s. c. 22 Law J. Rep.

(N.S.) Chanc. 313; s. c. 20 Law J.

Rep. (N.S.) Chanc. 153.

The arguments in the case are fully stated in the judgment of the Vice Chancellor.

KINDERSLEY, V.C.—On the 19th of May 1830 Robert Bell Livesey made his will. At that time, and at his death, he had living his wife (Jane Livesey), one child (Marianne, the wife of Edmund Turton), and three grandchildren (the children of Mr. and Mrs. Turton), viz., Edmund Henry Turton (the eldest son), Robert Consett Turton (the second son), and Marianne Terese Turton, afterwards Mrs. Lambarde (the daughter), and a nephew (John Bell). The testator was owner of the Kildale estate, in Yorkshire. Edmund Turton was in possession of the Turton

estate. John Bell was in possession of the Bell estate. It was arranged that I should assume as facts that Edmund Turton was tenant for life of the Turton estate, with remainder to his first and other sons in tail; and that John Bell was tenant for life of the Bell estate, with remainder to his first and other sons in tail. The testator died on the 15th of November 1831, and thereupon Jane Livesey, his widow, entered into possession of the Kildale estate. She died on the 17th of October 1846, when Marianne Turton, the testator's daughter, entered into possession of the Kildale estate. She died in May 1858. Edmund Turton, the husband of the testator's daughter, had died in March 1857. On the death of Marianne Turton, the person who would have been according to the limitations in the will entitled to the possession of the Kildale estate, if he had been alive, was Robert Consett Turton, the second son of Mr. and Mrs. Turton, but he had died an infant, without issue, on the 17th of November 1831, two days after the death of the testator. Next to him in the order of the limitations in the will, as there were no other younger sons of Mr. and Mrs. Turton, was the defendant, E. H. Turton, who, according to the limitations in the will, was next tenant for life; he entered into possession wrongfully, as the plaintiff insists, inasmuch as on the death of his father, Edmund Turton, in March 1857, he had become seised of the Turton estate, and that therefore the event had happened which was provided for by the shifting clause, upon the happening of which the limitation made by the will in his favour was to cease, determine and be absolutely void, and the devised estate was to go over to the person next entitled in remainder under the will. The defendant E. H. Turton insists that the shifting clause does not apply to him. The first question, therefore, is, whether the shifting clause is to be held to apply to E. H. Turton.—[His Honour having read the clause said]—Now it is perfectly clear that, according to the plain meaning of this language, E. H. Turton is one of the persons coming within the description "any other tenant for life or in tail." He is a tenant for life under the limitations contained in the will, and is,

therefore, clearly within the express words of the shifting clause. What is desired on the part of E. H. Turton is, that the Court should, in effect, introduce into the will an exception in his favour, exempting him from the operation of the clause. If this is to be done, it must be by reason of something to be collected from the will leading irresistibly to the conclusion that the testator could not possibly have meant him to be included among the persons to whom the clause was to apply. The following are the grounds on which the defendant contends that the testator did not intend the clause to apply to him. It is said that, if the shifting clause is held to apply to E. H. Turton, he never could, by possibility, take any benefit from the devised estate, for he would come into possession of the Turton estate on his father's death; and under the limitations of the will he could not come into possession of the devised estate until after the death of the survivor of his father and mother; so that he could never be in possession of the devised estate for a single moment without having also become seised of the Turton estate; therefore, the instant he became entitled in possession to the devised estate under the limitations, the shifting clause (if it applies to him) would cause it to pass away from him. The result of this would be, that he could not exercise the powers of jointuring, and charging portions for younger children, which were given to all the tenants for life. Now, it is perfectly true that such would be the result of holding that the shifting clause applies to E. H. Turton; but it does not appear to me that this is a sufficient reason for holding that the testator meant to exempt him from the operation of the clause, which, in express terms, applies to him. In truth, the argument resolves itself into this: As the effect of the shifting clause, when applied to E. H. Turton, is that he never can enjoy the devised estate for a single day, why did the testator include him in the limitations at all? If there were no other answer to this question than that such was the testator's caprice, I apprehend it would be sufficient. But I think it was not unnatural that the testator should include him in the limitations, although he would not

derive any benefit therefrom. The testator meant that the devised estate should devolve on the second and other younger sons of E. H. Turton, in tail male; those limitations would, at least until E. H. Turton should have a second son born, be contingent remainders, which would require an estate of freehold to support them; and, accordingly, the testator has limited an estate for life to E. H. Turton, with a limitation, in case of the determination of that estate by any means in his lifetime, to trustees during his life, in trust to preserve the contingent remainders; and thus the contingent remainders to the second and every other younger son of E. H. Turton are effectually supported and preserved. It is true that this might have been done by limiting an estate to the trustees during the life of E. H. Turton without limiting any estate to him at all, but the testator has chosen to produce the same effect by limiting an estate for life to E. H. Turton, with a limitation to the trustees, and although the life estate to E. H. Turton is barren of enjoyment, the mode of limitation presents a more uniform appearance with the other instances in which the testator has in this will limited an estate to trustees to preserve contingent remainders than if he had altogether omitted E. H. Turton. And as to the argument that, if the shifting clause be applied to E. H. Turton he could never exercise the power of jointuring and charging portions, the answer is, that the proviso in the will which follows next after these powers is of itself sufficient to preclude him from exercising them.

It is secondly argued that, according to the express terms of the shifting clause, the limitation made by the will in favour of any tenant for life becoming seised of the Turton estate is to cease and determine; and it is insisted that if the shifting clause is held to apply to E. H. Turton, he would not have any estate or interest in the devised estate which could cease and determine, for then the devised estate would never come to him. This argument is founded on a fallacy. It rests on the assumption that the devised estate would never come to E. H. Turton at all. This is a false assumption. The devised estate would come to him, and did come to him,

although it would not remain with him. He took a vested life estate in remainder, by virtue of the limitations, but as soon as he became seised of the Turton estate, the shifting clause came into operation, and caused his life estate to cease and determine.

The third argument is, that the testator has in the limitation of the estate postponed E. H. Turton, "though the eldest son," and his male issue, to all the younger sons of Mr. and Mrs. Turton, and their male issue, which he did because he anticipated E. H. Turton would become seised of the Turton estate. The testator, therefore, having for that reason excluded him from his natural and proper place in the series of limitations, and introduced him into a lower place, has shewn that he did not intend that the same reason should operate to his total exclusion, but that he intended it to operate only to the extent of his being postponed to the younger sons and their issue. If this argument affords a sufficient reason for exempting E. H. Turton from the operation of the shifting clause, it affords an equally sufficient reason for exempting therefrom his second and other younger sons and their issue male, for they are equally excluded from their natural and proper place in the series of limitations, and are introduced in a lower place. And yet no one, I suppose, would contend that the testator intended that the second or any other younger son of E. H. Turton might hold both of the estates together.

The fourth argument is this: the eldest son of E. H. Turton is altogether passed over and omitted from the limitations of the devised estate, and the testator intended to exclude him from all interest in the devised estate, because he anticipated that he would eventually come into possession of the Turton estate. The reason would have induced the testator altogether to pass over and omit E. H. Turton from the limitations if he had intended the shifting clause to apply to him; for E. H. Turton was even more certain of becoming seised of the Turton estate than his eldest son. This argument is very much of the same character as the first, for it resolves itself into this, why did the testator include E. H. Turton at all in the series of limita-

tion? I do not think it necessary to repeat the answer.

In the fifth place, it is argued that if E. H. Turton had now an eldest and second son, the devised estate would, according to the plaintiff's contention, go to the second son, although the eldest son would not come into possession of the Turton estate till after the father's death, so that during the father's life his second son would be in possession of the devised estate, while the eldest son would be unprovided for until the father's death, and it is contended that this is a very improbable intention to attribute to the testator. I confess it does not appear to me so very improbable that such should be the testator's intention, although the effect would no doubt be that during the father's life the second son would be better off than the first. At all events, any such improbability cannot, in my opinion, prevail against the clear and express words used by the testator.

The last argument to be noticed is this: the testator, at the end of the shifting clause, declares it to be his wish and intention that both the estates should not vest in the same person, except as was otherwise thereinbefore provided for. And it is contended that there is not any case provided for by the previous limitations in which the two estates may vest in the same person other than the case of E. H. Turton. Therefore, it was not the wish and intention of the testator that both the estates should not vest in E. H. Turton. This argument appears to me to be founded on a false assumption. There is a case provided for by the previous limitations in which the two estates might vest in the same person, namely, the case of E. Turton, the father of E. H. Turton. He was already in possession of the Turton estate, and the shifting clause cannot apply to him, because the words are "shall become seised of the settled family estates of the said E. Turton." It is true that by the codicil the life estate devised to E. Turton is revoked, but the words "except as is otherwise hereinbefore provided for" have reference to the terms of the will as it stood before the codicil was made, and not to those of the codicil. Now, I am far from thinking that the answers I have

suggested to the arguments on behalf of E. H. Turton are such as to deprive them of all weight. Notwithstanding any answer that may be given to them, these arguments, at least some of them, still retain much of their force. But what is the extent of this force? Do they go to shew that there is anything in the limitations of the devised estate so contradictory or repugnant or inconsistent with the shifting clause, if applied to E. H. Turton, as to lead irresistibly to the conclusion, that the testator could not intend the shifting clause to apply to him? Far from it. Giving to those arguments their utmost weight and effect, they result in this conclusion: that it is somewhat strange that the testator, intending the shifting clause to apply to E. H. Turton, should have framed the limitations precisely as he has done, and that consistently with that intention, it might have been expected that he would have shaped the limitations in a more skilful and workmanlike manner. This seems to me the utmost extent of the force belonging to those arguments, and this is wholly insufficient to prevail against the plain language of the shifting clause, by which it is made applicable to every tenant for life or in tail who shall become seised of the Turton estate, without any exception in favour of E. H. Turton. The will, no doubt, contains in several places indications that its framer was not a very careful or experienced conveyancer, but the clumsiness of the draftsman is not to be used as a reason for getting rid of the clearly expressed intention of the testator. I am of opinion that the shifting clause must be held to apply to E. H. Turton.

I now come to the second and most material question in the cause, which is this. On the death of Mr. Turton in March 1857, E. H. Turton became seised of the Turton estate; the event then happened, upon which by the operation of the shifting clause the limitation of the devised estate in favour of E. H. Turton ceased and determined. At that time his mother, Mrs. Turton, was tenant for life in possession of the devised estate. She died in May 1858. And the question is, who upon her death became entitled to the devised estate? Upon reading the testator's

will two things, at least, are clearly seen to have been intended by the testator. The one is, that the devised estates should go to the second or other younger sons of E. H. Turton in tail male, after their father's death, and before it should go to Mrs. Lambarde and her first and other sons in tail. About this intention there can be no shadow of doubt. The words are clear: "And from and immediately after the death of the said E. H. Turton, to the use of the second son of E. H. Turton lawfully begotten, and the heir male of the body of such second son lawfully issuing, and for default of such issue then to the use of the third, fourth and all and every other the younger son and sons of the said E. H. Turton;" and then follows a remainder to the use of the first and third sons of Mrs. Turton by any future husband in tail male, and not until after these limitations comes the limitation to the use of Mrs. Lambarde for life. The testator clearly intended that the devised estate should not go to Mrs. Lambarde until after failure of the second and other younger sons of E. H. Turton and their issue male. And as the limitations to the use of the second and other sons of E. H. Turton are contingent remainders, the testator has carefully guarded them from destruction by limiting an estate to trustees and their heirs during the life of E. H. Turton, upon the express trust to support and preserve those contingent remainders from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion may require. The existence, then, and the continuance of the estate of the trustees to preserve contingent remainders was a prominent and important design of the testator, in order to effectuate his intention to give the estate to the second and other sons of E. H. Turton in tail male. The other thing clearly intended by the testator was, that, except in the case of E. H. Turton, the devised estate and the Turton estate should never vest in the same person; and to effectuate that intention he has introduced the shifting clause. Now, it is a plain rule that any particular passage in a will is to be so construed as to give effect to the testator's clear intention collected from the whole will, so that if two distinct intentions are clearly col-

lected from the will, any particular passage ought to be so construed as, if possible, to carry into effect both these intentions. If, indeed, the case should arise in which it is impossible to effect both intentions, of course, one must be sacrificed to the other; but that is never to be done until every endeavour has been used to find such a construction as shall effectuate both. Let me apply this to the case now under consideration. E. H. Turton having, on his father's death, become seised of the Turton estate, by the express terms of the shifting clause his life estate has ceased and determined. To whom, then, is the estate to go? What says the shifting clause? Its language is this:—"And the said hereby devised manors, advowson, messuages, lands, tenements and real estate, with the appurtenances, shall go over to the person next entitled in remainder under and by virtue of this my will." What construction is to be put on this language? Who is "the person next entitled in remainder under and by virtue of the will"? Mrs. Lambarde insists, as all the prior tenants for life are dead, and as R. C. Turton died without issue, and as there never was any other younger son of Mr. and Mrs. Turton, and as there is no second son of E. H. Turton, and as there never was any son of Mrs. Turton by a second marriage, she, Mrs. Lambarde, is the person to whom, according to the true construction of the clause, the estate is to go over, as being next entitled in remainder under and by virtue of the will. Let us consider what will be the effect of adopting this construction with reference to both the intentions, which I have pointed out as being manifest on the face of the will. It does not, indeed, at all conflict with the one intention, that the devised estate and the Turton estate shall not vest in the same person. But it entirely defeats the other clear intention of the testator, viz., that the estate shall go to the second and other younger sons of E. H. Turton. If Mrs. Lambarde is now the legal tenant for life in possession, as she insists that she is, the estate limited to the trustees during the life of E. H. Turton in trust to preserve the contingent remainders is gone, and the contingent remainders to the second and other younger sons of E. H. Turton

are destroyed, and thus the clear and manifest intention of the testator in this respect is utterly defeated. Now, of course, if this is the necessary construction of the clause it cannot be helped, and the consequences must follow. But is this the necessary construction? Is the language of the clause incapable of any other construction, by the adoption of which the whole intention of the testator may be preserved? It must be observed, that the words "next entitled in remainder" mean next after the person whose estate and interest is to cease and determine. And it must be further observed, that it has long been settled that the estate to trustees to preserve contingent remainders is a good vested remainder. When, therefore, the estate for life limited to E. H. Turton ceased and determined by reason of his having become seised of the Turton estate, who was in the most strict and accurate sense the person entitled in remainder next to him? Without doubt James Serjeantson, the survivor of the two trustees, to whom the estate was limited during the life of E. H. Turton in trust to preserve the contingent remainders. And by thus construing the clause, both the intentions of the testator before referred to are preserved: his intention that the devised estate and the Turton estate should not vest in the same person is preserved, and so also is his other equally clear intention, that the devised estate should go to the second son of E. H. Turton (if he should ever have one) in tail male. Here, then, we have two constructions of the passage offered to us: the one, that which is contended for by Mrs. Lambarde, which would defeat one of the two intentions of the testator, and the other, that which would preserve them both. And, according to principle, the Court ought to adopt the latter. Upon a review of the authorities, to which I shall presently refer, I think it may be laid down as a general rule that where, as in the present case, an estate for life is by will limited to one, with a limitation to trustees during his life, in trust to preserve contingent remainders, followed by a limitation to any of his unborn sons in tail, and there is a shifting clause similar to that in the present case, by virtue of which the estate and interest of such tenant for life is made to cease and

determine by the acquisition of another property, or by succeeding to a title, or in any other similar event, and the estate is to go over to the person next entitled in remainder, the expression "the person next entitled in remainder" shall, in order to effectuate the testator's intention, be held to mean the trustees to preserve contingent remainders, if there be any contingent remainders to be preserved; although in a case in which there are no contingent remainders to be preserved the construction may be different. In this case there are contingent remainders to be preserved, viz., the remainders limited to the second and other sons of E. H. Turton in tail male; and, therefore, I must hold, as the event has happened upon which the life estate of E. H. Turton has ceased and determined, the devised estate has become vested in J. Serjeantson, the surviving trustee, to preserve contingent remainders. But a question still remains, who, under these circumstances, is entitled to the beneficial enjoyment of the rents and profits? Not the trustee to preserve contingent remainders: he is clearly a mere trustee, and was never intended to have any beneficial enjoyment. Not Mrs. Lambarde, or any other person entitled after the expiration or failure of those contingent remainders which the trustee's estate is to support; there is no present trust declared of them. Is then E. H. Turton, the quondam tenant for life, entitled to the rents and profits? I apprehend certainly not. True it is that in declaring the limitations of the devised estate the testator has declared that the trustees to preserve contingent remainders shall hold in trust to permit E. H. Turton during his life to receive and take the rents, issues and profits of the devised estate for his own use and benefit. But by the shifting clause which follows the testator has declared that in the event which has happened of E. H. Turton becoming seised of the Turton estate, the limitation by the will made in his favour shall cease and determine and be absolutely void as if he were dead, and has moreover expressly declared his intention to be that both the estates should not vest in the same person. Therefore, to hold that E. H. Turton is entitled to the rents and profits of the estate now vested in the trustee to preserve contin-

gent remainders would be to decide in direct contravention of the plainly declared intention of the testator; it would be merely changing his previous legal estate for life into an equitable estate for his life. The result is, that the beneficial interest in the rents and profits of the devised estate since the death of Mrs. Turton, in May 1858, is undisposed of by the will, and consequently devolves by descent on the testator's heir-at-law; and it will be found when I come to examine the authorities that they are in accordance with this conclusion. The heir-at-law of the testator at his death was his daughter, Mrs. Turton. Whether she made a will which would have the effect of disposing of this interest does not appear; if not, her eldest son and heir, E. H. Turton, is now entitled to the beneficial interest. But, be it observed, if entitled, he is entitled, not under the will, but by descent. At all events, it is sufficient for the purposes of this suit that I declare my opinion to be that Mrs. Lambarde is not entitled to these rents and profits.

I now proceed to examine the authorities on the subject. In *Doe v. Heneage*, before Lord Kenyon and Buller, J. and Grose, J., the question arose on the will of Thomas Heneage. His Honour stated the facts of the case, and said the question was, whether upon George Fieschi Heneage becoming seised in possession of the uncle's estate, the devised estate did or did not go to the trustees to preserve contingent remainders. If it did not, then the contingent remainders to the first and other sons of G. F. Heneage in tail male were defeated, and the estate devolved on G. F. Heneage in fee, as the testator's heir, and the plaintiff took nothing under the will. If the estate did go to the trustees to preserve, then the contingent remainders to the first and other sons of G. F. Heneage were preserved, and the defendant and the plaintiff became on their births successive tenants in tail male in remainder; and upon the defendant becoming on his father's death seised in possession of the uncle's estate, the shifting clause operated to cause his estate tail under his grandfather's will to cease, and the devised estate thereupon went over to the plaintiff as being the next in remainder. The Court of Queen's Bench decided, that on G. F.

Heneage, the tenant for life, becoming seised in possession of the uncle's estate, the devised estate passed under the shifting clause to the trustees to preserve contingent remainders, and so the contingent remainders to his first and other sons were preserved.

This is a strong case, because, in order to arrive at this conclusion, it was necessary to get over these words in the shifting clause, "And in such case my will and meaning is, that the next in remainder, according to the uses of this my will, shall succeed to, and have and enjoy my estate hereby devised, as if my said son, G. F. Heneage, or any such son or sons of his was or were respectively dead." These were certainly difficult words to get over, because if G. F. Heneage had been actually dead, there would of course have been an end of the estate to the trustees to preserve contingent remainders, which was only to endure during the life of G. F. Heneage. But the Court did get over these words in favour of the clear intention of the testator, that the devised estate should go to the first and other sons of G. F. Heneage. The Court seems to have considered that the first and other sons of G. F. Heneage were those who substantially possessed the testator's regard as next in remainder to G. F. Heneage, though they were unborn, and that the estate to the trustees was, in his view, a mere instrument for preserving the remainders limited to them, and as it were an appendage to those remainders. If G. F. Heneage had actually died, the next in remainder would have been his first son, if he had one; and in directing the estate to go to the next in remainder, as if G. F. Heneage were dead, the testator intended that it was to go to his first son, if he should have one at his death; and that intention could only be accomplished by holding that the estate should go to the trustees to preserve the contingent remainders to the first and other sons; and so the Court held. Besides the words I have mentioned as difficult to get over, there were in that case other words in the clause which also presented some difficulty, though not so great. The language of the shifting clause was, "The next in remainder shall succeed to, and have and enjoy my said estates." The

word "enjoy" seemed to point to some person or persons who should take the estate beneficially, and not to mere trustees to preserve contingent remainders. Yet the Court got over that difficulty, in order to effectuate the testator's intention, that if ever G. F. Heneage should have a son, the estate should go to that son in tail. It is considered that some doubt was thrown upon the decision in *Doe v. Heneage*, by a passing observation of Lord Ellenborough in *Carr v. Lord Errol*. Unfortunately, that case being decided upon a case sent out of Chancery, we have, according to the then practice, only the certificate, without any reasons, and therefore it is impossible to know whether the Court did, upon full deliberation, still retain any doubt upon the decision in *Doe v. Heneage*, which I shall presently consider. Upon examining *Carr v. Lord Errol*, it will be seen that the shifting clause was altogether different from that in *Doe v. Heneage*, and that the decisions and the cases are perfectly consistent with each other; and though *Doe v. Heneage* has been cited in a great number of subsequent cases, I am not aware it has ever been formally disapproved of. But whether Lord Kenyon and the other Judges who decided *Doe v. Heneage* were or were not justified in getting over the difficult words which occurred in the shifting clause in that case, no such difficulty is presented by the case now before me. The shifting clause, in both cases, consists of two distinct branches: the one directing, upon the happening of a certain event, the ceasing of the estate or interest limited to a party, and the other directing that the estate shall go over to the next in remainder. In *Doe v. Heneage* the latter branch of the clause was in these terms: "And in such case my will and meaning is, that the next in remainder, according to the uses of this my will, shall succeed to, and have and enjoy my said estate hereby devised, as if my son George F. Heneage was dead." So that, to this latter branch of the clause, directing that the estate should go over to the next in remainder, there was added a direction, that it should go to the next in remainder as if G. F. Heneage was dead; and it was this last-mentioned direction that presented the difficulty, because if G. F. Heneage

was dead, the estate of the trustees to preserve contingent remainders, which was only to endure during his life, would have been determined. In the case now before me this last-mentioned direction does not occur. For though it is true the words "as if he were dead" do occur in the shifting clause, they occur not in connexion with the latter branch of the clause, which directs that the estate shall go to the next in remainder, but in connexion with the former branch, which directs the ceasing of the estate limited to the party becoming entitled to the other property.

The terms of the shifting clause in the case before me are, "then and from thenceforth the limitations hereby made in his favour shall cease, determine and be absolutely void, as if he were dead, and the said hereby devised lands shall go over to the person next entitled in remainder," without adding "as if he were dead." So that the direction is, that his estate is to cease as if he were dead; but not that the lands shall go over to the next in remainder as if he were dead. This appears to me to be a substantial and important distinction. What then is the meaning and operation of the words "as if he were dead," when added to the branch of the clause which directs the ceasing of his estate? Simply to express in strong and unmistakeable terms the testator's intention that the estate of the tenant for life is to cease absolutely and entirely, and to all intents and purposes. If he were dead, of course his estate would cease absolutely and entirely, and to all intents and purposes; and therefore the testator, intending that the estate should cease absolutely and entirely, and to all intents and purposes, illustrates his intention by saying, that it shall cease as if the party were dead, although not actually dead. But these words, "as if he were dead," having thus performed their function in the former branch of the clause, which directs the ceasing of the estate, what ground is there for carrying them on to the latter branch of the clause, which directs that the lands shall go over to the person next entitled in remainder? Why are we to construe this latter branch as if the testator had said, that the land shall go over to the person next entitled in remainder, as if

the party were dead, when in truth he has said no such thing? To do so appears to me to be nothing less than a gratuitous importation into a will of a direction which the testator has not inserted, and which, so far from being required in order to effectuate any general intention of the testator, does in fact defeat it. So that even if the decision in *Doe v. Heneage* be open to reasonable doubt, the ground for such doubt does not exist in the case now under consideration. And even if *Doe v. Heneage* had been actually overruled, which it never has been, it would not cease to be deserving of notice, as shewing how strong is the disposition of a Court of justice to get over difficulties, in order to give effect to the testator's intention that the estate should go to the unborn son of the party whose estate is to cease and determine. The only expression in the shifting clause, in the present case, which presents any difficulty, is the word "person" in the singular number: the words being, "shall go over to the *person* next entitled in remainder," from which it may be argued, that the testator could not have intended by that word "person," in the singular, to express the *two* trustees to preserve the contingent remainders; but I do not feel any hesitation in getting over that difficulty in favour of the clear intention.

I now come to the case of *Carr v. Lord Errol*. This is a clear case in which there was no need to keep up the estate to the trustees to preserve contingent remainders, because the testator himself directed that on the happening of the event upon which the shifting clause was to come into operation, the contingent remainders as well as the life estate were to cease, and therefore there were no longer any contingent remainders to be preserved.—[His Honour stated the facts of the case and proceeded]—Here the shifting clause is very different from that in *Doe v. Heneage*, as well as from that in the case now before me, for, by the very terms of the shifting clause itself, upon W. Hay, the tenant for life, becoming Earl of Errol, not only his life estate, but the estate and use limited in remainder to his sons in tail was directed to cease and determine, that is, the contingent remainders which the estate to the trustees was intended to support, were at

an end, and therefore no longer needed in order to effectuate the testator's intention. Therefore, the Court decided that Lady Charlotte Carr was the person next in remainder. The decision in *Carr v. Lord Errol* does not in the least conflict with that in *Doe v. Heneage*. The next case is *Stanley v. Stanley*, before Sir William Grant.—[His Honour stated the facts of the case.]—It was there held, first, that Thomas Massey took a vested estate for life, after an estate in the trustees for so many years as his minority might last; secondly, that the question on the shifting clause must be decided in the same manner as if, instead of a direction to the trustees to convey to the uses mentioned, the devise had been directed to those uses; and, thirdly, that the trustees in making the conveyance directed, had no power to mould or to alter the limitations. Now, in June 1800, Thomas Massey had become possessed of the Puddington estate, and so the event had happened upon which his estate for life ceased and determined. At that time he had no son born, so the limitations to his first and other sons in tail male were then contingent remainders which required the existence of the estate in the trustees to support them. T. Massey attained the age of twenty-one in 1804, up to which time there was no doubt the devisees in trust were to receive the rents and to lay them out in the purchase of other estates. He had no son born until November 1806, so that nearly three years elapsed between the time when his life estate under the will ceased, and the birth of his first son. The first question then was, who, upon the cesser of the life estate of T. Massey, became entitled to the devised lands as the person next in remainder? It was contended, by John, the next brother and the next tenant for life under the limitations, that he was entitled. Now, it is important to observe that John in that case stood precisely in the same position as Mrs. Lambard does in the present case. And what said Sir W. Grant to the claim of John:—"The next question is, who became entitled as the person next in remainder under the limitations? By that description must be meant the person next in remainder after the person upon whom the Puddington

estate devolved. It is not easy to conceive how John could say he sustained that character and answered that description, there being a previous limitation or, which is the same thing, a direction for such limitation to trustees to preserve contingent remainders, and remainders to the first and other sons of T. Massey. It was, however, contended that, as the next person in remainder was to become entitled to the possession, he must be a person capable of possession, and therefore a son of Thomas could not answer that description. The answer to the objection is, that the trustees to preserve contingent remainders were the next, and they were capable of possession, and under the protection of their estate the contingent remainders to the first and other sons of Thomas were also to be considered as subsisting remainders, to prevent John's answering the description of next in remainder." That passage is a complete answer to the claim of Mrs. Lambarde; and it will be observed that the reason here given by Sir W. Grant for coming to that conclusion was, that, under the protection of the estate of the trustees to preserve contingent remainders, the contingent remainders to the unborn first and other sons of Thomas were to be considered as subsisting remainders, so as to prevent John's answering the description of next in remainder. So in the present case, under the protection of the estate of the trustees to preserve the contingent remainders, the contingent remainders to the second unborn and every other younger son of E. H. Turton are to be considered as subsisting remainders, so as to prevent Mrs. Lambarde answering the description of next in remainder. The following observations of Sir W. Grant bear very strongly upon this case, and the learned Judge held that the trustees to preserve contingent remainders took the devised estate as next in remainder until the birth of a son of Thomas, and that such son became entitled on his birth as tenant in tail. The second question was, who was entitled to the rents between the time when Thomas attained twenty-one and the birth of his son? and Sir W. Grant held, that they were undisposed of by the will and belonged to the testator's heir-at-law.

The next case to be noticed is *Morris v. Langham*. The two reports of this case, though relating to a litigation between the same parties, do, in fact, relate to two totally different instruments, containing different shifting clauses, and are to all intents and purposes two distinct and separate cases.—[His Honour stated the cases.]—The question under the will came before the Vice-Chancellor of England, who decided the point as to the devised copyhold, and also partially decided as to the appointed freehold, holding that a certain interest in those freeholds was undisposed of by the will, and that therefore the right to that interest must be governed by the deed; and he sent a case for the opinion of the Court of Exchequer on the deed, which case was, of course, framed upon the supposition that the power of appointment had not been exercised. So that, in the report in *Meeson & Welsby*, we have the decision of the Court of Exchequer upon the deed, and in the report in *Simons* we have the decision of the Vice-Chancellor upon the will. I will consider first the case in the Exchequer on the deed.—[His Honour stated the facts of the case, and said]—On the 12th of May 1812 James Langham became entitled in possession to the family estates of his father, Sir James Langham; and the questions for the opinion of the Court were, first, whether, upon the death of Francis Tuttle, in January 1824, Herbert Langham, the second son of Sir James Langham, took any and what estate in the lands comprised in the deed; and, secondly, whether Langham Christie took any and what estate therein. In one respect the shifting clause resembles that in *Carr v. Lord Errol*, viz., that on the event happening of James Langham becoming entitled to the possession of the family estates of Sir James Langham, not only was the use and estate limited to him to cease and determine, but also the uses and estates limited to his issue male, *i. e.*, to his first and other sons. So that there no longer remained any contingent remainders which required to be preserved by the estate limited to the trustees to preserve contingent remainders, and the estate was to go over in the same manner as if he were actually dead without issue

male, and therefore, as in *Carr v. Lord Errol*, it was decided that the estate went not to the trustees to preserve contingent remainders, because there were no contingent remainders to preserve, but to Langham Christie, the person who would have been next entitled if James Langham had actually died without issue male.

It now remains to consider the case of *Morrice v. Langham*, in *Simons*, which was the case upon the will of Francis Tutte, dated the 24th of June 1820.—[His Honour stated the facts of that case.]—The testator died on the 13th of January 1824. On the 14th of April 1833 James Hay Langham became entitled in possession to the settled estates of Sir James Langham. J. H. Langham had then no son born. Edward Ayshford Landford was the heir of Herbert Hay, and he contended that as the life estate of J. H. Langham had ceased and determined, and there was no son of J. H. Langham to take the estate, he was entitled to the estate as the person next in remainder under the limitations. That contention was precisely the same as that which is now raised by Mrs. Lambard, for she contends that, as the life estate of E. H. Turton has ceased and determined, and there is no second son of E. H. Turton to take the estate, she is the person next in remainder under the limitations. The Court decided against the claim of the heir of H. Hay. With reference to that claim, the Vice Chancellor says, at page 279, "It appears to me that it is quite impossible to argue the case on behalf of the heir of H. Hay without running into a manifest inconsistency, and without, in effect, contradicting the principle of *Hopkins v. Hopkins*, and other cases of that kind, which are unquestionable. It appears to me that the real effect of *Stanley v. Stanley*, *Doe v. Heneage* and *Carr v. Lord Errol* is this, that the Courts are bound to construe the words of cesser, as nearly as they possibly can, in their simple and ordinary sense; and my opinion is, that there is no mode whatever of construing the words of cesser in the will of Mr. Tutte which can have the effect of giving any interest to the right heirs of H. Hay." The Vice Chancellor does not here expressly refer to the estate limited to the trustees during the life of the tenant

for life in trust to preserve contingent remainders, because the whole legal fee being in the devisees in trust, that estate, according to *Hopkins v. Hopkins*, was of itself sufficient to support all the contingent remainders, even if there had not been an estate limited to trustees during the life of the tenant for life in trust to preserve contingent remainders. The Court having decided against the claim of the heir of H. Hay, the next question was, who was entitled to the rents and profits from the time when J. H. Langham became possessed of the settled estates of Sir J. Langham until he should have a son to take the estate? J. H. Langham could not have them because his estate and interest had ceased and determined by the express direction of the testator. The specific disposition of them having failed, the rents of the freeholds were held to go as in default of appointment, and to belong to the person who might be entitled under the deed of 1804, which created the power, and for that reason the Vice Chancellor directed the case to be sent to the Court of Exchequer upon the question under that deed. As to the rents of the copyholds, which were not included in the deed, and, therefore, not appointed but devised, it was held, that they belonged to the residuary devisee. On appeal to the House of Lords (1) the decree was affirmed as to the copyholds, but it was reversed as to the freeholds, not on the merits, but merely on the ground that it was an attempt to decide a question between co-defendants.

These authorities appear to me to be sufficient to establish these propositions:—First, that in cases of this nature the Court will endeavour to effectuate the testator's intention that the estate should go to the unborn sons of the tenant for life whose estate has ceased and determined, as well as his intention that the two estates should not vest in the same person. Secondly, that for this end the Court will struggle with and, if possible, get over particular expressions which seem to stand in the way of that intention. Thirdly, that if there be contingent remainders to the unborn sons of a tenant for life, whose life estate has ceased and determined, which

(1) *Sandford v. Morrice*, 11 Cl. & F. 567.

require to be supported by the estate limited to trustees to preserve contingent remainders, those trustees shall, if possible, be held to take the estate as the persons next in remainder, for the purpose of supporting the contingent remainders next in remainder, and not the person to whom the estate is limited after the expiration or failure of the estates limited to the unborn sons of the tenant for life. Fourthly, that the intermediate rents accruing between the time when the estate of the tenant for life ceased and the birth of his son entitled under the limitations, shall belong to the residuary devisee, if there be a residuary devise, and if not, then to the testator's heir-at-law. Mrs. Lambard's bill must, therefore, be dismissed.

M.R. { THE METROPOLITAN
Feb. 17, 18, 21. { COUNTIES ASSURANCE
SOCIETY v. BROWN.

*Fixtures — Machinery — Mortgages —
Rights against Creditors — Costs.*

A leasee of steel and iron works assigned, by way of mortgage, the land, with the appurtenances, and also the machinery specified in the schedule, "and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the said premises, whether in addition to or substitution of the several fixtures, machinery, articles and things specified in the schedule":—Held, that these words referred not merely to additions to existing machinery, but also to any new machinery fixed or fastened to the mill.

The construction of the words "fixed and fastened," as applied to machines, their adjuncts and removable parts.

The Albion Iron and Steel Works were established, by William Henry Brown, upon a piece of land at Neepsend, in the parish of Sheffield, which had been demised to him from the 25th of March 1856, for a term of 800 years, subject to various rents and covenants.

By a deed, dated the 23rd of September 1856, W. H. Brown assigned the works, the rolling-mill and the piece or parcel of land, with the appurtenances, and also all that steam-engine set up and fixed for

working the rolling-mill and the boilers, wheels, shafts, machinery, gearing, apparatus, trains of rolls, shears, fixtures and things of, in and connected with the rolling-mill, as specified in the schedule thereunder written, and all engines, machinery, fixtures and things which might thereafter be fixed and fastened in or upon the same premises, whether in addition to or substitution of the several fixtures, machinery, articles and things specified in the said schedule, to Benjamin Vickers, Elias Lowe and Edward Vickers, to hold the land and such of the machinery and fixtures as were of the nature of realty, for the residue of the term of 800 years, subject to the rents and covenants reserved by the lease, and to hold such of the machinery and fixtures as were of the nature of personalty absolutely, as a security for the repayment, on the 23rd of March 1857, of the sum of 2,500*l.* with interest at 5*l.* per cent. The deed contained a power of sale on default; and also a power of entry, and a power of entry and distress; and W. H. Brown attorned tenant from year to year to the mortgagees.

The following schedule was attached to the deed:—Four steam boilers and steam pipes and valves, complete; sixty-horse power steam-engine, complete; driving-wheel and shaft, fly-wheel and shaft, two speed-wheels and shaft, long underground shaft, four speed-wheels at end of ditto, long train of rolls for file steel, consisting of a bed-plate and its foundation, ten standards or housings, one pair of pinions and four pairs of rolls, with spindles and coupling boxes to each pair; train of rolls for rounds, &c., consisting of bed-plates and foundations, ten standards or housings, three pinions, three high set of rolls, pair of two-feet rolls and two pairs of twelve-inch rolls with spindles and coupling boxes, complete; turning lathe, pair of shears, forty tons or upwards of cast-metal floor plates, nine large metal pillars and girders for roof of rolling-mill.

The plaintiffs, with a view to a loan, procured a new inventory and valuation to be made of the fixtures and fittings of the mill, but, on the 18th of February 1857, W. H. Brown again assigned the same premises by the same description and with the same schedule, to the plaintiffs, by way

of mortgage, to secure the repayment of 500*l.* and interest.

On the 27th of October 1858, Messrs. Vickers & Lowe transferred their mortgage security of the 23rd of September 1856 to the plaintiffs.

On the 31st of August 1857 Mr. Brown assigned all the fixtures, articles and things, in the rolling-mill to Messrs. R. Brown & H. Cooper, for the benefit of his creditors, subject to the mortgages.

Various alterations were made both in the rolling-mill and in the machinery, &c., by additions, between the dates of the first and second mortgages, as well as after the date of the second mortgage.

The trustees under the deed of composition, claimed a great part of the machinery, &c. in the mill, and in particular nearly the whole of what had been substituted or added after the date of the mortgages; they consisted of a furnace, with plates at the mouth, a steam hammer and anvil, four pairs of rod rolls, one pair of cutters, two pairs of pinions, two straightening-plates, forty tons of additional metal flooring plates, a boiler, engine, and turning lathe, used for cutting the surface or the grooves in the rolls.

It was alleged that these were fixtures, and that some of them were comprised in a valuation made at the date of the second mortgage, and that such of them were intended to have been added to the schedule to that deed, but that they were by mistake omitted.

The bill then prayed that the plaintiffs might be declared entitled to the machinery, &c. in the rolling-mill, and that the schedule might be rectified.

Mr. R. Palmer and *Mr. W. W. Mackeson*, for the plaintiffs.

Mr. Lloyd and *Mr. Terrell*, for the defendants, referred to

Trappes v. Harter, 2 Cr. & M. 153; s. c. 3 Tyrw. 603; 3 Law J. Rep. (n.s.) Exch. 24.

Fisher v. Dixon, 12 Cl. & F. 312.

Hare v. Horton, 5 B. & Ad. 715; s. c. 2 Nev. & M. 428; 3 Law J. Rep. (n.s.) K.B. 41.

Ex parte Barclay, 5 De Gex, M. & G. 403; s. c. nom. *Ex parte Gawan*, 25 Law J. Rep. (n.s.) Bankr. 1.

Whitmore v. Empson, 23 Beav. 313; s. c. 26 Law J. Rep. (n.s.) Chanc. 364.

Hutchinson v. Kay, Ibid. 413; s. c. 26 Law J. Rep. (n.s.) Chanc. 457.

Ex parte Reynell, 2 Mont. D. & D. 443.

Ex parte Bentley, Ibid. 591.

Ex parte Cotton, Ibid. 725.

Mather v. Fraser, 2 Kay & J. 536; s. c. 25 Law J. Rep. (n.s.) Chanc. 361.

Hubbard v. Bagshaw, 4 Sim. 326; s. c. 9 Law J. Rep. Chanc. 190.

Wiltshire v. Cottrell, 1 E. & B. 764; s. c. 22 Law J. Rep. (n.s.) Q.B. 177.

Place v. Fagg, 4 Man. & Ry. 227; s. c. 7 Law J. Rep. K.B. 195.

Winn v. Ingilby, 5 B. & Ald. 625.

Waterfall v. Penistone, 6 El. & B. 876; s. c. 26 Law J. Rep. (n.s.) Q.B. 100.

Skipp v. Harwood, 2 Swanst. 586.

Williams v. Evans, 23 Beav. 239.

THE MASTER OF THE ROLLS.—The words, "all engines, machinery, fixtures and things which may be hereafter fixed and fastened in or upon the said premises," &c., in the mortgage-deed, refer to any new machinery fastened and fixed to the mill, and not merely to additions to existing machinery; and, though there is obscurity about the clauses in the deed on this subject, still whatever was substituted for anything which was loose at the date of the mortgage, and which was essential for the management and carrying on of the mill as a rolling-mill, would pass under those words. But it is not necessary to go into that question, as from the evidence it apparently does not arise. The words "fixed and fastened" may for the purpose of every question raised in this case, be considered as governing the meaning of the whole sentence; consequently, the Court has nothing to do but to regard the evidence in respect to each particular article in dispute, with a view to see whether, in the legal sense of the words, they are fixed on the premises, using the word "fixed" in the same way as it was in *Mather v. Fraser*. Now, so looking at it, I will consider the articles in the order they have been brought to the attention of the Court. The donkey engine has been

given up. There is then the engine for the turning-lathe and the steam-hammer. I class them together, since it is admitted in the evidence that they stand on the same principle. The way they are fixed is this: some ashlar stone is laid on the ground on a sound foundation made for it at the same depth in the ground, and this ashlar stone is laid, with mortar, in the ordinary way; the steam-hammer, or at least the firm part of the machine, is screwed down on to the stone by screws; it is consequently fixed into the ground, and is a fixture. The ashlar stone is clearly built or fixed into the ground upon which this machine is fastened. It may, no doubt, be removed, and so may a steam-engine from any species of mill, if it is thought fit, if means are taken. Yet if it is built into the premises, it is treated as fastened to the ground. This steam-hammer must be considered as fastened to the freehold, and accordingly it comes within the clause of the deed. The anvil, though not fixed upon the ground, is adjacent to the machine, and essential to it. Therefore, so far as the engine for the turning-lathe and the steam-hammer and the anvil are concerned, they must go to the mortgagees under the terms of the deed. Then there is the boiler: that also is fastened to the freehold. It is impossible to treat it in any other point of view. Here, exactly in the same way, an excavation is made to obtain a firm foundation; then the masonry is built up to receive the boiler; the boiler is then placed into it on supports in the brickwork on which it rests; then two or three tiers of additional brickwork are added on the top to fasten it, and it is fixed there completely. It is impossible to say that the boiler is not built into or attached to the freehold, otherwise nothing is attached to the freehold. You must take away the brickwork in order to get it out; you are obliged to do the same with a copper or an oven, which is fixed into the ground. It must be held to be affixed to the ground. I had more doubt about the furnace; but the evidence satisfies me, that the furnace is also affixed to the freehold. It appears to stand thus:—In the first place, a foundation is built of common brick, which, as in other

cases, goes down a certain depth into the ground, making a foundation. The furnace itself is constructed of fire-bricks fastened together with fire-clay in a peculiar mode, so as to form the greatest protection against fire which they are capable of acquiring, and it is cased with iron plates fastened together with iron rods which are driven through in various directions. If it were merely resting on the brickwork, there would have been considerable doubt whether it was or was not a fixture; but the evidence is, that the fire-bricks which form the bottom of the furnace touch upon the common bricks which form the foundation, and that it does not merely rest there; that the method is to unite the two with mortar. It is true, the furnace is made of bricks of a different species, probably of a more costly description, with a set of iron-plates attached to them, and for that reason they do not dovetail one brick into another, as in another part, and there is a different and complete layer of bricks on the top of the common bricks. In addition to that, two of the iron plates which are near the mouth of the furnace go down into the ground some little distance, close by the side of the brickwork, which is covered with earth, and it is fixed there by mortar, at the same time, to this common brick pedestal which supports it; it must, therefore, also be considered as a fixture in the same way. As to the cutters, they do not appear to be fixed on the bed. There is apparently a bed-plate, which is not fastened at all into the ground. The usual mode of putting down bed-plates is to make a solid foundation for them, sometimes of ashlar, sometimes mixed with wood, and then to rest the bed-plate on that; but the bed-plate is not fixed to it in any way whatever. There is not such a thing as a screw. They may clearly be moved, though no doubt a very considerable degree of power is required to move them, as they are very heavy; but they are merely resting on that foundation. Then comes the bed-plate which has been introduced into the mill subsequently to the mortgage-deed with the cutters, and the cutters do not appear to be in any way fastened to the freehold. The bed-plate is not fastened to the freehold, and even if it were, I doubt whether a cutter, merely

wedged in with pieces of wood, which may be easily removed at pleasure, is different from those things which come within the case of *Hutchinson v. Kay*. The same observation applies to the straightening-plates, though there is a small portion of them which penetrates into the ground for a few inches; but that is merely accidental; it is not for the purpose of using the straightening-plate: it is made in that form for the purpose of preventing irregularities in its construction when cast. Accordingly, the straightening-plates when laid down do not appear to be fixtures, or fastened or fixed into the ground, and they must be treated as things which might be taken away. The evidence would seem to say that neither the straightening-plates nor the bed-plates for the cutters (although they form a part of the floor of the mill) could be used as the common metal-plate flooring of the mill. Then I come to the metal flooring of the mill, part of which, it appears, was put down between the date of the two mortgage-deeds, and part subsequently to the second deed. It appears to be quite loose, and therefore not a fixture. The question does not turn upon whether it is essential to the working of the mill, because, if half the mill is covered the rolling-mill can still be carried on effectually; although, no doubt, the mill would be more perfect, and it would be more convenient if the whole of the floor had been covered with these metal-plates. Then the question arises as to that part which was put down between the date of the two mortgage-deeds, whether this Court can reform the second deed by inserting the metal flooring, because, as I understand, the schedule of the second deed does not include the metal flooring. I cannot, however, alter the deed upon the valuation made when the plaintiffs took their mortgage. The parties who advanced this money, no doubt, intended to include in the deed everything which was included in the valuation. The metal flooring was, without doubt, there; but I cannot therefore include it in the deed in the absence of proof that it was omitted by a common mistake of both parties. There is nothing to shew that Mr. Brown made any mistake on the subject. The plaintiffs ought to have taken care that the schedule was so framed

as to include it. Therefore, I think this part of the metal flooring must fall within the same category as the metal flooring put down subsequently to the date of both deeds, and must be treated as not passing under the mortgage to the plaintiffs. That will dispose of all the questions. The costs, however, will remain to be disposed of; and with respect to them there is some difficulty, as the plaintiffs, to a great extent, are right,—more right than the defendants. But I will consider before deciding.

Feb. 21.—THE MASTER OF THE ROLLS.
—I must follow the rule, which is to make the costs follow the event where the claim succeeds. In that case it carries costs with it. The consequence is, that the costs of the suit, so far as they have been occasioned by the plaintiffs claiming the bed-plate and cutter, the straightening-plates and the metal flooring, or by the claim to have the second mortgage-deed rectified, must be paid by the plaintiffs, and the defendants must pay the rest of the costs of the suit.

Wood, V.C. }
April 28; }
May 30. }

SCOTT v. MILLER.

Attorney and Solicitor—6 & 7 Vict. c. 73. s. 32.—Barratry—Answer—Sufficiency—Privilege of Witness.

An agreement between A, a certificated conveyancer, and B, an attorney, that in case A. should introduce to B. any matters of professional business for which B. would have a claim for costs, B. would allow and pay to A. certain sums of money by way of commission, is not such a permitting by the attorney of his name to be made use of upon the account or for the profit of an unqualified person, as was intended to be provided against by the 32nd section of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73.), nor would such an agreement subject the parties to the penalties for common barratry; and, therefore, where a defendant, an attorney, by his answer declined to answer interrogatories founded on a statement of such an agreement, on the ground that if the facts alleged in the bill were true, he was liable

to be struck off the roll, and was liable to other pains and penalties under the statutes and laws in force concerning common barratry and maintenance, it was held, that the answer was insufficient.

A witness claiming to be privileged from answering, on the ground that he is not bound to criminate himself, must at all events swear that he is advised or believes that his answer will have that effect; and it is not sufficient to say that his answer would or might criminate him or tend to criminate him.

The bill, in this case, stated that in or previously to the year 1854, the plaintiff, who was a certificated conveyancer, entered into a verbal agreement with the defendant, who was an attorney and solicitor, that in case he, the plaintiff, should introduce to the defendant any matters of professional business for which the defendant could have a claim for costs, the defendant would allow and pay unto the plaintiff sums of money, by way of commission in respect of such matters of professional business, equal in amount to one moiety or half-part of the net gains and profits to be realised by the defendant from all such matters of professional business after deducting and retaining the amount of all monies expended and disbursed by the defendant on account of the said matters of professional business; and, also, that in case the plaintiff should employ the defendant as his attorney or solicitor to transact any matters of professional business for him, the defendant should not claim or charge against the plaintiff any costs or sums of money whatever in respect of the last-mentioned matters of professional business beyond the amount of the sums of money which the defendant might have expended or disbursed in relation to the last-mentioned matters of business.

The bill further stated, that the terms of this agreement were entered into and accepted by the defendant, and that it was acted upon, and in pursuance and consideration thereof various matters of professional business were from time to time introduced and recommended by the plaintiff to the defendant, and various matters of professional business, especially the

bringing and prosecuting and defending of actions at law, were from time to time transacted by the defendant for clients introduced and recommended by the plaintiff; and that the defendant had from time to time received the amounts of his bills of costs relating to such matters of professional business, and became justly and truly indebted to the plaintiff in various sums of money in respect of the commission agreed to be allowed and paid to him by the defendant; that the defendant from time to time made to the plaintiff divers small payments on account of such commission, and had also transacted matters of professional business on behalf of the plaintiff personally, for which he was entitled to charge against the plaintiff the amount of his costs out of pocket, but that, after deducting all such payments and costs, a large balance was still due from the defendant to the plaintiff under the agreement.

By the sixth paragraph of the bill it was stated that neither the plaintiff nor the defendant at any time, directly or indirectly, did, or agreed to do, or join in doing any act whatever which could be construed to be an infringement of the provisions of the statute in force with regard to attornies and solicitors, inasmuch as the plaintiff never, directly or indirectly, interfered in any of the matters of professional business which he introduced to the defendant, nor had he at any time any right or claim whatever to receive any portion of the gains and profits realized and received by the defendant, nor did he at any time in any manner, directly or indirectly, act as, or represent himself to be the clerk or assistant of the defendant; nor did he ever use or obtain the permission of the defendant to use his name in any matter of professional business whatever; nor did he ever act as or hold himself out to be the agent of the defendant in any matter whatever; nor did the plaintiff at any time receive any sum of money whatever for or on account of the defendant in relation to the matters of professional business introduced by the plaintiff, except the sums of money which were paid to the plaintiff by the defendant as before mentioned.

The bill then prayed for a declaration

that the agreement was valid and binding on the defendant, and for a decree for specific performance, and an account of what was due in respect of commission.

The defendant, by his answer, submitted that if the facts in the bill stated with reference to and arising out of the alleged agreement were according to the truth, the defendant was, under the provisions of the 6 & 7 Vict. c. 73, liable to be struck off the roll, and for ever after disabled from practising as an attorney and solicitor, and was liable to other pains and penalties under the statutes and laws in force concerning common barratry and maintenance, and he, therefore, declined to answer the interrogatories founded upon the statement of the agreement.

To this answer the plaintiff excepted.

Mr. Willcock and Mr. Bilton, in support of the exceptions, cited—

Candler v. Candler, 6 Madd. 141; s. c. Jac. 225.

Fisher v. Price, 11 Beav. 194; s. c. 18 Law J. Rep. (N.S.) Chanc. 235.

Whittaker v. Howe, 3 Beav. 383.

Mason v. Wakeman, 2 Phill. 516; s. c. 17 Law J. Rep. (N.S.) Chanc.

208: reversing s. c. 15 Law J. Rep. (N.S.) Chanc. 423; 15 Sim. 374.

22 Geo. 2. c. 46. s. 11.

Mr. Bird, for the defendant, referred to—

Southall v. —, Younge, 308.

Tench v. Roberts, 6 Madd. 145.

Wallis v. the Duke of Portland, 3 Ves. 494.

6 & 7 Vict. c. 73. s. 32.

12 Geo. 1. c. 29. s. 4.

38th General Order of August, 1841.

Lord Redesdale's Pleading, p. 358.

4 *Blackstone's Commentaries*, 332.

Mr. Willcock was not called upon to reply.

WOOD, V.C.—It appears to me that the agreement as averred is not one which would subject the defendant to the penalties he speaks of in his answer. The bill avers that the plaintiff is a certificated conveyancer, and a person, therefore, who

might legitimately have opportunities of recommending clients to the defendant upon points of law which did not fall within his own province; and the agreement is averred to be, that in respect of all business introduced by him to the defendant, the defendant would allow and pay to him half the net profits; and the sixth paragraph of the bill contains a distinct averment that the plaintiff never directly or indirectly interfered in any of the matters of professional business which he introduced to the defendant, nor used his name, nor held himself out to be his agent; and that he did not at any time receive any sum of money whatever for or on account of the defendant in relation to the matters of professional business introduced by the plaintiff, except the sums of money which were paid to the plaintiff by the defendant. It clearly appears to me, therefore, that no penalty has been incurred under the statute.

The 2nd section of the act enacts that, "from and after the passing of this act no person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit or defend any action, suit or other proceeding in the name of any other person or his own name . . . in any court of civil or criminal jurisdiction, . . . or act as an attorney or solicitor in any cause, matter or suit, civil or criminal, to be heard, tried or determined, before any Justice of assize, &c., unless such person shall have been previously to the passing of this act admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this act be admitted and enrolled, &c. pursuant to the directions and regulations of this act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid." And the 32nd section enacts that, "if any attorney or solicitor shall wilfully and knowingly act as agent in any action or suit in any court of law or equity, or matter in bankruptcy, for any person not duly qualified to act as an attorney or solicitor as aforesaid,

or permit or suffer his name to be anyways made use of in any such action, suit or matter upon the account or for the profit of any unqualified person, or send any process to such unqualified person, or do any other act thereby to enable such unqualified person to appear, act or practise in any respect as an attorney or solicitor in any suit at law or in equity, knowing such person not to be duly qualified as aforesaid, . . . then and in such case every such attorney or solicitor so offending shall and may be struck off the roll and for ever after disabled from practising as an attorney or solicitor."

Now, no doubt the earlier part of that section, down to the words "upon the account or for the profit of any unqualified person," standing alone, would reach a very large class of cases which the act was never intended to reach; such cases, for instance, as where a son carries on his father's business for the benefit of the family, or where a retiring solicitor stipulates with his successor that he shall be allowed an annuity in proportion to the profits. But it is quite clear that the statute was never intended to reach such cases as those; and this appears when you come to the subsequent words, "or do any other act thereby to enable such unqualified person to act as an attorney or solicitor." This, therefore, was the mischief intended to be guarded against by the act; but according to the averments in the bill, this is expressly negatived by the sixth paragraph, to which I have already adverted, for the plaintiff says, he never interfered in any matters of professional business which he introduced to the defendant; that having introduced it, he had nothing more to do with the business, except that he was to receive half the profits; and, if this statement is correct, it follows from *Candler v. Candler* that whatever may be the propriety of such an agreement, it would not bring the defendant within the penalties of the act.

Then, Mr. Bird says, that the alleged agreement, if proved, might subject the defendant to the penalties against barratry or maintenance; common barratry being defined to be the offence of frequently exciting and stirring up suits and quarrels

between Her Majesty's subjects, either at law or otherwise (1); and maintenance being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it (2). This argument might have been of some force, if the plaintiff had been a person wholly unconnected with legal business, and had entered into such an agreement; but the plaintiff here is a certificated conveyancer, and in the course of his practice many cases might come before him involving business of a litigious nature, with which, as a conveyancer, he would have nothing to do. It is clear, that by merely introducing such business to the defendant and there leaving it, he would not be guilty of common barratry. I shall not now decide whether such an agreement as this can be enforced; but I can easily imagine a case in which it would not be against public policy, as where a solicitor is engaged in one kind of legal business, and is offered another with which he is not conversant, he is unwilling to undertake it himself, and he, therefore, hands it over on the terms of half profits to some other solicitor, who understands it. There would certainly be nothing against the policy of the law in that.

There was another point in Mr. Bird's argument which struck me more forcibly, and that was as to the tendency of the defendant's answer to establish a case which would subject him to penalties. The agreement, no doubt, is merely for the introduction of business; but if it can be shewn that in any case, after the plaintiff has introduced business, he has interfered with it, then the case would clearly be within the statute; but I do not think that argument can have any weight as the answer is at present framed, because I have held, that if the alleged facts are according to truth the defendant is not liable under the statute. There is nothing to shew that anything is here asked of the defendant that will subject him to penalties, or tend to do so. Upon the question of the propriety of such agreements as this, and the

(1) 1 Hawk. P.C. 243.

(2) Ibid. 249.

COURTS OF CHANCERY:

Re Palmer, 2 Ad. & E. 686; s.c. 4 Nev. & M. 529; 4 Law J. Rep. (n.s.) K.B. 110.
Wick v. Parker, 22 Beav. 59.

Mr. Willcock replied.

policy of encouraging them, I am unwilling to express any opinion before the hearing of the cause; the defendant does not rest his objection upon any want of equity, and the exceptions must be allowed. The question of costs will stand over till the hearing.

May 30.—The cause now came on upon exceptions to the further answer of the defendant, which was in the following terms:—

"I submit that I am not bound to discover or set forth, and I refuse to discover or set forth the matters which, by my former answer, I have refused to set forth, because the discovery of such matters would might shew, or tend to shew, that, under the provisions of the act of the 6 & 7 Vict. c. 73, I am liable to be struck off the roll and for ever after disabled from practising as an attorney or solicitor."

Mr. Willcock and *Mr. Bilton*, for the plaintiff, contended that the answer was still insufficient, and that the matter stood in precisely the same position as before.

Mr. Bird, for the defendant, contended that the answer was sufficient, and that the defendant was not bound to go so far as to say that if he answered he would subject himself to penalties.

In addition to the cases cited on the former occasion, the following were referred to:—

Fisher v. Ronalds, 12 Com. B. Rep. 762; s.c. 22 Law J. Rep. (n.s.) C.P. 62.

The Queen v. Garbett, 1 Den. C.C. 236; s.c. 2 Car. & K. 474.

Adams v. Lloyd, 3 Hurl. & N. 351; s.c. 27 Law J. Rep. (n.s.) Exch. 499.

Sidebottom v. Adkins, 3 Jur. N.S. 631.

Short v. Mercier, 2 De Gex & Sm. 635, 649; s.c. 18 Law J. Rep. (n.s.) Chanc. 490; on appeal, 3 Mac. & G. 205; 20 Law J. Rep. (n.s.) Chanc. 289.

Jackson and Wood, 1 B. & C. 270. 5 Ibid. 108; s.c. Price. 265;

Wood, V.C.—It is clear to me that the defendant is merely fencing with the question, and the exceptions must be allowed. Where a witness claims privilege on the ground that his answer will subject him to penalties, he must swear to his belief that his answer will so subject him. In that case before *Knight Bruce, V.C.*, the defendants swore that they were advised, and did jointly and severally believe that the discovery of all, or any, of the matters or particulars by them declined to be answered would tend to subject them to penalties. On the former occasion I held that the answer was insufficient, because, upon a statement of what appeared to be a perfectly innocent agreement, the defendant submitted that it was illegal, which I held it was not. Then the question occurred, whether the agreement, though perfectly innocent on the face of the bill, might not come so near the words of the law that the introduction of a single word not appearing upon the bill would bring within the statute. But the defendant does not say he is advised or believes that his answer will have the effect of criminating himself. The further answer carries the matter no further than the former one. He does nothing more than again submit, in effect, that his answer would tend to subject him to penalties. I must, at least, have the security of his oath that he believes it will do so. In *Fisher v. Ronalds*, the rule was laid down, by *Maule, J.*, as follows: he said,—"I apprehend the Court is bound by the witness's answer if he says on oath that he believes the question will tend to criminate him." Here, however, the witness says no such thing, and there is nothing in the bill to shew that the agreement is not perfectly innocent. The exceptions must be allowed, with costs.

KINDERSLEY, V.C. { *In re* THE NATIONAL
Feb. 19. PATENT STEAM FUEL
COMPANY, *ex parte*
WORTH.

*Company—Winding-up—Contributory—
Misrepresentation of Directors.*

The directors of a company, with the sanction of a general meeting of the shareholders, issued certain preference shares, at 6l. per cent. interest, which they had no power to do under their deed of settlement. Some of these shares were taken by one of the directors, who sold a part to W, representing them to be preference shares. W. signed the deed of settlement:—Held, that there was no fraud or misrepresentation on the part of the company which would exempt W. from the liability incurred as a shareholder, and that W.'s name must be placed on the list of contributories.

This case came on upon an adjourned summons from chambers.

The directors of the National Patent Steam Fuel Company having, with the sanction of a general meeting of the shareholders in the company, declared that certain shares in respect of which the shareholders had not signed the deed of settlement should be forfeited, it was further resolved, at a special meeting of shareholders, held on the 27th of April 1854, that the re-issue of the forfeited shares should be at the rate of 6l. per cent. preference interest per annum, and the directors were authorized to issue such shares as preference shares.

In November 1854 Mr. Fry, who was a director and shareholder in the company, took a transfer of 300 of these shares, and on the 10th of July 1855 100 of the shares so taken by Mr. Fry were transferred by him to Miss Worth, upon a representation that they were preference shares and would be entitled to 6l. per cent. of the profits in priority over the other shares in the company. This transfer was recognized and confirmed at a subsequent meeting of the shareholders, and Miss Worth executed the deed of settlement of the company in respect of such shares, and also a document by which she acknowledged herself to be a shareholder.

The company was dissolved in 1856, and a winding-up order was obtained.

It appeared that there was no power given by the deed of settlement of the company to the directors to issue preference shares.

The question was now argued whether Miss Worth was liable to be placed on the list of contributories in respect of the 100 shares which had been transferred to her.

Mr. Glasse and Mr. Baggallay, for the official manager, contended that Miss Worth ought to be placed on the list of contributories, as she had signed the deed of settlement and thereby incurred all the liabilities of a shareholder, and her liability as between her and the other shareholders was not taken away by the fact, that the company had no power to issue the shares as preference shares. This was not a case of misrepresentation made to a person for the sake of inducing her to take shares, as in *Brockwell's case* (1). The directors might have been in error in issuing these shares as preference shares, but there was no misrepresentation made to her upon the subject.

Mr. Amphlett and Mr. Southgate, for Miss Worth, relied upon the principle laid down in *Brockwell's case*, and submitted that the fact of the shares being issued as preference shares without any power on the part of the directors to do so, was a misrepresentation on the faith of which Miss Worth had been induced to take the shares and sign the deed of settlement. This misrepresentation having been made at a general meeting of the shareholders, was made to the public, and to Miss Worth as one of the public, and thus her liability was taken away and the contract could not be enforced against her. They cited

In re the Royal British Bank, ex parte Brockwell, 4 Drew. 205; s. c. 26

Law J. Rep. (N.S.) Chanc. 855.

Robinson's case, 2 De Gex, M. & G. 517.

Ex parte Nicoll, ante, 257.

Hitchcock's case, 3 De Gex & Sm. 92.

(1) 4 Drew. 206; s. c. 26 Law J. Rep. (N.S.) Chanc. 845.

In re the Mexican and South American Mining Company, ex parte Barclay,
27 Law J. Rep. (N.S.) Chanc. 660.
The National Exchange Company v. Drew, 2 Macq. 103.

KINDERSLEY, V.C.—Whether the directors had power to issue these preference shares or not, but assuming that they had not, it must be taken that the directors, in recommending such issue, and the general meeting in adopting such recommendation, believed that they had the power. If they had looked into the deed, they would have seen that they had no such power, and the transaction might have been upset at the time by any shareholder. But suppose they could issue preference shares, there could be no guarantee of 6l. per cent. interest, inasmuch as it was to come out of the profits, if there should be any. The intention was, that this interest should be paid in priority over the other shares, and that was why they were called “preference shares.” They did not, however, differ from any other shares by reason of their having this preference, even supposing the company had power to issue them, and the holder was no less liable as a contributory in the event of the company being wound up than any ordinary shareholder, and there would be the same administration of the equities between them. Miss Worth signed the deed of settlement for 100 shares, and also signed a paper acknowledging herself a shareholder, and as between herself and the other shareholders she has no right to say she is not bound as a contributory. The question is, whether she can say that there has been such misrepresentation made to her by the company, that as between herself and the company, she is not to be placed on the list. On this point, reference has been made to *Brockwell's case*. Now, that there may be no misapprehension as to the ground on which I acted in deciding that case, I may say that that decision was to the effect, that if a company consisting of a number of shareholders, or a partnership consisting of only two or three, enter into a contract with another person, and the whole body represent to that person something which is false, on the faith of which representation that person enters into the contract, upon the

commonest principles of justice and equity, the contract cannot be enforced against the person who has been led into it by misrepresentation. Whether it is a single individual making the representation or several persons appears to me to make no difference whatever, and, therefore, the principle I went upon was this:—If there has been a dealing between the company and the person sought to be affected by it, and if the company, as a company, have made a false representation to that person, on the faith of which he contracted, the company cannot enforce it against that person; and the only question on which difficulty can arise would be whether the false representation made to the individual is to be treated as a representation made by the company. That is a fair question, and a great number of cases may be cited where a director or the secretary of a company or the vendor of shares has made misrepresentations; and then the answer has always been, that it is the representation, not of the company, but of an individual, and the company cannot be affected by it; but it was laid down in *The National Exchange Company v. Drew* (I do not say that the point was actually decided, but the opinion of some of the most eminent Judges of the present day was expressed) that where there is a body like this, consisting of a great number of shareholders, and the directors make a report to the body at large in performance of their duty, then if such report contain a representation of the affairs of the company which is false, and if that is made to a public and general meeting of the shareholders of the company, and is adopted by the company as the report of the directors to that general meeting, although there be no order to publish it, either by the directors or the body at large, yet from the very nature of the case it must be regarded as the representation of the company. It is not like the case of partnership between two or three persons, and one being instructed to report on its affairs, reports to his partners; for here was the managing body of a company reporting to the members at a general meeting; and of course the transactions that there take place will transpire and be made public. Therefore, it appeared to me, upon the authority of those learned

Judges, that that report, made in performance of a duty, to a general meeting, which in fact represented the whole company, amounted to such a misrepresentation, that where a person on the faith of the misrepresentation dealt with the company, and not with an individual shareholder of the company, but took the shares direct from the company, the misrepresentation vitiated the transaction. That was the principle upon which I decided *Brockwell's case*. There was in effect an appeal from that decision in *Nicoll's case*, and some difference of opinion was expressed upon it; but I think that the balance of opinion is in favour of the view I then took, and to which I still adhere. In the first place, it was a dealing between Brockwell and the company; it was not a dealing between Brockwell and another person; and, secondly, it was upon the faith of a representation of the company to the public, and to Brockwell as one of the public, which turned out to be false, and was an intentional misrepresentation.

In the present case there is nothing approximating to these circumstances. Miss Worth has not been dealing with the company at all. She was not induced to take the shares by any misrepresentation made to her by the company, or made by the company to the public, and which she had a right to take advantage of as one of the public. It was arranged between the directors and the shareholders at a meeting held by them, that certain shares should have a preference, and they believed they had a right to give that preference. Mr. Fry was the person who first took 300 of the shares, and afterwards represented to her, what he believed to be true, that she would be entitled to a preference of 6l. per cent. out of the profits. But that was no fraudulent representation on the part of the company.

It appears to me, therefore, that there is nothing which can lead to the conclusion, that Miss Worth is not liable as a contributory upon the shares taken by her. She took them, no doubt, under the impression that she would have a preference in the division of profits, but that does not prevent her liability in respect of these shares. If she could shew a case of misrepresentation on the part of Mr. Fry, she might

perhaps have a remedy against him, but she is not on that account discharged from being a contributory of the company. Her name must, therefore, be placed on the list of contributories.

M.R. }
June 13. } FRY v. FRY.

Trustees—Real Estate—Direction to sell—Breach of Trust.

A testator devised a public-house to A. and B, as trustees, upon trust, as soon as convenient after his death, to sell the same, invest the proceeds, and pay the income to C. for life, and divide the capital, after the death of C, as therein mentioned. The testator died in 1834. In 1836 the property was advertised for sale, and, soon after, an offer was made of 900l. for it. The trustees having been advised that the property was worth 1,000l. did not accept of this offer. Shortly afterwards the property became depreciated in value from the scheme of a railway. A. died in 1842. C, the tenant for life, died in 1842. B. died in 1856. The property was unsold. In a suit instituted in 1856 for the administration of the testator's estate,—Held, that the property must be sold, and that the estates of A. and B. should be held liable for the difference between the purchase-money and the rents from 1842, and 900l. and interest at 4l. per cent. from 1842.

James Fry, by his will dated the 26th of March 1834, after making certain specific devises for his children and grand-children, devised his messuage called Langford Inn to John Fry and James Cooper, and their heirs in these terms: "upon trust, as soon as convenient after my decease to sell and dispose of the same either by auction or private contract, and for the most money that can be reasonably obtained for the same." The testator gave the residue of his personal estate to his trustees upon trust to convert the same, and place out the monies arising therefrom, and the purchase-money of Langford Inn on security, and to pay the interest to his wife for her life, and, after her death, to divide these securities among his four children.

The testator died on the 27th of March

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1834, and his will was proved by his trustees, James Cooper and John Fry, who were also named the executors.

James Cooper died in 1842. John Fry died in February 1856, and left Thomas Fry and Joseph Fry his executors, who proved his will.

The testator's widow died in 1842. The general estate of the testator James Fry being (at the death of John Fry) insufficient for the payment of his debts, this suit was instituted, in August 1856 by Messrs. Thomas and Joseph Fry, against the children and grandchildren of James Fry for the administration of his real and personal estate. Langford Inn had not then been sold.

The defendants, by their answer, sought to charge the plaintiffs, as representatives of John Fry, and the representatives of Cooper in respect of the default of John Fry and Cooper in not having sold the Langford Inn.

The only evidence as to Langford Inn was contained in the affidavit of Mr. Bennett, who had been solicitor to the trust from the death of the testator. It was to the effect that the testator, at his death, was entitled to a freehold public-house called Langford Inn, situate on the high road between Bristol and Exeter, and, there being a great traffic along this road, it was a flourishing concern. The property shortly before the testator's death had been put in good repair, and was let for 80*l.* a year. It had been mortgaged by the testator for 1,000*l.*

In April 1836 the property was advertised for sale in all the leading local papers, the trustees not having been able before to effect a sale by private contract. On the 25th of April 1836 a Mr. Bradford wrote to Mr. Bennett making an offer of 900*l.* for the property. Mr. Bennett advised two of Mr. Fry's sons not to take less than 1,000*l.*, and it was arranged that they should see Mr. Bradford. Mr. Bennett did not recollect anything further respecting Bradford's offer.

On the 27th of April 1836 Mr. Bennett offered to sell the property to a solicitor, who had written respecting it, for 1,000*l.* and was generally known in the neighbourhood as being the best property for sale, it

Shortly after the property had been advertised for sale it suffered a great and unexpected deterioration in value from the scheme for the formation of the Bristol and Exeter Railway. This railway was opened in 1843.

It did not appear in the proceedings, but it was stated in court, at the hearing, that the Bristol and Exeter Railway Act was passed on the 19th of May 1836. The property was again advertised for sale in 1845, but no offer was ever made for a purchase of it, that was considered eligible, and it was still unsold. The present rent was 30*l.*, and the estimated value about 400*l.*

Mr. Lloyd and Mr. Shee, for the representatives of John Fry; and Mr. B. L. Chapman, for the representatives of Cooper, cited *Buxton v. Buxton*

(1).—Lord Cottenham there lays down the rule, without any qualification as to the nature of the property at the time of sale, that, in the direction to convert with all convenient speed, an executor was entitled to proceed to an immediate sale, and bound to exercise a discretion, and was not bound to proceed to an immediate sale, and points out the inconvenience that would happen if the rule was otherwise. Lord Cottenham also stated, "that there was no case in which an executor had been called upon to bear a loss which he might have avoided by exercising a reasonable discretion the conclusion was, that the executor was not bound to do so. In this case, as far as appears by the evidence, there was every reason to suppose that, at the time of Bradford's offer of 900*l.* the property was worth more than 900*l.*. In the exercise of their discretion they declined the offer. The circumstances that an offer was made of 900*l.* is a sort of proof that the property was worth more than 900*l.*, as purchasers generally offer less in the first instance than they are prepared ultimately to give. This discretion, then, according to *Buxton v. Buxton*, was properly exercised. No other offers were stated, and it is to be presumed that none were made that could, in their discretion, be properly accepted. The circumstance that the property has been depreciated by the railway ought not to have any bearing on the question."

(1) 1 Myl. & Cr. 80; s. c. C.P.C. 97.

on the question. The probability of a railway being made and its effects on the high road traffic were not known in 1836 in the same way as they are now. At any rate, the sellers and the purchasers were in the same situation as far as this is concerned. Neither could foresee the event, and, when it happened, both would know its effects. Besides this, there is in evidence only a bare statement of an offer. It is impossible to say what would have become of the offer, if it had been accepted. In addition to this, the estates of the trustees are now for the first time charged with a neglect, or an indiscretion of the trustees which took place about 1836, and both trustees are dead. Had this charge been brought earlier a satisfactory explanation might have been given, which is not now accessible to their representatives—*Taylor v. Tabrum* (2).

Mr. Freeking, for the defendants, cited *Dessynges v. Robinson* (3), but was not further called upon.

THE MASTER OF THE ROLLS.—No time is mentioned within which the executors must sell the Langford Inn; the words of the will being “as soon as convenient after my decease to sell the same.” The testator died on the 27th of March 1834. One trustee passed the whole of his life without selling, and died in 1842; and the other did nothing to carry the trust into effect for upwards of twenty years. How long is such a state of things to be allowed to go on? If property of a fluctuating nature happens to be at a low price in the market at the time it ought to be sold, executors may reasonably abstain from selling; but that is not so with respect to real estate. The surviving trustee lived fourteen years and a half after the decease of his co-trustee, without taking any step to sell the estate, and it still remains unsold. There is really no excuse for this. It remains, therefore, to say what loss has been sustained by the refusal of an actual offer to purchase the estate in 1836. The proof is, that the estate might then have been sold. If any inquiry were directed the trustees could not be

charged with less, and they might be charged more, and, if it was supposed that the proposed railway would depreciate the value, that was a reason why the trustees ought to have sold. In *Taylor v. Tabrum* the trustees had refused an offer, and had afterwards sold the estate for less, and they were charged with the loss. All, therefore, that I can do is to direct the estate to be sold, and declare that the trustees must be charged with the difference between the purchase-money, and the rents received from 1842, and the sum of 900*l.* and interest at 4*l.* per cent. from the same date.

M.R. } FRY v. FRY.
June 13. }

Executor, Liability of, for Testator's Breach of Covenant to insure.

A testator who was, at his death, lessee of a house under a lease, in which he had covenanted to keep the house insured, appointed A, his son, his executor. The testator had effected a policy of insurance. The policy expired on the 25th of March. The testator died on the 27th of March. The house was burnt down on the 26th of May. A. proved the will on the 17th of June. Evidence was given that, between the death of the testator and the 26th of May, A. had received money of some of the customers of the testator who had been a tradesman:—Held, that A. was not liable in respect of the breach of the covenant.

James Fry, the testator in the last case, was also at his death the lessee of a house held under a lease, which contained a covenant by him to insure the property for 300*l.*

The testator had effected an insurance for 300*l.*

The policy of insurance expired on the 25th of March 1834. The testator died on the 27th of March 1834, two days after. The house was burnt down on the 26th of May 1834. The executors, Cooper and Fry, proved the will on the 17th of June 1834.

The defendants sought to make John Fry's estate liable in respect of this breach of covenant by the testator, on the ground that John Fry had accepted the trust and

(2) 6 Sim. 281; s.c. 1 Law J. Rep. (N.S.) Chanc. 189.

(3) 24 Beav. 86; s.c. 27 Law J. Rep. (N.S.) Chanc. 157.

acted in the executorship before the fire took place, and that it was his duty, immediately after such acceptance, to have insured the house.

The only evidence on this point was as follows:—

For the defendants.—One Rowe stated that the testator was a tallow-chandler at Wrington, and that he, Rowe, was in the employment of the testator, and that it was his (Rowe's) business to carry about the goods in a cart. After the funeral he went his rounds as usual, by the direction and under the instructions of John Fry, who took the money and accounted with the customers.

J. S. Fry, one of the children of the testator, stated that he heard his mother, after the testator's death and before the fire, tell John Fry that the fire insurance was due, and ask him, as he went by the agent's office, to pay it.

For the plaintiffs.—Mr. James stated that he was the agent of the Fire Office at Wrington, and that it was not the custom of the office to issue notices that policies had expired or were on the point of expiring.

Mr. Lloyd and Mr. Shee, for the plaintiffs, stated the above case, and contended that John Fry's estate was not liable.

Mr. Freeling, for the defendants, contended that, under the circumstances stated in Rowe's affidavit, John Fry's liabilities in respect of the lease had been incurred before the fire—*Garner v. Moore* (1).

THE MASTER OF THE ROLLS.—It would be a strong measure to charge the executor with neglect in not having kept up the policy of insurance. There is no evidence that it really was on foot at the death of the testator; he was bound by the covenant in his lease to effect it, and to renew it before it expired. The accident took place before the executors proved the will; they were at liberty to take that duty upon themselves at any time. It was impossible, therefore, to say that they were bound to perform the covenant, or that they must be charged with the loss.

(1) 8 Drew. 277; s. c. 24 Law J. Rep. (N.S.) Chanc. 687.

M.R. }
Jan. 21, 22, 24; } **ADDAMS v. FERICK.**
March 18. }

Company—Bequest of Shares—Liability to Calls—Executors—Indemnity on Transfer.

A testatrix, who held unpaid-up shares in a banking company, bequeathed them specifically by a codicil to her will. She subsequently received notice of a series of calls on days named. This was accompanied by a notice that the first call must be paid on a specified day, and a form of receipt was inclosed. The testatrix paid the first call, but died before the days named for the other calls. Similar notices were sent to her executors fourteen days before each of the other days named for payment:—Held, that the notification of the series of calls did not create a charge on the estate of the testatrix within the meaning of the company's deed of settlement, or prevent a transfer of her shares; that the liability was created by the subsequent notice to pay, and that the legatees must take the shares cum onere, and that they must reimburse the executors such calls as had been paid by the executors after the death of the testatrix, with interest at 4l. per cent.

The practice of a company must affect the decision of a Court in questions relating to calls and the forfeiture of shares.

Executors who transfer shares in a company under a decree of the Court will be indemnified from future liability, when they have brought before the Court all the facts of the case.

Two questions were raised in this suit, the one, whether calls made on some new shares of the Union Bank of Australia, the property of Arabella Lewis, and by her specifically bequeathed, were payable by the specific legatees of the shares, or were payable out of her general personal estate. The other question was, whether the executors and trustees, and the estate of the testatrix, on the transfer of the shares to the specific legatees under the order of the Court, were indemnified and discharged from all future liabilities in respect of such shares, or whether a sufficient fund ought not to be appropriated and set apart, to answer all such future

liabilities as might arise. The facts are sufficiently stated in the judgment.

Mr. Toller and Mr. E. F. Smith, for the plaintiff, *Arabella Addams*, cited *Armstrong v. Burnet*, 20 Beav. 424; s. c. 34 Law J. Rep. (n.s.) Chanc. 473.

Parsons v. Dearlove, 4 East, 438.

Price v. Nison, 5 Taunt. 338.

Uterson v. Vernon, 4 Term Rep. 570.

Foley v. Fletcher, 28 Law J. Rep. (n.s.) Exch. 100.

Hickling v. Boyer, 3 Mac. & G. 635; s. c. 21 Law J. Rep. (n.s.) Chanc. 388;

1 De Gex, M. & G. 762.

Clive v. Clive, Kay, 600; s. c. 23 Law J. Rep. (n.s.) Chanc. 981.

Jacques v. Chambers, 2 Coll. 435; s. c. 15 Law J. Rep. (n.s.) Chanc. 225; 16 Law J. Rep. (n.s.) Chanc. 248.

Fitzwilliam v. Kelly, 10 Hare, 266; s. c. 22 Law J. Rep. (n.s.) Chanc. 1016.

Mr. Selwyn and Mr. W. P. Murray, for the executors and trustees, *Agnes Isabella Ferick and James Bartholomew Lowndes*.

Mr. R. Palmer and Mr. Rodwell, for some of the specific legatees, referred to *Marshall v. Holloway*, 5 Sim. 196.

Blount v. Hopkins, 7 Sim. 51; s. c. 4 Law J. Rep. (n.s.) Chanc. 13.

Wright v. Warren, 4 De Gex & Sm. 367.

The Sheffield, Ashton-under-Lyne and Manchester Railway Company v. Woodcock, 2 Rail. Cas. 522; s. c. 10 Law J. Rep. (n.s.) Exch. 492; 11 Law J. Rep. (n.s.) Exch. 26; 7 Mee. & W. 574.

The Newry and Enniskillen Railway Company v. Edmunds, 5 Ibid. 275.

Ex parte Took, in re the Londonderry and Coleraine Railway Company, 6 Ibid. 1; s. c. 18 Law J. Rep. (n.s.) Q.B. 343.

The London and North-Western Railway Company v. M'Michael, 5 Exch. Rep. 855; s. c. 6 Rail. Cas. 495; 20 Law J. Rep. (n.s.) Exch. 6.

The Birkenhead, Lancashire and Cheshire Junction Railway Company v.

Webster, 6 Exch. Rep. 277; s. c. 6 Rail. Cas. 498; 20 Law J. Rep. (n.s.) Exch. 234.

Mr. G. J. Wood, for *Caroline Colborne*.
Mr. Toller, in reply.

March 18.—THE MASTER OF THE ROLLS.
—The Union Bank of Australia was incorporated by deed, dated the 28th of October 1837. The capital consisted of 20,000 shares of 25*l.* each. Of these the testatrix, at her death, possessed 629 shares, all of which were paid up in full. On the 8th of June 1841 the directors resolved to double their capital, and for this purpose to create 20,000 new shares of 25*l.* each. This was done by a resolution passed at a general meeting which was held for that purpose. From extracts of the minute of the special board of the 8th of June 1841, it appears that they came to a resolution to this effect:—"The question having been discussed of the propriety of bringing forward a motion at the approaching general meeting to extend the capital of the bank to 1,000,000*l.*, resolved, that the general meeting to be held on the 11th instant be made special for that purpose, and that advertisements be accordingly inserted in the morning papers." This course was recommended by a report read to the general meeting on the 11th of June 1841. The course ultimately adopted was this:—"The directors allotted one new share to every holder of four old shares, and the testatrix consequently became possessed of 159 new shares. The first instalment on these shares was 2*l.* 10*s.*, which was payable on the allotment of the shares, and was paid by the testatrix. On the 9th of May 1856 the testatrix made her will, by which she appointed the plaintiff, *Arabella Addams*, her residuary legatee. On the 12th of March 1857 she added a codicil to her will, which was in these words:—"Of my shares in the Union Bank of Australia, on which as yet only the first instalment of 2*l.* 10*s.* per share is paid, I bequeath as follows:—To *Elixa*, wife of *Col. Kingston Phibbs*, forty shares for her separate use; to *Harriette Pyper*, widow, thirty other of the said part paid shares for her use; to *Caroline*, daughter of the *Rev. John Colborne*, forty other of the said part paid shares, for her

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use; and to Sarah, wife of Henry Doblin, forty other of the said part paid shares, for her separate use." And she ratified her will in every respect.

On the 24th of December 1857 the directors "resolved, that, in consideration of the increased business of the branches, and of the colonies opened during the present year, it is the opinion of the board, that the remaining capital of the bank, 180,000*l.*, being 22*l.* 10*s.* per share on 8,000 shares of the third issue, be called up; that the time and mode of doing this be notified to the proprietors in the report to be submitted at the next special general meeting."

The following resolution was adopted by the directors on the 8th of January 1858:—"That it is expedient to call up the unpaid capital of 22*l.* 10*s.* per share on the shares of the third issue in the proportions and at the dates following, viz., 7*l.* 10*s.* on the 1st of February next, 5*l.* on the 1st of April next, 5*l.* on the 1st of July next, and 5*l.* on the 1st of October next."

On the 11th of January 1858 the directors made their report to the extraordinary general meeting of the proprietors of the bank, which was held for that purpose, and after stating various circumstances and suggesting the result, the Report continued as follows:—"Under these circumstances, and having regard to the general expansion of the bank business, the directors have resolved, that it is expedient to call up the unpaid capital of the shares of the third issue; they have, therefore, fixed the following periods and amounts for the calls on these shares, viz., 7*l.* 10*s.* per share on the 1st of February next, 5*l.* on the 1st of April next, 5*l.* on the 1st of July next, and 5*l.* on the 1st of October next." The general meeting of the 11th of January 1858, passed a resolution in these words:—"It was resolved unanimously, that the Report now read be approved and adopted, and printed as usual for the information of the proprietors." The following resolution was read from the chair:—"That the periods and instalments fixed by the directors for calling up the unpaid capital on the third series of shares be hereby authorized and approved." Before putting

the question, the chairman read the following statement:—"With regard to dividends on these instalments, the same course will be followed by the directors as in the case of the second series of shares, viz., the two instalments payable in February and April will receive a half-year's dividend at Christmas next, and the two other instalments, payable in July and October, will receive a half-year's dividend at Midsummer 1859." The resolution was carried unanimously.

There was also a resolution that the periods for the payment of the instalments should be authorized and approved. No further resolution was passed at this general meeting, but on the 16th of January 1858 a printed circular was issued to the shareholders, which was in these words:—"I have to notify to you that by a resolution passed at the extraordinary general meeting of the proprietors of this bank, held at this office on the 11th instant, and in accordance with the course pursued on the issue of the second series of shares as there stated the directors, you are required to pay 12*l.* 10*s.* on your 159 shares of the sum say, 7*l.* 10*s.* on the 1st of February, 5*l.* on the 1st of April next, in regard to which payments these shares will be entitled to rank proportionally with the other paid-up capital in the dividend profit declared for the half-year ending 31st of December next; and, further, you are required to pay within the half-year commencing the 1st of July next, namely, 5*l.* on the said 1st of July, and 5*l.* on the 1st of October, after which payments the shares will become entitled to rank in common with the full paid-up capital in the dividend of profit declared for the half-year ending the 30th of June 1859. The shares will be liable to forfeiture if several instalments are not paid on days appointed." On the same 16th of January the following circular also addressed to the shareholders:—"I inform you that the second instalment of the inclosed circular, 7*l.* 10*s.* (seven pounds ten shillings) share on — shares of the third series held by you in this bank must

on or before the 1st of February next, to Messrs. Glyn, Mills & Co., bankers, Lombard Street, who will give you their receipt as at foot." And at the foot of this circular was the following form of receipt:—"Received, on account of the Directors of the Union Bank of Australia, the sum of — pounds — shillings, being an instalment of 7*l.* 10*s.* per share on — shares of the third series, called pursuant to the resolution of the general meeting of proprietors, held on January 11th, 1858, for Messrs. Glyn & Co." In pursuance of this notice, the testatrix, on the 28th of January 1858, paid the first call of 7*l.* 10*s.* on her 159 shares. On the 17th of February following the testatrix died.

On the 16th of March following a circular was sent to the shareholders of the new shares, and, amongst others, to the executors of the testatrix, which was in exactly the same terms, except that it did not say "in the terms of the inclosed circular," but simply, "I beg to inform you that the second instalment of 5*l.* per share on the — shares of the third series is to be paid on or before the 1st of April next, to Messrs. Glyn, Mills & Co., bankers, Lombard Street, who will give you their receipt as at foot."

The executors of the testatrix paid the second instalment out of her general estate. The same course was adopted with respect to the third and fourth instalments. Fourteen days before the instalment became due, namely, on the 16th of June 1858, a similar circular was sent, and on the 16th of September 1858, a similar circular was sent for the payment on the 1st of October.

The question is, whether these last three instalments, which were paid by the executors, ought to be repaid by the legatees of the shares respectively, or whether they are properly payable out of the general personal estate. Having regard to the cases, and particularly to *Armstrong v. Bernet*, I think that this question must depend simply on the question of fact, whether the calls were actually made before or after the death of the testatrix. If the testatrix had died before the Report of the directors made at the meeting of the 11th of January 1858, the subsequent

calls would, consistently with the rule I have laid down, have fallen on the legatee who accepted the legacy; but the question here is, whether what occurred prior to the death of the testatrix amounted to a call of the three instalments which were paid subsequently to her death. This requires a somewhat critical examination of the facts relating to those calls. It is certain, that on the 11th of January 1858, the Report to the meeting recommended that the shares should be paid in full; that there then remained 22*l.* 10*s.* to be paid up, and that the Report recommended that this amount should be paid by the four calls on four separate days, and that on the 16th of January a circular was sent to the shareholders specially intimating the fact to them. It is contended, by the legatees, that this constituted a valid and effectual call for the payment of each of the four instalments. On the other hand, it is contended, by the residuary legatee, that this is not a call for the payment of the instalments, but simply notice that the calls would be made; and this is insisted upon principally in consequence of the subsequent notice given to the shareholders to pay the instalments, and which it is argued is confirmed by the construction put on the deed of settlement by the company itself with relation to its practice in regard to these shares. On the whole, and after some hesitation, I have come to the conclusion, that the resolution of the 11th of January, and the circular of the 16th of January, constituted merely a notice that the subsequent calls would be made, although I am of opinion that the paper which accompanied the circular of the 16th of January, and of even date, was a call for the first instalment. It may, perhaps, be asked why, if this was a call of the first instalment, it was not a call of the second, third and fourth instalments, as the same words are used; but I think that the answer is to be found in the subsequent notice for the payment of the call, that was sent regularly a fortnight before each payment was required, and which notice accompanied the circular given on the 16th of January. In order most carefully to consider which of the applications ought to be designated as a call, I have been referred to the mode in which

the company itself regarded it, because this is obvious, that the company itself is paramount as to what constitutes a call; and according to the practice of the company, the second notice, that is to say, the notice given a fortnight before the actual payment, was the real call, and not the former. I find it is provided by clause 59. of the company's deed, "That no proprietor holding any share or shares upon which any call duly made by the board of directors shall not have been paid, shall be entitled to sell or dispose of such share or shares, or receive any dividend or bonus thereon, or to vote at any meeting of the proprietors of the said company, or exercise any other right or receive any advantage whatsoever in respect of such share or shares until such call shall have been fully paid, together with all interest thereon; and that if any proprietor shall sell or dispose of such share or shares contrary to this provision, such sale shall be void, and the share or shares so attempted to be sold or disposed of, shall be liable to be declared by the board of directors forfeited to the company."

It is in evidence, that after the first notice, and up to the time when at all events the final notice was given, the shares were permitted to be transferred in the books of the company. There is no evidence whether any transfer was permitted during the fortnight which elapsed after the final notice of the call; and on that subject it is not extremely important. The result upon the whole case is, that the calls in respect of which the final notice was given after the death of the testatrix must be paid by the legatees, and not out of the general residuary estate of the testatrix; and they must pay interest upon the amount at 4l. per cent. from the respective times of payment.

Mr. Toller.—There appear to be no debts on the testatrix's estate.

Mr. Selwyn.—The question of debts has not been adverted to; but if I recollect right, the opinion of the Court is, that although these are the shares of a company with entirely unlimited liability, still, as all the facts have been brought fully to the notice of the Court, the executors are held indemnified from all future

liability in respect of them. This is very great—*Waller v. Barrett*

The MASTER OF THE ROLLS.—opinion that the executors must be perfectly harmless and secure from liability; to obtain indemnity it is of the executors to bring all before the Court, otherwise, if they pressed anything wilfully, no indemnity could be awarded to them.

M.R. }
1858. } DE WINTON v. THE
July 29, 30. } &C. OF BRECKENRIDGE

Corporation—Tolls—Receiver appointed.

A corporation, by act of parliament authorized to raise money by debentures, the tolls, rents and stallages of the markets. The interest upon these debentures was allowed to fall into arrear:—The Court could grant a receiver of the tolls, rents and stallages, but that it had no jurisdiction to interfere with the corporation in the letting or management of the stalls, &c. in the markets.

This was a motion for the appointment of a receiver of the rents and profits of the estates of the mayor, &c. of Brecknockshire, of the tolls, rents and stallages, and monies payable under and by the 1 Vict. c. xii.; and further that the receiver might be authorized to manage from time to time let the corporation and also the stalls, shops, standing shambles, benches and other concerns of the several markets, and generally to exercise the powers of the act, or that they might be exercised under the direction of the Court.

It was also asked that the receiver should be allowed a salary for his care and upon his giving security to account for what he should receive.

The Court, on the 8th of July, made an order in the terms of the notice of motion, but two other notices were afterwards filed by leave of the Court, the one by the corporation, and the other by

Parry, the former asking that the order for a receiver of the tolls and stallages might be discharged, and the latter that the order for a receiver of the rents, tolls and stallages might be discharged, and that the rights and interests of W. Parry might be protected.

By the 1 Vict. c. xii. the corporation of Brecon were empowered to rebuild and enlarge the markets, and for that purpose they were empowered to purchase and take lands, and also to issue debentures for securing the repayment of money advanced by parties for the purposes of the act. They were also directed to sell so much of the lands purchased and taken by virtue of the act as were not required for the purposes of the markets.

The markets were completed and the market-house was opened to the public on the 4th of April 1840.

The plaintiff was a holder of five debentures of 100*l.* each, and he filed the bill in this suit complaining that since the 1st of January 1851 no interest had been paid upon any debentures, except those collaterally secured by a mortgage to Sarah Judith Payne of the market-house, and other lands which had been taken by the corporation, and which had not been sold as directed by the act, and that interest even on those debentures had been paid only to the 4th of September 1855.

The bill alleged that an income of 210*l.* was secured to the corporation by the Market Act, and that they had no interest in the efficient management of either the old or new estates; that they had been mismanaged and neglected; that parts of the property were let below their value despite of advantageous offers; that they had lost some of the estates by omitting to collect the rents for twenty years; that they had not applied the purchase-money of parts of the lands sold in reduction of the debt, and that they had expended money in the repair of other parts which they had neglected to sell. It charged them also with neglecting to enforce payment of the rents, tolls and stallages, and with dealing with the property contrary to the 1 Vict. c. xii. and the Municipal Corporation Act (1). It also charged

them with not keeping proper accounts, and with blending one year's rent with another.

The bill then prayed for a sale of the property remaining unsold, and for an account of the income arising from the estates and from the markets. It also prayed for the appointment of a receiver, not only of the corporate estates, but also of the rents, tolls and stallages, and of all money payable under the 1 Vict. c. xii., and that he might have full power to let the estate, &c. and to exercise the powers of the act.

Mr. R. Palmer and *Mr. Hardy* now moved for the appointment of a receiver.—They cited

Ames v. the Trustees of the Birkenhead Docks, 20 Beav. 332; s. c. 24 Law J. Rep. (N.S.) Chanc. 540.

Fripp v. the Chard Railway Company, 11 Hare, 241; s. c. 22 Law J. Rep. (N.S.) Chanc. 1084.

Mr. Follett and *Mr. C. Barber*, for the corporation.—The Court cannot appoint a receiver of the market tolls, &c. or authorize the receiver to exercise the powers of the act. It would be a direct contravention of the act, and subject the corporation to proceedings at the instance of the Attorney General. The Market Act does not authorize any appointment of a receiver.

Mr. Osborne Morgan, for W. Parry, a judgment creditor of the corporation, who had advanced 750*l.* upon an agreement that he should have a transfer of Vaughan's mortgage.

THE MASTER OF THE ROLLS.—You are entitled to have a receiver appointed. It is not necessary that the act of parliament should give a power to appoint a receiver to enable this Court to make the appointment, but when an act of parliament authorizes a mortgage to be made it necessarily authorizes that the mortgagee shall have, as incidental to his character of mortgagee, all proper and appropriate remedies which belong to that peculiar character as against the mortgagor, and there is, especially in the case of tolls, whatever they may be, the power of appointing a receiver. I cannot regard the argument that the corporation

(1) 7 Will. 4. & 1 Vict. c. 78.

must be considered as the first incumbancers on this fund, and, therefore, entitled to take possession of this property. They are, in fact, the mortgagors; they certainly mortgaged the property subject to a varying and uncertain rent-charge in their favour, but subject to that they are the mortgagors, and they can be regarded in no other light than a person who, as the owner of property subject to a quit-rent, which was payable to himself, had mortgaged the property subject to that quit-rent, in which case the mortgagee would still be entitled to the possession of the property, always keeping down and paying the quit-rent; this, however, must be considered in settling the form of the order when applying the tolls. In this case the security is subject to the payment in priority of the sum mentioned in the 1 Vict. c. xii. s. 34. If it had said that the payment shall amount to 210*l.* a year, it would have been simple and plain, and the receiver would have nothing to do but to pay that out of his receipts, but it is "to pay such a sum as, with the rents, tolls and dues which shall be received by the corporation from any property belonging to them, other than the tolls, rents and stallages authorized to be taken by the act, shall amount to 210*l.* a year." The consequence is, that it may involve an account every time it is to be paid, and the only mode in which that can be got over is, by giving a general liberty to apply in case of difficulty. The order, however, appointing a receiver should contain a statement that the receiver should be at liberty, out of the first tolls, rents and stallages received by him, to pay to the corporation such a sum of money as, together with the tolls, rents and dues received by them from the property, shall make up the 210*l.* per annum. As, however, the act of parliament has authorized the mortgage of these tolls, and the interest has been allowed to fall into arrear, the Court will appoint a receiver of the tolls, but it will not at the same time give the receiver such a management of the affairs of the corporation as is incidental to that, so as to make them, as has been argued, liable to proceedings by the Attorney General, either by mandamus or the like. If it would produce any such effect the corporation must let the tolls, but the receiver must

receive them and pay to the corporation what, upon the affidavit of the borough treasurer, shall with the rents of their other property appear necessary to make up the sum of 210*l.*

M.R. }
 Jan. 25, 26, } DE WINTON v. THE MAYOR,
 27, 31. } &c. OF BRECON.

Statute—Conflicting Enactments—Borrowing Powers, with a Declaration of Equality among Lenders—Power to Mortgage—Double Security—Priority.

The Brecon Market Act empowered the corporation to purchase lands for enlarging the borough market, &c., and it directed them, within seven years after the passing of the act, to sell so much of the lands as were not required, the proceeds to be applied for the purposes of the act. They were also empowered to borrow money on debentures, and one holder was to have no priority over another. Power was also given to borrow money on mortgage, or by sale of the corporate property. The corporation was directed to apply all money received under the act, and the rents of the estates, and the tolls, &c. of the market, after paying various charges, in payment of the money borrowed. The act also contained a clause restraining the corporation, without the consent of the Lords of the Treasury, from taking, appropriating, using, selling, demising, mortgaging or alienating for the purposes of the act any messuages which they could not have taken, &c. before the act passed. Upon a bill, by a debenture holder,—Held, that a mortgage of lands made to a debenture holder, as a further security for money advanced on debentures, could not be supported; that such mortgage gave no priority or preference to the mortgagee; and that the lands comprised in the mortgage (being part of those purchased under the act) must be sold, and the money applied in discharge of the debts as directed by the act.

This suit was instituted, by Henry De Winton, who held five debentures of 100*l.* each, issued under the Brecon Market Act, 1 Vict. c. xii., against the Mayor, Aldermen and Burgesses of Brecon, and Sarah Judith Payne, and, except as to her, it

Prayed, on behalf of himself and all the unsatisfied debenture holders, or assignees and creditors, under the Market Act, that the "Queen's Head" and other lands purchased and taken by the corporation under the Market Act, and never used for the purposes thereof, might be sold, and the proceeds applied under the direction of the Court. It also prayed for accounts of the property and estates of the corporation at the time of passing the act and at the present time, and an account of all sales and purchases under the act, and of all monies received from such sales by the corporation, together with an account of the rents of the corporate property received since the act passed, and a like account of all tolls, rents, stallage and all other monies from time to time received by the corporation under the act, and of the application thereof. It further prayed for a receiver, and that he might be authorized to let the estates and exercise the powers of the act; and that all rents and profits, and the tolls and stallage might be applied in accordance with the provisions of the act.

The Brecon Market Act, 1 Vict. c. xii. (local and personal) was passed in 1838. It empowered the mayor, &c. of the borough to purchase and take such messuages, lands and hereditaments within the borough as they might think necessary for the purposes of the act; it also authorized them to contract with the owners and occupiers of any other messuages, buildings, lands or hereditaments within the borough, and to take down, alter and use the same as well as any other lands purchased by or belonging to the mayor, &c. for the purposes of the act. It then empowered them to erect a market-house and make a market-place, with all necessary stalls, standings and other conveniences for the accommodation of the public, and to preserve, regulate, maintain and use the same. Section 29, after reciting that the mayor, &c., by means of the purchases, might happen to be seized of more land than would be necessary for the purpose of the act, enacted that it should be lawful for the mayor, &c., and they were required within seven years after the passing of the act to sell any such land; provided they first offered to re-sell the land to the person from whom the same was purchased in

case he should then be the owner of the adjoining land, and in case he should have died or should decline to re-purchase, then that the offer should be made to the owner of any adjoining land, and they were to convey the same to the purchasers; and the money produced by such sales was to be applied to the purposes of the act.

Section 30. empowered the mayor, &c., from time to time to borrow and take up at interest such sum or sums of money as the mayor, &c. should think necessary for providing, erecting, altering, repairing and improving the new market-house or market-place upon the credit of the tolls, rents and stallage to be levied and collected by virtue of the second schedule to the act annexed, and by writing under their common seal to assign all or any part of the rents and stallage to be received by the mayor, &c., by virtue of the second schedule to the act annexed, to such person as should lend or advance any money thereon, or to his trustee, as a security for any sum of money so to be advanced, with lawful interest for the same, and the charges and expenses of such assignment, to be made in manner and form thereafter mentioned, should be from time to time defrayed by the mayor, &c. out of the money so borrowed, and every such assignment should be by deed duly stamped, in which the consideration should be fairly stated, and might be in the words or to the effect next thereafter stated; and all persons to whom such assignment should be made or who should be entitled to the money thereby secured should be, in proportion to the sums thereby respectively mentioned, creditors on the said tolls, rents and stallage (as the case might be), equally one with another, without any preference in respect of the priority of advancing such money on the dates of any such assignments; and every such security should be good, valid and effectual in the law, and should entitle the person to whom the same should be made, his executors, administrators or assigns, to the payment of the money thereby secured, and to all profit and advantage thereon, according to the true intent and meaning of the act.

Section 31. enacted that it should be lawful for the persons entitled to any of

the securities for the money to be borrowed on interest as aforesaid, and their respective executors, administrators or assigns, as the case might be, at any time, by writing under their respective hands and seals, duly stamped, in which the consideration should be truly stated, to transfer such securities to any person whomsoever, and every such transfer might be in the words or to the effect next thereafter stated.

Section 34. enacted, that the mayor, &c. should, and they were thereby directed to apply the money to arise or to be received by virtue of the act, and subject as therein mentioned, the tolls, rents and stallage thereby authorized to be taken in manner following, viz., in the first place in paying and defraying the costs, charges and expenses of applying for and incident to the obtaining and passing of the act, together with interest thereon from the time of advancing and disbursing the same; then in paying the costs, charges and expenses incident to and attending the forming, erecting, fitting up and making commodious for the public, the said market-places and conveniences connected therewith; in the next place, in retaining and setting apart such sum or sums of money as, with the rents, tolls and dues which should be received by the mayor, &c., from any property belonging to them other than the tolls, rents and stallage authorized to be taken by the act, should be equal in amount to or necessary to make up the annual sum of 210*l*. (the amount of the net annual income of the mayor, &c.), from the whole tolls of the borough and other property of or belonging to them, of which sum of 210*l*. a competent part should be applied by the mayor, &c. towards defraying the interest of any incumbrance then affecting their said property, and the remainder should be by them applied to such purposes and in such manner as they were by law then authorized and empowered to apply their net annual income; and afterwards their said surplus tolls, rents and stallage should be applied in paying the interest of all monies which should be borrowed under and by virtue and for the purposes of this act, and subject to the said costs, charges, expenses and payments aforesaid, the residue of the

same surplus tolls, rents and stallage, should be divided into two equal moieties, one of which should be paid unto and among the persons entitled to any of the securities for the money to be borrowed on mortgage as aforesaid, and their respective executors, administrators and assigns, as the case might be, in proportion to the respective sums advanced by him, her or them, without any preference by reason of the priority of date of any such mortgage or any other account whatsoever, and the other moiety of the said residue of the surplus tolls, rents and stallage should be retained by the mayor, &c., towards enabling them to pay off, in manner thereafter mentioned, the money borrowed on mortgage, and after payment thereof the whole of the surplus tolls, rents and stallage should be by them applied to such purposes of public benefit within the borough as to them should seem meet.

Section 37. enacted, that within one month after Michaelmas-day in each and every year the mayor, &c. should, and they were thereby required to make a just and true statement or account of all sums of money by them received and expended in the execution of the act; and should also in such statement or account particularly specify the several items and articles for which each particular sum had been received, disbursed and paid.

Section 44. enacted, that it should be lawful for the mayor, &c., and their successors, and they were thereby authorized and empowered to let any or either of the stalls, shops, standing-places, shambles, benches and other conveniences in the several market-places, to any person who might be willing or desirous of taking the same for any term not exceeding three years: provided always, that the tolls and rents so to be taken should not in any case exceed the sums mentioned in the second schedule to the act.

Section 83. enacted, that nothing in the act should enable the mayor, &c. of the borough of Brecon to take, appropriate, use, sell, demise, mortgage or alienate for the purposes of the said act, without the approbation of the Lords Commissioners of Her Majesty's Treasury, or any three of them, any messuages, lands or here-

ditaments which they could not have taken, appropriated, used, sold, demised, mortgaged or alienated, without such approbation, before the passing of the said act, anything therein to the contrary notwithstanding.

Before the Market Act, the estates of the corporation consisted of, first, the manor of the borough of Brecon, with the chief rents, amounting to 23*l.* per annum, and the profits of courts leet; secondly, a shire or town-hall, since used as the town-hall and corn-market, with cellar and warehouses attached, and let separately; thirdly, a town gaol, the site of which is now sold; fourthly, several houses and lands, mostly let on long leases, at rents amounting to 38*l.* 6*s.* 6*d.* per annum, or thereabouts, and others occupied by the corporation; fifthly, the tolls of fairs and drift-toll, payable on all goods of persons, not natives, passing through the borough; sixthly, the tolls of markets held under the town-hall and in the streets.

This property, when the act passed, was computed to produce 210*l.* per annum. It was, however, subject to a mortgage, dated the 17th of July 1835, which had been granted by the old corporation to Philip Vaughan, to secure the repayment of 750*l.* and interest; and this, by an indenture, dated the 4th of March 1840, became vested in the defendant, Sarah Judith Payne.

The corporation, under the Market Act, purchased some premises, called the "Queen's Head," and other lands, at divers sums, amounting to 3,630*l.*; and they used a portion for the new market. They also sold a portion of such lands, by which they realized a sum of 2,180*l.*; but they still retained a portion of the purchased hereditaments, though they were not required for the market.

The market-house was erected, and opened for public use on the 4th of April 1840.

By an indenture, dated the same day, after reciting that Sarah Judith Payne had agreed to lend a sum of 1,500*l.* to the mayor, &c. of Brecon, upon having the same secured by a mortgage of the tolls, rents and stallage, and also by a mortgage of the freehold property, of which the corporation were seised under the act, and

reciting that the mayor, &c. had that day duly executed and given to Sarah Judith Payne three several debentures for 500*l.*, upon the credit of the tolls, rents and stallage; it was witnessed that the corporation granted and conveyed the "Queen's Head," and all those several pieces of ground upon which the new market-house or market-place, called the Brecon New Market, was then erecting, together with the several erections, buildings and appendages then or thereafter to be built thereon in connexion with the new market, to hold the same to Sarah Judith Payne, her heirs and assigns, for further securing to her the 1,500*l.* and interest, which was also secured by the three debentures for 500*l.* each, upon the tolls, rents and stallage. The deed also provided that in case default should be made in payment of the 1,500*l.* and interest at the time mentioned, it should be lawful for Sarah Judith Payne, without any further consent of the corporation, as soon, or at any time thereafter as might be convenient, to sell the debentures; and in case they should not produce the whole 1,500*l.* and interest, then in like manner to sell the said messuages, hereditaments and premises thereby granted to her, and to apply the money received thereby in discharge of the said mortgage debt.

The mortgage comprised land on the surface of which a part of the new market was then building and afterwards stood, and also land on which some warehouses or cellars, with arched roofs, let by the corporation at fixed rents, not being then or ever used as a market, or ever opened to the public, and having an entirely separate approach, on the roof of which the remainder of the new market was built and held, and also comprised other premises totally distinct from the market, viz. the the "Queen's Head" or market-tavern, with the yards, stables, &c. and other premises, and which had never been used as a market. No interest had been paid upon any debentures from the 1st of January 1851, except on those collaterally secured by the mortgage to Sarah Judith Payne; and the interest upon those had been paid only to the 4th of September 1855.

It was then alleged that the corporation had no interest in the efficient management,

either of the new or old corporate property, as they were empowered to take from the tolls, rents and stallage sufficient, with the income of the general corporate property, to make up the corporate income of 210*l.*, to which they were entitled before the passing of the act. It was also alleged that the corporation had mismanaged and neglected both classes of property; and it charged that they let parts of the old corporate property at rents below the value, and that they refused advantageous offers, and that they had lost some property by omitting to obtain any payment of rent or acknowledgment of title for twenty years or more; that they allowed the chief rents of the manor of the borough to remain unpaid, so that some had been lost; that they had sold divers parts of the corporate property, and had not applied the purchase-money in reduction of the debt due thereon; that they had expended money on repairs of the "Queen's Head," &c.; that they had neglected to enforce tolls, rents and stallage to a considerable amount, and particularly from persons trafficking by means of hand-baskets, and from persons selling corn in public or other houses, not being shops; that the corporation, since the passing of the act, had not only sold portions of the corporate property, but they had also made the mortgage to Sarah Judith Payne as a security for the 1,500*l.*, without the consent of the Lords of the Treasury; that the accounts directed to be made out annually by the corporation had been made out at irregular periods, the last of which was from the 1st of June 1852 to the 30th of June 1856; and from that it appeared that the corporation had paid the interest on the old mortgage for 750*l.*, and the rents of premises held by them, viz. the borough lock-up and fire-engine shed, and of three houses previously sold by them without the concurrence of the mortgagee, amounting to 18*l.* 8*s.* per annum, and had also allowed him to receive the corn and market-tolls, with the tolls of fairs and drift-tolls; and that the treasurer had paid both the mortgage debts of Sarah Judith Payne, the costs of repairs ordered by the corporation, and the costs of maintaining the market and of the collection of the tolls; that the corporation declined to let the tolls separately, or to

take any toll from dealers by hand-baskets and on the sale of corn.

Mr. R. Palmer and Mr. Hardy, for the plaintiff, insisted that the surplus estate ought to be sold, and that the proceeds and rents, together with the tolls, rents and stallages, ought to be applied in paying *pari passu* the debenture-holders, and that S. J. Payne, in consequence of the mortgage she had obtained, had no right to any priority or preference—*Lord Crewe v. Eddleston* (1).

Mr. Follett and Mr. Barber, for the corporation.—The Court had no jurisdiction to interfere with the corporation in the management of the estates.

Mr. Eddis, for Edward Seymour and others, executors of S. J. Payne, who had died since the institution of the suit, claimed the benefit of the contract made with the corporation.

THE MASTER OF THE ROLLS.—The question I have to consider is, whether the mortgage to S. J. Payne is valid against the plaintiff; and upon the construction of the act of parliament, I think it is not. When an act of parliament contains two sets of provisions, one being specific, with precise directions to do particular things, and the other being general, prohibiting certain acts, which in their general sense will include the particular acts in the statute, the general clause does not control the specific enactment. For instance, if there is an authority in an act of parliament to a corporation to sell a particular piece of land, and there is then a general clause at the end that nothing in this act contained shall authorize the corporation to sell any land, that would not control the particular enactment, but the particular enactment would take effect notwithstanding it was not clearly expressed and distinct, and the insertion of the exception in the general clause would be supplied. If the Court finds a positive inconsistency and repugnancy, it may be difficult to deal with it, but, so far as it can, it must give effect to the whole of the act of parliament. In this act there is authority to buy lands for the purposes of the act; and if among them there are lands which are

(1) 1 De Gex & Jo. 63.

not required for the purposes of the act, then the act requires and commands the corporation to sell those particular lands at a specified time. The act then authorises the corporation to sell, convey and dispose of any lands for the purposes of the act; it authorises the corporation to borrow money on mortgage of the property of the corporation generally, and for that purpose to convey, sell and dispose of any of the property relating to the corporation. That general clause must be read concurrently with the other part of the act, that is to say, that, having directed particular lands belonging to the corporation to be sold in a particular manner, this general clause must be construed to apply to the rest of the land of the corporation. The effect of this would be in substance to overrule 7 Will. 4. & 1 Vict. c. 78. s. 97. (the Municipal Corporation Act). By section 83. the provisions of the Municipal Corporation Act, with respect to the impediments and fetters put upon the alienation of land, are repeated over and over again for the purposes of this act, and it is directed that they shall have no power to alienate any land, except with the sanction of the Lords of the Treasury. That applies, not to 7 Will. 4. & 1 Vict. c. 78. s. 97, but to that which is included in 1 Vict. c. xii. s. 32, and that the sanction of the Lords of the Treasury must be taken to ascertain that it is for the purposes of the act they require to sell. On this, it is argued, that under this section, there is power to mortgage any land for the purposes of the act, and that therefore, if they are empowered to mortgage land for the purposes of the act, it will extend to the surplus lands, and that the clause relating to the sale of the surplus lands will only apply to so much as shall remain after they have been mortgaged for the purposes of the act. But the 1 Vict. c. xii. s. 32. directs that land shall be sold, and the purchase-money applied for the purposes of the act, and, consequently, the section must be expressly and distinctly so applied, and nothing can appear more inconsistent with 1 Vict. c. xii. s. 29, or more calculated to overrule it, than that this should be the construction when it is said, "Before they shall sell and dispose of any

such land or ground they shall first offer to re-sell," &c. This section does not give a permission, but a direction for the purposes of the act to sell this land in a particular way. Can the corporation mortgage that land to a stranger, and tell the stranger, You shall sell the land in any manner you please? The whole thing is put an end to. Suppose the corporation wanted expressly to get rid of this; suppose they wanted the proprietor of the adjoining land, who had sold his land, not to have it again, and they did not want it to be offered to him, they might mortgage it to a stranger with a power to sell it to anybody he pleased, and thereby defeat the object of the act of parliament. It is impossible that such can be the construction of these two clauses taken together. Nothing appears to be more consistent than this, that, with respect to the particular land which you have bought, and which site you do not want for the purposes of the act, you shall sell it in a particular manner, and the other land you may mortgage, alienate or sell as you think fit for the purposes of the act; provided always, that nothing in this act shall enable you to put this power into operation, except with the sanction of the Lords Commissioners of Her Majesty's Treasury, who are to be the guardians and are to ascertain that you do *bona fide* sell it for the purposes of the act. That makes the whole clear and consistent. I do not see how it can be said that for the purposes of this act this is to be taken as a separate and distinct transaction. Under the 1 Vict. c. xii. s. 30. the object is to place all debenture holders on the same footing. The plaintiff advances money upon the security of these tolls for the purposes of the act, the defendant, S. J. Payne, also advances money, but in order to defeat this clause and get a priority, she contracts with the corporation that she is to have a mortgage upon other property of the corporation, in order to give her a priority or control over it, and in order that she may dispose of this first, which will evidently give her a manifest advantage, because, after the sum of 210*l.* is paid to the corporation, all the debenture holders would share. She is a debenture holder, and by taking this additional security, she does

not acquire priority; on both these grounds, therefore it is impossible to say, as against the plaintiff, that this is a mortgage which will give priority over the plaintiff in this suit. A very different case may arise. In this case, however, S. J. Payne has not obtained any priority against the plaintiff, and the other debenture holders, on behalf of whom the bill is filed, but it leaves the covenant of the corporation with S. J. Payne quite untouched.

By 1 Vict. c. xii. s. 29. the corporation are required to sell within seven years after the passing of the act; they have not done so, and it is difficult to say they are not compellable to sell, and that any person interested under the act may not enforce that sale, certainly it is not given to them to deal with merely at their discretion. If it is insisted on, the plaintiff is entitled to have a sale, but I doubt much whether it would be for his benefit, and yet with an express and positive declaration of the statute that the sale shall be made, I am apprehensive whether I am entitled, even with the consent of the parties, to say that the Court will not enforce the statute according to the clause, which is compulsory on the corporation. I should, however, like to be referred to a case in which a similar matter has been dealt with; the disposition of the Court would be to act in a way most productive to all parties. I must continue the receiver of the tolls and stallages of the market-place; but the corporation, at the close of every year, will have to give a detailed account of their receipts, for the purposes of the act, including such sums as they would have received but for the incumbrances created by themselves. It will not be long; still it must be sufficiently detailed to shew distinctly the nature and extent of the receipts from each different source: it must shew those distinctly and clearly. When that is once done, the receiver is to act upon it as if it could not be disputed, and he is to pay over, out of any money in his hands, to the corporation such a sum of money as, with the balance in the hands of the corporation, will amount to the sum of 210*l*. When that is done the debenture holders to whom this account is rendered may, if they think fit, under this suit, make an application in chambers, and require

the accounts to be taken on disputed items, but not so as to require it to be brought into court; and so from time to time it can be disposed of, and the balance to be carried over to the next year settled in the ordinary way, so that it will be rectified by the receiver's account in the next year. The receiver is not to be at liberty to dispute that, but he is to pay over the balance; or rather, if there is any, he is to apply it in payment of what is due to the debenture holders.

Jan. 31.—THE MASTER OF THE ROLLS.
—I have difficulty and doubt respecting the position of the corporation. It is singular; but upon the whole, I cannot let them have their costs added to the 210*l*. in the first instance, before all the other parties; the corporation must take them out of the 210*l*., but after the payment of the others they may have their costs out of the estate; that will amount to the same thing. I treat the corporation as one having a charge upon it of 210*l*., which they are entitled to; they have power to mortgage their property, tolls and stallages, and the like, subject to that rent-charge, and therefore, after the rent-charge is satisfied, the first to be paid are the mortgagees. The mortgagees, therefore, are now entitled to add their costs to the mortgage securities.

M.R. } THE MAYOR, ETC. OF BRE-
March 4, 5, 9. } CON v. SEYMOUR.

Municipal Corporations—Mortgage previous to 5 & 6 Will. 4. c. 76.—7 Will. 4. & 1 Vict. c. 78.—Tacking—Subsequent Mortgage—Charge—Judgment.

The defendants were the holders of two mortgages, made by the corporation of Brecon, upon their land. One was made before the Municipal Corporation Act, and the other subsequently. This latter mortgage comprised in addition lands acquired under the Market House Act. The defendants brought an action to obtain payment of the money due on both mortgages. The corporation then paid into court the sum due on the mortgage made before the Municipal Corporation Act. The defendants, plaintiffs in the action, took this money out

of court and proceeded with the action upon the second mortgage, and obtained a judgment. The defendants refused to reconvey the lands or deliver up the title-deeds in the first mortgage; and upon a bill by the corporation,—Held, that the first mortgage was satisfied before any judgment was obtained, and that no right to tack had arisen, and that the defendants must reconvey the lands and deliver up the title-deeds to the corporation.

The bill in this suit was filed, by the Mayor, Aldermen and Burgesses of the borough of Brecon, who, before the passing of the 5 & 6 Will. 4. c. 76. (the Municipal Corporation Act), were called the Bailiff, Aldermen and Burgesses of the borough of Brecon, against Edward William Seymour, Philip George, Edward Lewis and William Parry, to obtain a reconveyance of several messuages and lands comprised in certain indentures of lease and release, dated the 3rd and 4th of March 1840, free from all incumbrance made by Sarah Judith Payne, the plaintiffs offering to pay so much of the costs of an action as had been incurred in relation to the principal money and interest secured thereby. It also prayed that the first three defendants might be restrained from further proceedings at law, or from disposing of the lands or parting with the title-deeds thereof.

By an indenture of feoffment, dated the 17th of July 1835, in consideration of 750*l.*, the plaintiffs, after reciting that they were seised in fee of divers messuages and lands, and also of three several markets to be holden every week in the borough, and also of several fairs to be held yearly for ever within the borough, and of divers tolls and stallage, piecage, and other profits and emoluments arising therefrom, granted and enfeoffed the same with their appurtenances to Philip Vaughan, his heirs and assigns, subject to redemption on payment of the principal money, with interest thereon. The deed also contained a power of sale in case of non-payment of the principal and interest. The property mortgaged was also described in a schedule attached to the deed. This mortgage was afterwards transferred to William Dyke.

By indentures, dated the 3rd and 4th of March 1840, in consideration of the

750*l.* W. Dyke, with the consent of the corporation, conveyed the messuages and lands, and also the tolls, &c. of the markets and fairs, to Sarah Judith Payne, her heirs and assigns, subject to the then existing equity of redemption, as well as to the power of sale contained in the mortgage to P. Vaughan.

In 1836 the 1 Vict. c. xii. was passed to empower the corporation of Brecon to rebuild the market, and it enabled them for that purpose, not only to use the then lands of the corporation, but also to take, contract for, and purchase other lands; it also empowered them to raise money by debentures for the purposes of the act.

By an indenture, dated the 4th of March 1840, and made between the corporation of the first part, S. J. Payne of the second part, Thomas Lawrence of the third part, and E. Williams of the fourth part, the corporation conveyed divers freehold lands in Brecon, acquired under the Market Act since the mortgage of the 17th of July 1835, to S. J. Payne, her heirs and assigns, to secure a sum of 1,500*l.* and interest. This deed contained a covenant by the corporation for payment of the principal money and interest.

On the 30th of October 1857 S. J. Payne brought an action in the Court of Exchequer against the corporation to recover not only the sum of 750*l.* and interest secured on Vaughan's mortgage, but also the 1,500*l.* and interest secured by the market-house mortgage.

On the 30th of November 1857 S. J. Payne declared in the said action. It contained, first, a count on the covenant in the market-house mortgage, and, secondly, the usual *indebitatus* counts and a count on an account stated. In the particulars of demand delivered therewith she claimed under the *indebitatus* counts to recover the 750*l.* for money lent and paid for the use of the corporation on or about the 4th of March 1840, with 43*l.* 5*s.* for interest, which she claimed to recover on account stated.

The corporation having been advised that they had no defence to the action so far as related to the 750*l.* and interest, applied to William Parry, who advanced a sum of 796*l.* 15*s.* upon an agreement that its repayment should be secured upon

COURTS OF CHANCERY:

hereditaments comprised in Vaughan's mortgage. On the 23rd of December 1857 the corporation put in two pleas to the first count of the declaration, and as to the second and subsequent counts, for a third plea they brought the 796*l.* 15*s.* into court, and averred that the same was enough to satisfy the claim of the plaintiff in respect of the matters so pleaded to.

This sum S. J. Payne took out of court. The action, however, was proceeded with upon the claim under the covenant contained in the market-house mortgage—*Payne v. the Mayor, &c. of Brecon* (1). S. J. Payne, by her will, dated the 12th of April 1841, devised all trust estates vested in her to Messrs. Seymour, George and Lewis, whom she appointed her executors.

The testatrix died on the 15th of February 1858.

The plaintiffs tendered 9*l.* 6*s.* 6*d.* to the executors in respect of the costs of the action, and requested them to reconvey the premises comprised in Vaughan's mortgage, and W. Parry claimed to have the same conveyed to him as a security corporation; at the same time he brought an action against the corporation and obtained a judgment, which he registered in the Common Pleas and issued the goods by virtue of which he extended the mortgage and chattels and the lands and tenements of the corporation. The plaintiffs alleged that the claim of S. J. Payne in respect of Vaughan's mortgage was satisfied, and that the defendants were bound to reconvey the hereditaments to the corporation or as they should direct. They also charged that they were trustees for the inhabitants of the borough, and that the market-house mortgage, if valid, could not be tacked so as to make Vaughan's mortgage a security for the repayment of the money secured by the market-house mortgage. It was also charged that the market-house mortgage was made without the consent of the Lords of the Treasury, and that it was not authorized by the Market Act, 1 Vict. c. xii.; that it did not enable the corporation to mortgage or

alienate any of the corporate estates which, without such approbation, could not previously have been mortgaged or alienated.

Mr. Follett and Mr. Barber, for the plaintiffs.—The market-house mortgage was not a proper security for the 1,500*l.* The Lords of the Treasury had never consented to the security. It could not be tacked to Vaughan's mortgage. The judgment which the executors had obtained for the 1,500*l.* did not affect the corporate lands. The corporation, as trustees for the inhabitants, were entitled to have the lands comprised in Vaughan's mortgage reconveyed to them.—

5 & 6 Will. 4. c. 76. ss. 92, 94;
7 Will. 4 & 1 Vict. c. 78. s. 28.
(Municipal Corporations).

6 & 7 Will. 4. c. 104 (Borough Funds).
The Attorney General v. Aspinall, 2 Myl. & Cr. 613; s. c. 7 Law J. Rep. (n.s.) Chanc. 51; overruling 1 K. 513.
The Attorney General v. the Mayor of Norwich, Ibid. 406.

Payne v. the Mayor, &c. of Brecon, 3 Exch. Rep. N.S. 572; s. c. 27 Law J. Rep. (n.s.) Exch. 495.
Arnold v. Rigge, 13 Com. B. Rep. 745; s. c. 22 Law J. Rep. (n.s.) C.P. 235.

Ex parte the Corporation of Hythe, 4 You. & C. 55.
Arnold v. the Mayor of Gravesend, 2 Kay & J. 574; s. c. 25 Law J. Rep. (n.s.) Chanc. 530, 776.
The Attorney General v. the Corporation of Poole, 4 Myl. & Cr. 17; s. c. 8 Law J. Rep. (n.s.) Chanc. 27; overruling 2 K. 120.

Mr. Osborne Morgan, for W. Parry, insisted that he was entitled to a transfer of Vaughan's mortgage, and a conveyance of the lands comprised in it.
Mr. R. Palmer and Mr. Eddis, for the executors of Sarah J. Payne.—The corporation are not restrained from mortgaging the income arising from the corporate property, as distinct from the property itself, and that power extends to all proper producing income. The Municipal Corporation Act makes no distinction. The market-house mortgage was not void; it might still be made available with the co-

(1) 27 Law J. Rep. (n.s.) Exch. 495.

sent of the Lords of the Treasury. This, of itself, was proof that the deed was good. The corporation, therefore, could not ask in this court that the deed should be treated as nothing, or that the deeds relating to Vaughan's mortgage should be given up; especially when they have to repay the money with which the market-house was built. The corporation in this case were possessed of property, which they had previous to the passing of the 1 Vict. c. xii., and property which they had obtained since. As to the latter, there was nothing in the act to fetter their dealing with it; so far, therefore, the concurrence of the Lords of the Treasury was not required. In this case a debt was due to S. J. Payne, and a judgment for it had been obtained; as this was not *in iudicio*, it bound the lands of the corporation. Neither could the act be extended by construction.—

Holdsworth v. the Mayor of Clifton
Dartmouth Hardness, 3 P. & D. 308;

s. c. 9 Law J. Rep. (n.s.) Q.B. 121.

Pallister v. the Mayor of Gravesend,
9 Com. B. Rep. 774; s. c. 19 Law
J. Rep. (n.s.) C.P. 358; 25 Law J.
Rep. (n.s.) Chanc. 776.

Croft v. Lumley, 6 H.L. Cas. 672; s. c.
27 Law J. Rep. (n.s.) Q.B. 321.

Alexander v. Brame, 19 Beav. 436;
s. c. 7 De Gex, M. & G. 525.

1 & 2 Vict. c. 110. s. 13.

Mr. Follett, in reply.

THE MASTER OF THE ROLLS.—The plaintiffs are entitled to a decree; it follows from the decision in *De Winton v. the Mayor of Brecon* (2). The bill is filed for a reconveyance of land mortgaged, and to recover the deeds upon payment of the mortgage. The defendants insist that they are entitled to retain them, in consequence of their having another incumbrance upon the land of the mortgagees. It appeared that a mortgage was made in 1835, and that it was not affected by the Municipal Corporation Act. A sum of 750*l.* was advanced by Mr. Vaughan; it was secured upon property of the corporation. This mortgage was assigned, first to Mr. Dyke, and then to Sarah Judith Payne,

and its validity is not disputed. In 1840 Vaughan's mortgage was transferred to her from Mr. Dyke; on the same day a second mortgage was made to Mrs. Payne; it was a separate mortgage for 1,500*l.*, not a mortgage for 2,250*l.* I do not go into any question respecting the rights of debenture or bondholders under the Market Act. A question then arose, whether the second mortgage created any charge on the land. I held that the second mortgage was not a valid mortgage; that it was prohibited by the Municipal Corporation Act, 5 & 6 Will. 4. c. 76. s. 94; and that the corporation was prohibited from raising any money upon their property; and that the 1 Vict. c. xii. s. 83. confirmed and established that prohibition with respect to this property. A distinction has been drawn between a mortgage of capital and a mortgage of income; it is, however, too fine to be acted on. In substance it is the same. The section, therefore, which prevents the mortgage of land equally applies to prevent a mortgage of the 210*l.* per annum.

In October 1857 Sarah Judith Payne brought an action against the corporation. The amount claimed upon the first mortgage was paid into court; that was taken out by Mrs. Payne in satisfaction of the causes of action in respect of the third plea, that is, in respect of the whole declaration, except what is claimed upon the covenant contained in the deed of the market-house mortgage. The matter came on upon the motion for a new trial, before the Court of Exchequer, which held, that the covenant is perfectly good; although it holds, apparently, that the mortgage-deed is not a good mortgage, it holds that the covenant is collateral to, and not dependent upon it, and consequently can be sued upon separately; that it does not fall within the mortgage, and is not invalid. Therefore, it finds for the plaintiff upon the first count, upon which these two pleas are pleaded. In that state of things the question arises, as all that was due upon the first mortgage has been received, whether the defendant has any right to resist what would be the usual equity of a mortgagor, viz. to have a reconveyance of the land mortgaged, and also a delivery of the title-deeds upon payment of what is due on the

(2) *Ante*, p. 600.

mortgage. This is resisted, in the first place, upon the ground that there is a right to tack. It is not put exactly in that form, but as a right to tack it is clear that no equity can exist; you might, no doubt, tack a judgment to a mortgage, but the mortgage was paid off, and did not exist in equity before the judgment was recovered, and consequently no judgment which was subsequently recovered could be tacked to the mortgage. In fact, as soon as the money was taken out of court, or if it had been a tender of the total amount that was due it would have been the same—but as soon as the money is taken out of court, which is admitted to be the total amount due on the first mortgage, then the equity of the mortgagor arose, and he was entitled at once to have both the reconveyance of the land and the title-deeds delivered up to him. And without considering that the plaintiffs were a corporation, I regard it as if, by the effect of the statute, there was no mortgage of the market-house, but merely a deed of covenant; and though Vaughan's mortgage was good, it had been paid off. Then, as between individuals, it is impossible to hold that one individual mortgagee could resist the right of the mortgagor to have the reconveyance of his land and the delivery up of his title-deeds, after the mortgage-money, interest and costs had been paid, upon the ground that there was a covenant by the mortgagor to the mortgagee with respect to a separate and collateral matter upon which the mortgagee was bringing an action, or had brought an action which might ripen into a judgment, and which judgment might ultimately produce a lien upon the land.

The principal argument, which is founded upon the construction of the 1 Vict. c. xii., is covered by the decision in *De Winton v. the Mayor of Brecon*. I read sections 32. and 29. of the Market House Act together. I said they must be made consistent, and when I read section 83. it is impossible to say that, under the words "take, appropriate and use," some different and distinct meaning is applicable, and that by reason of that this mortgage must be limited to property then acquired and not affect subsequent property, or that the intervention of the Lords of the Treasury would be

necessary for every trifling matter under the act, such as the selection of the site, and various other matters to be done. But the way I read it is this: there is the Municipal Corporation Act which forbids corporations alienating their property in the largest and most general sense. Then the 1 Vict. c. xii. s. 83. uses the largest and most extensive words that can be, saying that nothing contained in this act shall authorize them to do what they could not have done without it, and, consequently, except where the specific and precise provisions and enactments are contained authorizing the peculiar things to be done, it leaves them exactly as they were before, and, consequently, the prohibition of alienation extends not merely to existing lands, but to future and any property which they may acquire hereafter; and if any person should think fit to make a gift of an estate or land to the corporation by deed properly enrolled under the Mortmain Act, the corporation would be just as much prevented from alienating that land as if it had belonged to the corporation prior to the passing of the Municipal Corporation Act, or prior to the passing of the Market House Act. I should so look at it between two private individuals; but it is stronger as it affects the case of the corporation, than if this question arose as against an individual. It is true that a judgment would ripen into a lien and charge upon the land, but it is a question whether that would have the effect as against a corporation. The question may have to be determined between these very persons, what will be the effect of the judgment recovered against the corporation? and whether a distinction can be made between a judgment *in iudicio*, and a judgment confessed and not resisted? Certainly, if a corporation has borrowed money, and has no defence to the action, it is difficult to see how they can be in a better situation by resisting the action and putting the creditor to the useless expense of obtaining the judgment, instead of making no defence in the action and allowing the judgment to go by default. If a judgment can go by default, or if a judgment can be confessed at once when the money is raised, it is clearly another form by which a corporation can alienate their property to any extent, because if the

gment can be enforced against the corporation it is merely doing it in that form instead of by a mortgage by deed; but it is not necessary to go into that, because if there were a matter between two private individuals, I am of opinion that treating, as I am bound to treat, the market-house mortgage as simply a nullity, as nothing more than a deed of covenant, and there being only one mortgage, and that one mortgage paid off, the equity of the mortgagor to have the deeds and the reconveyance arises immediately, notwithstanding the subsequent deed of covenant. The plaintiffs, therefore, are entitled to a decree. In *Deaton v. the Mayor of Brecon*, I made a reservation with respect to any case where personal equity may arise, but a personal equity cannot arise against a corporation. The members of the corporation themselves may have induced persons to lend money to the corporation, and by so doing they may have become personally liable to particular persons who lent the money, but the words "personal equity" do not apply to a corporation in its corporate character, and it is impossible that the corporation itself should be bound in its corporate character, on the ground of having obtained money by the wrong of a personal equity; that would qualify or disentitle the corporation to the use of a defence which might not bemissible in the mouth of a private individual. The plaintiffs, therefore, are entitled to a decree for reconveyance of the deeds, and for the delivery up of the title-deeds, and the defendants must pay the costs.

[IN THE HOUSE OF LORDS.]

March 15, }
 17, 18, 21. } HOARE v. DRESSER.

Shipping Documents—Legal and Equitable Rights.

N, a timber-dealer in Sweden, had transactions with *D*, a factor in London, who sold timber on his account on a *del credere* commission. *D* had sold for him three cargoes of timber. *N*, on the 29th of September 1853, wrote to *D* a letter, in which he expressed a hope to be able in a few days to send the shipping documents of all the cargoes. Two only of those cargoes arrived. On the

6th of October 1853, *N*. wrote to *D*. inclosing invoices of timber shipped on board three vessels, and made out an account in which *N*. appeared to be a creditor for 1,312*l.*, and he drew a bill to that amount on *D*. On the same day *N*. wrote to *H. & Co.*, stating the value of the cargoes, and asking for three acceptances to the amount of 1,300*l.* He inclosed his letter to *D*, and the bill and the shipping documents, with directions to *H. & Co.* to deliver these last to *D*, on condition that *D*. accepted the bill for 1,312*l.*, acknowledged the correctness of the account current, and admitted that the cargoes agreed for had been forwarded. These conditions were communicated by *H. & Co.* to *D*, who called the whole affair a regular swindle. *D*, after some hesitation, accepted the bill, but he obtained possession of the shipping documents by a statement that he wanted them to compare with the invoices, and would return them if from any cause he did not accept the bill. On this *H. & Co.* accepted *N*'s three bills for 1,300*l.* *D*. did accept the bill for 1,312*l.*, but refused to return the shipping documents, and utterly disregarded the other conditions on which they were to be delivered to him:—Held, that though he might have a prior equitable claim to these shipping documents, he had not properly insisted on it, and that he had thereby misled *H. & Co.*, who had a legal right to recover them from him.

This was an appeal against a decree of the Lords Justices, by which a previous decree of Vice Chancellor Kindersley had been varied.

The facts were, shortly, these:—Norbom, a timber-dealer in Sweden, employed Dresser to sell timber for him in different parts of England on a *del credere* commission. In December 1852 and March 1853, Dresser, under Norbom's directions, sold three cargoes of timber for him, to be delivered at Bristol, at Gloucester, and at London respectively. Before the timber reached England Norbom had drawn and Dresser had accepted a bill for the price. This bill was paid. Only two cargoes were sent, one to London, the other to Bristol.

On the 29th of September 1853 Norbom wrote to Dresser, "As an advance on the freight to these captains, I have been compelled to request Mr. Frestadius,

of Stockholm, to draw upon you for my account, 200*l.* at ninety days' date, which I request you to honour to my debit. In a few days I hope to send in the shipping documents of all the four cargoes." There were other dealings between the parties, and Dresser claimed a large balance on the general account.

On the 6th of October 1853, Norbom wrote a letter to Dresser, inclosing invoices of deals and timber shipped on board three vessels, the *Verene*, the *Christiane*, and the *Solide*, to the alleged amount of 2,013*l.*, from which there were two deductions, amounting to 700*l.*, leaving a balance of 1,312*l.*, for which Norbom drew on Dresser in favour of Hoare & Co. On the same 6th of October 1853 Norbom wrote to Hoare & Co., introducing himself through a Mr. Frestadius, and inclosing his letter to Dresser, and the draft for 1,312*l.*, which he requested them to cash, and also the shipping documents, and gave these directions:—"After having obtained his acceptance, his acknowledgment of the correctness of the inclosed account current, and his written approval that I have delivered all the sold and purchased wood cargoes; then deliver to him the annexed three bills of lading of the shipped timber per *Christiane*, *Verene* and *Solide*, together with the inclosed two charter-parties. Should, against expectation, Dresser refuse acceptance, and not deliver the required certificate that all the agreed and sold cargoes have been delivered, then I request you to protest against them, and sell in the best possible way, and for my account, these extremely good cargoes." In truth, the cargo to Gloucester had never been delivered. These letters, with the bills of lading of the *Verene*, and the *Christiane*, and the *Solide*, were all forwarded to Hoare & Co. by Kleman, an agent of theirs in Sweden, and were received by them on the 24th of October 1853, and were at once taken by one of their clerks to the office of Dresser. This clerk, and Dresser, and Dresser's clerk differed in the accounts which they gave of this interview. Hoare's clerk said that he translated such parts of Norbom's letter as related to the conditions on which the shipping documents were to be given up to Dresser, who appeared unwilling to give his acceptance of the draft upon such terms. Dresser said, "I ex-

pressly stated that the proceeding was a strange one, as the cargoes were already mine, and that I had made advances to Norbom in respect of them"; that Norbom was his debtor. Dresser's clerk added, that the proceeding on the part of Norbom was "a regular swindle"; to which Hoare's "clerk made answer, that he knew nothing of the transactions, and only had to hand over the shipping documents." Dresser refused at that time to accept the bill for 1,312*l.*, and Hoare's clerk went away, leaving the letter, account current and bill with him. Dresser went to consult his attorney, who advised him to accept the bill, and to proceed against Norbom by foreign attachment in the Lord Mayor's Court. Dresser thereupon wrote to Hoare & Co., "We shall feel much obliged by your lending us the bills of lading, charters, &c., specifications for the cargoes shipped by Norbom, and we will return them, if from any cause we do not accept the bill of 1,312*l.* We cannot examine the invoices without the above documents." These documents were delivered to Dresser's clerk, who gave a receipt for them, and on the same day Hoare & Co. wrote a letter to Dresser, formally describing the documents which had been lent to him, and also the conditions on which he was to keep them, namely:—"On receiving your acceptance to the before-mentioned draft, your acknowledgment of the correctness of the account current, and your admission that Mr. Norbom has delivered all cargoes sold and contracted for through you, except that per *Ingeborg Anna*, which vessel was at Hernosand loading when Mr. Norbom wrote. As we have received instructions from Mr. Norbom to cover insurances on these cargoes, should you refuse to comply with these conditions, we shall feel obliged by receiving your decision in this matter at as early a moment as possible."

On the morning of the 25th the bill for 1,312*l.* had not been accepted by Dresser; but on the afternoon of that day it was sent accepted to the office of Hoare & Co., but none of the other conditions were complied with, and before sending it a suit had been instituted in the Lord Mayor's Court, to attach the goods of Norbom in the hands of Hoare & Co. An attachment was immediately afterwards served upon them

Hoare & Co. also, on the 25th, wrote to Dresser requiring compliance with the conditions, or demanding back the shipping documents, and offering to exchange against them the bill for 1,312*l*.

On the 24th of October Hoare & Co. had promised to accept three bills (980*l*., 220*l*. and 100*l*.) on Norbom's account. They accepted the first on the morning of the 25th of October, and the other two on the 1st and 4th of November.

On the 9th of November 1853 they brought an action against Dresser to recover the bills of lading, &c., and on the 19th of December Dresser filed a bill praying for an account, and for an injunction to restrain Hoare & Co. from proceeding with their action, and from parting with the bill for 1,312*l*., or otherwise dealing with it.

On the 28th of December an injunction was granted.

On the 19th of January the bill for 1,312*l*. became due, and was paid by Dresser.

The cause came to a hearing in July 1856, when Vice Chancellor Kindersley directed a general account, ordered Dresser to pay the costs to Hoare & Co., and continued the injunction.

Dresser appealed to the Lords Justices, who varied the decree, and declared that Dresser was entitled to relief against Hoare & Co., unless he should be found to be indebted to Norbom a balance of 1,312*l*. or more; that the award of costs to Hoare & Co. should be omitted from the decree, and that accounts should be taken between Dresser and Hoare, with liberty for Hoare & Co. to attend the taking of the same.—(See this case fully reported in the court below, 26 *Law J. Rep.* (n.s.) *Chanc.* 51.)

Sir R. Bethell and *Mr. Druce*, for the appellants, contended that the cargoes of the *Verene*, *Christiane* and *Solide*, and the bills of lading thereof, were consigned to them in pursuance of an agreement entered into on their behalf, by their agent in Sweden, with Norbom, without any notice of any claim existing on the part of Dresser, and for the specific purposes mentioned in Norbom's letter of instructions of the 6th of October 1853, and that, except as therein expressed, the cargoes were not appro-

priated to the purposes of any contract made with Dresser. That Dresser obtained from them the bills of lading, &c. by fraud, and was not therefore entitled to claim them, and that his refusal to restore them was also fraudulent. That he had no defence at law against the action brought to recover these shipping documents, which had thus been fraudulently obtained and retained, and that he had no equity to restrain legal proceedings against him, but that the appellants were entitled to the proceeds of the cargoes, to indemnify them against the liability they had incurred by accepting the three bills for 980*l*., 220*l*. and 100*l*. They cited *Wait v. Baker* (1).

The Solicitor General, Mr. Lee and *Mr. F. S. Williams*, for the respondent, contended that Dresser, by contract between him and Norbom, for valuable consideration given to the latter, acquired a right to the possession of the cargoes of the three vessels and to their bills of lading, and to sell the cargoes and apply the proceeds in payment of what might be found due to him from Norbom, and that the appellants had notice of his rights, and were bound by such notice, and could not maintain any claim against him in respect of the liability they had incurred for Norbom, or in respect of the bill for 1,312*l*. 1*s.* 9*d.*, except subject to his rights and interests in these cargoes. They argued that *Wait v. Baker* did not apply; and to shew that where a contract of this kind had been made it was treated as giving an equitable lien over the property, and equity could enforce its performance, they cited—

Wellesley v. Wellesley, 4 *Myl. & Cr.* 561; s. c. 9 *Law J. Rep.* (n.s.)

Chanc. 21; 6 *Sim.* 497; 10 *Sim.* 256.

Burn v. Carvalho, *Ibid.* 690; s. c. 9 *Law J. Rep.* (n.s.) *Chanc.* 65; 7 *Sim.* 109.

Lumley v. Wagner, 1 *De Gex, M. & G.* 604; s. c. 21 *Law J. Rep.* (n.s.)

Chanc. 898; 5 *De Gex & Sm.* 485.

Langton v. Horton, 1 *Hare*, 549; s. c. 11 *Law J. Rep.* (n.s.) *Chanc.* 283; 3 *Beav.* 464; 5 *Beav.* 9.

Sir R. Bethell, in reply, relied on the observation of Lord Lyndhurst in *Jones v.*

(1) 2 *Exch. Rep.* 1; s. c. 17 *Law J. Rep.* (n.s.) *Exch.* 307.

Smith (2), to shew that the want of caution and wariness which the appellants might have exhibited in this case, was not sufficient to affect them with notice.

March 21.—The LORD CHANCELLOR, after stating the facts of the case, said, the first question was, whether there was an appropriation of the cargoes of the *Verene* and the *Christiane* by Norbom to Dresser. At law that question would have been answered decisively by the case of *Wait v. Baker*. But, in equity, the question was not whether the property passed, but whether there was not such a contract as to give to Dresser, under the circumstances, an equitable right to the property. It seemed to him that though, at first, no timber had been specifically appropriated as the cargoes to be sent to Dresser, yet, when the *Verene* and the *Christiane* were loaded for the purpose of satisfying the contracts into which Dresser had entered for Norbom, for the supply of the exact quantities shipped for Bristol and London, Dresser had an equitable title to the property in that timber, and could enforce it against any one claiming through Norbom. Then did Hoare & Co. merely claim through him as his agents, or did they acquire any rights independently of him, in this transaction? Up to October 1853 they were strangers to both parties. In one of the letters of the attornies for Hoare & Co., there was the expression that they were "acting in the matter merely as the agents of Norbom," but that was only true so far as the obtaining the acceptance for 1,312*l.* on the conditions stated in Norbom's letter was concerned. In other respects their interest was independent. They were asked to accept bills to the amount of 1,300*l.*, and the bills of lading and the other documents were sent to them that they might have in their hands a security against such acceptances. Did they incur any such liabilities before they had notice of Dresser's rights as against Norbom? In the interview which took place between their clerk and Dresser there could be little doubt that Dresser learned the conditions on which alone the bills of lading

were to be delivered up to him, and that acting on advice he resorted to a contrivance to obtain them without performing these conditions. Whether at the moment he wrote his letter asking for these documents for a particular purpose, he had received the letter which informed him of the conditions on which alone they were to be delivered up was perhaps doubtful, but he knew it from conversation, and this latter question was, therefore, immaterial. It was admitted, on the letter posted on the 24th of October, that Hoare & Co. had become liable on the bills for 1,300*l.* Dresser had obtained the shipping documents by a stratagem, and made no objection to the conditions on which alone he was to hold them until Hoare & Co. had accepted the bills for 1,300*l.* When, therefore, on the following day they had the bill for 1,312*l.* 1*s.* 9*d.* returned to them without observation, they had a right to retain that bill to secure themselves against the liabilities which they had incurred. It was unnecessary to follow the proceedings further; the rights of the parties were determined on the evening of the 24th of October. At that time Hoare & Co. must be taken to have been in possession of the bills of lading which Dresser had improperly obtained from them: they had no notice at that time that Dresser had a better title than they, and they were entitled to retain the bill he had accepted as against the shipping documents which he had improperly obtained. The decision of Vice Chancellor Kindersley must, therefore, be restored, and the cause must be remitted, with a declaration that the appeal to the Lords Justices ought to have been dismissed, with costs.

LORD CRANWORTH entirely agreed.—The principle which governed a case like the present was the same at law as in equity: there must be at law an appropriation in the contract in order to enable the law to enforce it. So in equity there must be an engagement to appropriate either a whole cargo, or a part of a cargo out of a whole cargo, in either of which cases equity would interfere to decree what was in truth specific performance. But neither at law nor in equity could it be said, that because the person who made the contract had property within a particular jurisdiction, therefore that property could be made available for

(2) 1 Ph. 244; s. c. 12 Law J. Rep. (N.S.) Chanc. 381; affirming 11 Law J. Rep. (N.S.) Chanc. 83; 1 Hare, 43.

the specific performance of it. But that general question did not arise here. If Dresser had taken the proper steps before Hoare & Co. incurred any liability, he would have had an equitable right upon the timber as against Norbom. But that was not done, and the subsequent transactions (which his Lordship very fully described) shewed that Dresser had not done what he might to avail himself of the rights which he did possess, but had done that which allowed others to acquire rights against him. Hoare & Co. had no notice of Dresser's rights which could be binding on them, and they were entitled to indemnity against the liabilities which they had been allowed by the conduct of Dresser to incur.

LORD WENSLEYDALE concurred.—In the first place the legal title to these cargoes was vested by the delivery of the bills of lading to Hoare & Co.'s agent. When the factor under such circumstances came under a liability in respect of these bills of lading, and without notice of Dresser's equitable title his own title would prevail. At that time, however, they had not come under any liability, but on the morning of the 24th of October, when the bills of lading had actually come into their possession, they accepted the bills drawn on them in respect of this timber, and then they had acquired a title of their own. Then had there been any previous equitable assignment to Dresser, and had Hoare & Co. notice of it? It could hardly be said that there was any equitable assignment to Dresser before the 29th of September. An equitable assignment must be an undertaking to deliver a particular chattel, not to deliver any chattel; and, therefore, the case of *Wellesley v. Wellesley* did not apply for the purpose for which it had been quoted. But, upon the 29th of September, there was a positive engagement that the two cargoes of the *Verene* and the *Christiane* should be transmitted to Dresser, and though Dresser refused to accept the particular bill that was drawn upon them, this engagement was an appropriation of those two cargoes to him, and an equitable lien was thereby constituted. Then came the question whether, this lien existing, there had been such a notice of it as any mercantile man would act upon. It seemed to him that there had not. Merely saying, as Dresser did,

that he had a claim, and characterizing Norbom's conduct as a "regular swindle," was not sufficient. There should have been a claim of right and a declaration of an intention to enforce it. On the whole, he thought that, although there was in this case an equitable claim on the part of Dresser, he did not give proper notice of it as of a claim on which he meant to insist. Hoare & Co. were entitled either to have back the goods or to retain the bill.

LORD KINGSDOWN must, of course, entertain great distrust of his opinion, when he found it was opposed to those of the Lords Justices; but, after full consideration of the case, he thought that the view taken of it by Vice Chancellor Kindersley was the correct one. It might be assumed that, before the evening of the 24th of October, Dresser could have established an equitable title to the cargoes, but it by no means followed that he would do so, and his statement to Hoare & Co., that he had such title, was no notice that he should insist upon it, and what passed subsequently must be taken to have authorized them to believe that he would not.—[His Lordship went through all the circumstances of the interview, and the correspondence subsequent to it.]—It was in Dresser's option whether he would return the papers or accept the bill, and he adopted the latter alternative. It was said that if he had returned the papers and refused to accept the bill, he might still have established his title against Hoare & Co. by means of a suit in Chancery. It was unnecessary to consider that question, for that was not the course he adopted, and Hoare & Co., under the circumstances which really took place, were entitled to stand in the same position as if the acceptance had been given at the time that they received the conditional promise to accept. If Dresser had lost advantages to which he would in a different state of things have been entitled, it was the result of the conduct he had pursued, and he was not entitled to relief against those whom his conduct had misled.

Orders reversed, and cause remitted with a declaration.

[IN THE HOUSE OF LORDS.]

1859. }
 March 24, 25. } SLINGSBY v. GRAINGER.

Legacy—"The Funds"—Bank Stock.

A, who was possessed of property, both in consols and in Bank stock, made a will, by which she gave to her brother (who received the income from all her property, and acted as her banker,) "everything I may be possessed of at my decease for his own life, and should he marry and have children of his own, to those children after: but should he die a bachelor, I leave the whole of my fortune now standing in the funds to Emma Slingsby, my god-daughter." The brother died a bachelor:—Held, that under this will the Bank stock did not pass to Emma Slingsby.

Catherine Fox, spinster, deceased, by her will, dated the 21st of February 1837, appointed her brother Edward Buckley Fox, her executor, and after giving certain small legacies, the will went on thus:—"To my dear brother Edward I leave everything I may be possessed of at my decease for his life, and should he marry and have children of his own, to those children after: but should he die a bachelor, at his death I leave the whole of my fortune now standing in the funds to Emma Slingsby, my god-daughter. Plate, linen, furniture, books, &c., &c., I leave to my brother Edward for ever; and after my funeral expenses are paid, and the legacies out of the money he has of mine in his hands, the remainder to be his for ever, and no question what the sum may be." The testatrix died on the 7th of July 1838. Her brother took possession of the property. The testatrix possessed considerable sums in consols and new and reduced annuities, and also a sum of 5,833*l.* Bank stock. Her brother had been in the habit of receiving her dividends for her, and she drew on him as on a banker for money. On the death of the brother, which occurred on the 25th of December 1854, the respondents became his executors and personal representatives; and a question arose between them and the appellant, whether the "Bank stock" belonging to the testatrix formed part of what was bequeathed to the appellant, or fell into the residue and became part of the estate of Mr. Fox. In May 1855,

the respondents filed a bill, praying that it might be declared that the Bank stock was not included in the bequest to the appellant; and the appellant having put in her answer, the cause came on before Vice Chancellor Stuart, when His Honour was pleased to declare, that it did not form part of the bequest contained in the will of the testatrix. The appellant appealed to the Lords Justices, who, on the 10th of June 1856, affirmed the order of the Vice Chancellor (1). This was an appeal against the order and the affirmance.

Sir R. Bethell and Mr. Wickens, for the appellant, contended that, according to the true construction of the testatrix's will, the appellant on the death of the testatrix's brother became entitled under that will to the Bank stock as well as the other funds thereby bequeathed. They referred to the public newspapers, which contained Bank stock under the heading of "English Funds," and they cited—

Ridge v. Newton, 2 Dru. & W. 239.

Burnie v. Getting, 2 Coll. 324.

Trafford v. Boehm, 3 Atk. 440.

Mangin v. Mangin, 16 Beav. 300.

Goodtitle v. Southern, 1 M. & S. 299.

Mr. Malins and Mr. Osborne, for the respondents, contended that the words "now standing in the funds," were words restrictive of the generality of the terms "the whole of my fortune," and must be held to mean Government stock alone; and that this was all the more clear, as the testatrix was possessed at the time of her death of stock which did properly answer the description given in her will. They cited—

Rose v. Bartlett, Cro. Car. 292.

Thompson v. Lady Lawley, 2 B. & B. 303.

Day v. Trig, 1 P. Wms. 286.

Napier v. Napier, 1 Sim. 28; s. c. 5 Law J. Rep. Chanc. 65.

Denn v. Roake, 3 Law J. Rep. C.P. 82; s. c. 2 Bing. 497, which appeared to be the other way, but which was overruled, in error, in 4 Law J. Rep. K.B. 171; s. c. 8 Dowl. & Ry. 514 — 5 B. & C. 720; and this latter judgment was confirmed in this House in 1 Dow & Cl. 437.

(1) 25 Law J. Rep. (N.S.) Chanc. 572.

Beys v. Morgan, 3 Myl. & Cr. 661.
Lowe v. Thomas, 5 De Gex, M. & G.
 315; a.c. 28 Law J. Rep. (n.s.)
 Chanc. 455, 616; Kay 369.

Sir R. Bethell replied.

THE LORD CHANCELLOR.—This is one of those cases of construction of a will as to which, depending as it does on the intention of a testator, to be gathered from the language employed, different minds may be easily led to different conclusions. At present, however, there has been an entire uniformity of opinion among those who have been called on to determine the meaning of the very few words in the present will which require to be construed. Three learned Judges have already pronounced their judgments upon the subject, and two at least of my noble and learned friends are prepared to express their unhesitating agreement with them. Under these circumstances, any doubt I may entertain of the propriety of the construction which has been adopted, is of little importance, and can have no influence on the final decision. Cases have been cited to shew that the term "the funds" has a fixed technical meaning, which prevents its extending to Bank stock, unless there is a clear indication of intention that it should be included; and there is a concurrence of opinion of so many learned persons, that no such intention is to be discovered in this will that it is impossible for me to rest with any confidence upon any different view which I may have formed. I feel, therefore, that it would not be becoming in me to press any doubt upon your Lordships' attention, but that I ought to yield to the judgment of my noble and learned friends that the decree should be affirmed.

LORD CRAWFORTH was of opinion, that the decree must be affirmed. The expression "the funds" must be taken to mean the same as "the Government funds," or "the public funds." Any other interpretation would let in every possible kind of property. Now, suppose, "public funds," or "Government funds," had been used, would those words have included Bank stock? They would not. Those words applied only to the funds appropriated by

parliament to the payment of the public debt. But then it was said, that was not the way in which the expression was used popularly, and that popularly Bank stock would be included in the meaning of those words. The public newspapers had been referred to, which, under the market prices of the day of the "English funds," included Bank stock. That argument went too far, for it would have included Indian stock and Exchequer bills. Was there then anything in the context of the will to shew that the words "my fortune now standing in the public funds" were to have any other than their natural meaning? It was said that there was, because under the will everything, Bank stock included, would have gone to the brother and his children, if he had married and had had children; and, therefore, in like manner everything went to the god-daughter upon his death without children. But the testatrix had not used the same words in the two cases; and, therefore, that argument did not apply. She could not, therefore, have had the same intention in both cases. Then it was said, that the case came within the rule *falsa demonstratio non nocet*. But the words here were too closely connected together for that argument to arise; they were found in the gift itself, and not in any mere description which followed it. The case of *Goodtitle v. Southern* (2) did not apply, for there the land was properly described, though in some added words there was a mistake, for the whole of it was not in the occupation of A. C. Of course, such a mistake could not vitiate an otherwise valid gift. In this case, the gift was, "the whole of my fortune now standing in the funds," and the whole of her fortune did not stand in the funds. That which did not would not pass by these words.

LORD WENSLEYDALE concurred. He had often had occasion, particularly in the case of *Grey v. Pearson* (3) and *Abbott v. Middleton* (4), to call their Lordships' attention to the paramount importance of adhering to the rule of construction, that words must, where there was no obvious

(2) 1 M. & S. 299.

(3) 6 H. L. Cas. 105; a.c. 26 Law J. Rep. (n.s.) Chanc. 473.

(4) *Ante*, 110.

absurdity or repugnancy in the instrument, have their natural meaning assigned to them. The words "the funds" had, in common parlance, but one meaning, namely, the funds provided by parliament for the payment of the annuities granted by the government, and forming part of the National Debt. The 8 & 9 Will. 3. c. 20. might be referred to as shewing how that word had first been used. Nothing, therefore, but government securities would pass under such words, unless the context or the state of things to which the will related called on the House to put a different construction on these words. Now, Bank stock was nothing but a perpetual share of the general profits of a corporation. It was contended, that the testatrix must have meant the appellant, in the event of her brother Edward dying without children, to take all that the children would have taken under the previous bequest to him; and, therefore, that the words "the whole of my fortune now standing in the funds," must be considered as equivalent to the whole of her fortune which she had previously left to her brother. If they might speculate on what the testatrix possibly intended to say, they might possibly be right in conjecturing that she meant the whole of her fortune (with the exception of the small legacies mentioned in the will) to be enjoyed by the appellant in the event of the death of her brother a bachelor. But she had not said so. She had left him the whole, while she had left the appellant the whole "now standing in the funds." There was a clear distinction between the two things, and in his opinion these added words could not be treated as a *falsa demonstratio*. There were no words which were properly descriptive of the Bank stock, as to which the testatrix, in the event that had happened, had died intestate, and he was clearly of opinion that the decree of the Court below must be affirmed.

LORD KINGSDOWN had arrived at the same conclusion with much hesitation, and with some doubt whether they were not depriving the appellant of a benefit which the testatrix intended to confer upon her. It had been clearly settled, that Bank stock would not pass under the words "public funds," unless there was

something in the context of the will which gave to the words a more extended description than could strictly be attached to them. However, the Vice Chancellor and the Lords Justices, with every disposition to adopt a different construction, had held that there was nothing in the context to shew such an intention, and that that construction was inadmissible. Two of the noble and learned Lords were strongly of the same opinion; and, in his opinion, to advise the reversal of a judgment, it was not sufficient to doubt whether it was right; they must feel a reasonable assurance that it was wrong. He did not in this case feel such assurance, and therefore concurred, though unwillingly, in the opinion that the appeal should be dismissed; but he thought, without costs.

Appeal dismissed.

LORDS JUSTICES. } *In re BOWMER.*
 Feb. 11.

Lunacy Regulation Act of 1853, ss. 137, 138.—Appointment of New Trustees—Form of Order.

A power for the appointment of new trustees contained in a settlement became vested in a person who had been found lunatic by inquisition. The committee of the person and estate petitioned, under the above-named act (16 & 17 Vict. c. 70.) for leave to exercise the power for him, and the same was ordered.

Form of order.

This was a petition presented by Mr Isatt Bowmer, the wife and committee of the person and estate of George Bowmer, a lunatic, and was presented under the provisions of the Lunacy Regulation Act of 1853 (16 & 17 Vict. c. 70.). The facts were, that by settlement, dated the 26th of June 1848, made between G. Bowmer, of the one part, and two trustees of the other part, after assigning and conveying to the trustees a sum of 1,000*l.* due to G. Bowmer, and certain hereditaments upon which the same was then lent by way of mortgage, trusts were declared for G. Bowmer for life, and after his death for the petitioner Isatt Bowmer,

his wife, and after her death upon trusts for the children of the marriage. The settlement reserved to G. Bowmer during his life a power to appoint a new trustee or new trustees as occasion might require, and it gave a like power after his decease to the surviving or continuing trustees or trustees of the settlement.

Early in the year 1857 G. Bowmer was found lunatic by inquisition, and his wife Isatt Bowmer was appointed sole committee both of his person and estate. The mortgage-debt had been paid off by the mortgagor, and the money deposited at a banker's, and both of the trustees having died, and there being no trustee existing, Mrs. Bowmer presented the present petition, praying that she, as the committee of the lunatic, might be at liberty to appoint two persons (A. S. and S. R.) named in the petition as trustees of the settlement of 1848 (there being evidence of their fitness), in the place of the two trustees who had died, and that the right to sue for and recover the sum of 1,000*l.* might be vested in the new trustees so to be appointed. Evidence was given of the willingness of the new trustees to act.

The clauses of the Lunacy Regulation Act, 1853, applicable to the case were as follows:—Sect. 137. "Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the Lord Chancellor, intrusted as aforesaid, to be fit and expedient that the power should be exercised or the consent given (as the case may be), the committee of the estate, in the name and on behalf of the lunatic, under an order of the Lord Chancellor, intrusted as aforesaid, made upon the application of any person interested in the exercise of the power, may exercise the power or give the consent, as the case may be, in such manner as the order shall direct."

Sect. 138. "Where under this act the committee of the estate, under order of the Lord Chancellor, intrusted as aforesaid, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the

exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had also been made by the Court of Chancery, under the Trustee Act 1850, or any act amending the same, or if he or they had been appointed by decree of that Court in a suit duly instituted; and the Lord Chancellor, intrusted as aforesaid, may in any such case, where it seems to him to be for the lunatic's benefit, and also expedient, make any and every such order respecting the land or stock, or choses in action subject to the trust as might have been made in the same case under the provisions of the Trustee Act, 1850, or any act amending the same, on the appointment thereunder of a new trustee or new trustees."

Mr. Bury, in support of the petition, said, that this was the first order which he believed had been applied for under the above sections of the act.

THEIR LORDSHIPS made the order, which was in the following form:—"We do order that the said Isatt Bowmer, as the committee of the estate of the said G. Bowmer, exercise the power of appointing new trustees, vested in the said G. Bowmer, by the said indenture of the 26th of June, 1848, by appointing the said A. S. and S. R. trustees of the same indenture, and that it be referred to the Master in Lunacy to settle and approve of a proper deed for the appointment of the said trustees, and that the said deed when so settled and approved of, be executed by the said committee, in the name and on behalf of the said G. Bowmer. And we do order that the right to sue for, recover and receive the sum of 1,000*l.* deposited in the bank of &c., to the credit of &c., be vested in the said A. S. and S. R. on their appointment as such trustees as aforesaid, and be, when received by them, held, subject to the payment of the costs hereby directed to be taxed, upon the trusts of the said indenture of settlement. Direction for taxation of the costs of the application and payment thereof out of the trust monies."

LORDS JUSTICES.

Feb. 22, 24,
25, 26, 28;
April 29.

GRESLEY v. MOUSLEY.

Solicitor and Client—Transaction between—Sale at Undervalue—Delay in seeking Relief—Acquiescence—Devise of a Right.

A sale of real estate by a client to his solicitor at an undervalue, the client being in embarrassed circumstances, and not having independent professional advice in the transaction, cannot be allowed to stand, although upwards of twenty years have elapsed.

A solicitor, who purchases from his client, must take care that the transaction is perfectly fair, and also that evidence of that fairness is preserved, the onus of proof being upon him; and he cannot be heard to complain that the means of proving his fairness is lost by lapse of time.

A right to sue is a devisable interest.

This was an appeal from a decision of Vice Chancellor Stuart, reported 27 *Law J. Rep.* (N.S.) *Chanc.* 779. The facts are set forth in the former report (and are fully detailed in the judgment of his Lordship), though it does not appear that a material point urged on the appeal was noticed in the court below, namely, that at the time of the execution of the deed of conveyance from the late Sir Roger Gresley to the late Mr. William Eaton Mousley, the principal part of the estates were in mortgage for a sum of 7,000*l.* The facts may be thus shortly recapitulated. By deed, dated in February 1837, Sir Roger Gresley conveyed in fee to his solicitor, Mr. W. Eaton Mousley, certain manors and lands, and the minerals under them, for 6,940*l.* The transaction was conducted by the town agent of Mr. Mousley. Eight months after the sale Sir Roger Gresley died, having devised all his property to trustees upon trust for sale, and subject thereto to convey upon trust for his wife for life, and then to the use of children in tail, and on failure of issue to the use of William Nigel Gresley for life, with remainder to the use of his first and other sons successively in tail, with remainders over. The testator left no issue, and W. N. Gresley died in 1847, leaving Sir Thomas Gresley

(the plaintiff), his eldest son, who attained twenty-one years of age in January 1852. Sir Roger Gresley employed Mr. Mousley as his confidential solicitor until his death, and that gentleman continued to act for the trustees of Sir Roger's will in an administration suit instituted against them. Mr. Mousley died in 1853, having devised his estates to his two sons, who were made defendants in this suit. The only evidence of the 6,940*l.* having been paid was the receipt indorsed on the deed, and signed by Sir Roger Gresley. The Vice Chancellor, upon a bill filed, in 1855, by Sir Thomas Gresley, to set aside the transaction, in which the devisees of the will of Mr. Mousley, as well as the widow of Sir Roger (who had subsequently married) and her second husband were defendants, made a decree in favour of the plaintiff, declared the deed of conveyance void, both as against the plaintiff and as against the widow of Sir Roger and her second husband, and declined to direct an inquiry whether the purchase-money for the conveyance had or not been actually paid, directing the 6,940*l.* to be repaid, with interest, to the devisees of the will of the solicitor. The plaintiff appealed.

Mr. Rolt, Mr. Malins and Mr. George Lake Russell were for the plaintiff.

Mr. Bacon and Mr. Osborne, for Mr. and Lady Sophia des Vœux (formerly widow of Sir Roger Gresley).

Sir Richard Bethell, Mr. Amphlett and Mr. Charles Hall, for the devisees of the will of Mr. W. E. Mousley, divided their arguments into three parts: namely, that Sir Roger Gresley had no devisable interest in the estates in mortgage, and, therefore, as to them, that the plaintiff had no right to sue; secondly, that by lapse of time the plaintiff had lost all right of suit, so far as he ever had any; and, thirdly, that the decree exceeded the requirements of the case, and ought to be varied. They urged that the question of most importance was, whether Sir Roger Gresley had a devisable interest in the mortgaged estate at the time of making his will; and whether it passed by the words he had used, namely, "all my manors and freehold hereditaments which, as owner, or in execution of any powers, I am

competent to dispose of by will." They maintained that the right to sue for those lands did not pass under the will, for that it could only be granted by instrument *inter vivos* as a right of entry. To support such a grant a party must be seized *de facto* at the time. Suppose Sir Roger Gresley had for a consideration granted a right to file a bill to set aside the mortgage deed, would the grantee be able to file such a bill? Assuredly not, for the grant would be absolutely void, and that view of the matter concluded the point. The laws against maintenance and champerty also were conclusive. The old law on the question was fully and ably laid down in the argument of Mr. Preston, in the case of *Goodright v. Forrester* (1); and the Court decided that a right of entry was not devisable. Upon this point they cited also—

Uppington v. Bullen, 2 Dru. & W. 184.

Stamp v. Gaby, 2 De Gex, M. & G. 623; s. c. 22 Law J. Rep. (n.s.) Chanc. 352.

The Attorney General v. Vigors, 8 Ves. 288.

Case v. Holford, 3 Ves. 650.

There were two other points of considerable importance, namely, lapse of time and acquiescence; and a third, adequacy of price. It was contended that, at this distance of time, lapse of time was an absolute bar to such a bill, filed on the relation of solicitor and client; and, moreover, the operation of time was such, that the onus of justifying the transaction was not on the defendant; and the plaintiff could only succeed by establishing such a case as would give a title to relief if the relation of solicitor and client did not exist—

Charter v. Trevelyan, 11 Cl. & F. 715.

Champion v. Rigby, 1 Russ. & M. 539; s. c. 1 Tam. 421.

Gregory v. Gregory, Sir G. Cooper, 201.

Beckford v. Wade, 17 Ves. 87.

Chalmer v. Bradley, 1 J. & W. 51.

Roberts v. Tunstall, 4 Hare, 261; s. c. 14 Law J. Rep. (n.s.) Chanc. 184.

Baker v. Read, 18 Beav. 398.

Montesquieu v. Sandys, 18 Ves. 311.

The fact of the value of property having

increased by reason of circumstances taking place in the neighbourhood, as in this case the making of a railway near the property, would not avail to induce the Court to say that the price was inadequate at the time, but would operate the other way.—

Edwards v. Megrick, 3 Hare, 60; s. c. 12 Law J. Rep. (n.s.) Chanc. 49.

Clavering v. Clavering, 2 P. Wms. 388.

Norway v. Rowe, 19 Ves. 144.

Other arguments are referred to in the judgment.

April 29. — LORD JUSTICE KNIGHT BRUCE.—The main question in contest in this case is, whether the plaintiff is entitled to set aside a sale by the late Sir Roger Gresley, a landed proprietor in Derbyshire, of a portion of his estates there to Mr. William Eaton Mousley. Sir Roger Gresley must be taken to have been legally seized in fee of part of the estates, and to have been owner of the equity of redemption of the rest, subject to some mortgage or mortgages on which money was at that time due. Early in 1837 the sale was completed, so far at least as the execution of the conveyance in proper form, regular and according to law. Perhaps the purchase-money was also then paid in money, or satisfied by way of set-off, or in account. The deed is in these terms—[His Lordship read the deed]—and the receipt for the consideration-money, 6,940*l.*, is indorsed, and that and an accompanying document are attested by Mr. Hamilton and Mr. J. W. Mousley. The accompanying document was one whereby Sir Roger Gresley, who had not the legal estate in part of the property, covenanted for himself, his heirs or assigns, within four months, to procure a conveyance of the legal estate of the estates held in mortgage freed from the mortgage debts, to the uses of the deed of even date. No proof has been given of any written or verbal agreement for this purchase. I agree, however, that the bill contains a sufficient allegation of a written contract. The purchaser was let into possession of the estates. In October 1837, Sir Roger Gresley made his will, which contained a devise so framed as to include his right to the property if it had remained in his possession,

(1) 8 East, 562; s. c. 1 Taunt. 592.

to his wife for life, for her separate use, with remainder to Sir Nigel Gresley for life, with remainder in tail to the plaintiff, who attained his majority in 1852. Sir Roger Gresley died in 1837, Sir N. Gresley in 1847. The bill to set aside the sale was originally filed in April 1855, and amended in 1856, at which time, or previously, all the defendants had appeared. Time, therefore, in itself, is no bar to the relief prayed; but the late period of the suit, coupled with the fact of the death of the original parties, and of a material witness, may probably detract from the effect of the evidence, and introduce a certain amount of doubt. The allegations upon which the plaintiff relies are, that the sale was effected at an undervalue; that it was made by a client to his solicitor, and that it was made at a time when the client was in embarrassed circumstances. I consider that all these allegations are proved, subject to this, that Sir Roger Gresley was far from being actually insolvent, his property being more than sufficient to pay his debts; subject also to this further remark, that from a long period before 1830 Mr. Mousley had been Sir Roger Gresley's solicitor. It is clearly proved, that for more than seven years he had been his confidential adviser, and it is not proved, or to be inferred from the evidence, that Sir Roger Gresley had any other adviser or assistance. Mr. Hamilton, one of the witnesses to the deed of conveyance, was the London agent of Mr. Mousley; the other witness was his son. Undervalue to a material extent is also in my opinion proved, whether subsequent events are or are not taken into account. It is also clear, that Sir Roger Gresley, though solvent, owed at the time large sums of money, and was much harassed by his debts. The questions, therefore, for decision are, first, whether the title of Sir Roger Gresley was a devisable interest; secondly, whether there is any case of confirmation against Sir Roger Gresley or the plaintiff; and thirdly, whether, in the circumstances referred to, there ought to be a presumption in favour of Mr. Mousley's representation of the facts in dispute. All these questions I am of opinion ought to be answered in the plaintiff's favour. With respect to the first point, I think it

is concluded by the authority of the cases before Lord St. Leonards. If those cases are binding upon this Court, there is no more question; if not, still I am of opinion that those cases are correct. As to the second point, I am of opinion that there is no reasonable ground for saying that Sir Roger Gresley or the plaintiff have confirmed the transaction. The plaintiff was not born before 1831; Sir Roger Gresley died in 1837, and Mr. Mousley continued his solicitor and confidential adviser until that event, and for some years afterwards of the executors and trustees of his will, and of his widow. Whether the widow confirmed or acquiesced in the transaction I do not say, nor have I the means of saying. With respect to the third point, it is not proved that any important book, or paper or document has been destroyed, mutilated, defaced, lost or mislaid—subject to this observation, that certain documents or books of Sir Roger Gresley have been destroyed by Mr. Mousley, and possessed by him; I do not mean any other than a perfectly innocent destruction, and fair possession. But the evidence does not shew that any material testimony has been lost, or that Sir Roger Gresley, Mr. Mousley or Mr. Hamilton, if alive, could have given any evidence materially altering the case. Nor is there the least probability that if the proceedings had been commenced before 1838, and each of these gentlemen had been before the Court, the evidence on the part of the appellants would have been materially added to, or on the other side materially contradicted, explained away or displaced. It is, however, right to say, that very probably the mortgage of 1837 might have been satisfactorily explained, and the payment or satisfaction of the purchase-money plainly proved or disproved. The intimate relation, however, of solicitor and client, the client's temporary difficulty and the undervalue seem to me proved to demonstration. It should be remarked, too, that Mr. Mousley, in 1837—the year of the purchase, when also Sir Roger Gresley made his will, and died—was aware of the contents of the will, and that he did not die until 1853. He must have been conscious that if the transaction were impeached, the burden of supporting it would

be upon him. I cannot consider it likely that Mr. Mousley would be careless of preserving any evidence favourable to the support of the transaction, and my present impression is against assuming that the purchase-money (stated in the draft to be 7,000*l.*) was paid or satisfied. In this and a few other respects there must be an alteration in the decree, especially inasmuch as it is more in favour of Lady Sophia Des Vœux than justice at present requires, though eventually it may turn out to be correct.

LORD JUSTICE TURNER said, that this was an appeal from a decree of Vice Chancellor Stuart, setting aside a sale by Sir Roger Gresley to Mr. Mousley. There were three points to be considered: first, whether the plaintiff had any title to sue under the will of Sir Roger Gresley; secondly, whether the purchase was originally impeachable, and, if so, whether it was now impeachable through lapse of time; thirdly, whether the decree had gone further than it ought to have done; and, if so, what variation should be made in it. As to the first point, the will of Sir R. Gresley was made after the execution of the conveyance; and it was therefore argued that the testator had no estate, and there was no devisable interest, but only a right of suit analogous to a right of entry at common law. This view was, however, supported by no authority. It was, indeed, admitted that *Uppington v. Bullen* and *Stump v. Gaby* were opposed to it; but the authority of those decisions was called in question. His Lordship would hesitate to depart from authorities which were of equal weight with the decisions of this Court, even if he entertained a strong doubt of their correctness; but on a careful consideration he did not dissent from them. He was of opinion that the analogy contended for between such an equitable right as the present and a right of entry at common law did not exist. At law there was only a right to institute proceedings for the purpose of recovering the seisin. But such an equity as this existed independently of the institution of proceedings. The decree proceeded, not upon a new right, but upon a pre-existing right. It was attempted to support the argument by reference to the rule as to the revocation

of a devise by a will, though the will might turn out to be void. But in that case there would be an intention shewn not to devise the property; here there was no intention not to devise. He was therefore of opinion that there was no ground for the first objection. As to the second point, there had been lately so many cases of dealings between solicitor and client before this Court, that his Lordship had been led to doubt whether an impression did not prevail that the Court had relaxed its rules on this subject. He thought it right to state, for the information of those who ventured on such transactions, that this was by no means the case. There would be a strict observance of the rules which the obligations arising out of the relation enforce upon the parties, and strict evidence would be required that these rules had been complied with. The full consideration which this subject had received on former occasions rendered it unnecessary to detail these rules. It was only needful to refer to the argument respecting the length of time. The doctrine of the Court was well laid down by Lord Camden in *Smith v. Clay* (2). He said, "A Court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, and acquiesced for a length of time. Nothing can call forth this Court into activity but conscience, good faith, and reasonable diligence; where these are wanting the Court is passive and does nothing. *Laches* and neglect are always discountenanced, and therefore from the beginning of this jurisdiction there was always a limitation to suits in this court." And again, "*Expediit reipublice ut sit finis litium*" is a maxim that has prevailed in this court in all times without the help of any act of parliament. His Lordship had referred to this case, because an attempt had been made in argument to limit the time within which this Court would give relief to a stated period; for he thought that, independently of the statutory limitation, either express or by analogy, there was no such point of time, but each case was governed by its peculiar circumstances.

(2) 3 Bro. C.C. 639, n.

What were the facts of the present case to which these principles were to be applied?—[His Lordship examined the evidence as to undervalue, and as to the knowledge which Mr. Mousley had of the value of the coal-mines under the estate.]—With all these facts it was impossible to doubt that 6,940*l.* was not the fair value of the property. But supposing this were open to doubt, what was the duty of Mr. Mousley? Was it not to obtain the best advice, and to have inquired of the owners of neighbouring lands what they would have given for the property, and to have given Sir Roger Gresley the information so obtained? But there was no evidence of any such advice, inquiries or information. The appellants relied on Sir Roger Gresley's knowledge of the value of the estate, and on the failure of previous attempts to sell it. But the question was, what advice Mr. Mousley was bound to give to his client, whatever his client's knowledge of the value might have been. Nor did his Lordship attach any weight to the argument derived from the subsequent improvement of the access to the estate, or to the existence of faults in the seams of coal, which, at all events, did not apply to the whole of the estates. The chief point in favour of the appellants was, the difficulty arising from the lapse of time, and of ascertaining the true character of the transaction after the death of Sir Roger Gresley and Mr. Mousley. But Sir Roger Gresley's papers passed into Mr. Mousley's hands, and he was the solicitor of the trustees, and if these papers furnished material evidence they must have been preserved. The papers now existing only proved the continued embarrassment of Sir Roger Gresley. It must also be remembered, that if inquiries had been made, as they ought to have been made, some of the persons applied to might have been called as witnesses. A still more important consideration was, that Mr. Mousley must have known that the onus of supporting the transactions was on him, and that it was for him to preserve the necessary evidence. Solicitors who engage in such transactions as this must take care, not only that the transaction is fair, but that they can prove it to be so. On the whole, he felt no doubt that this sale was bad in its inception.

Whether, if Sir Roger Gresley had lived for a considerable time afterwards, it might have been supported in consequence of his acquiescence, his Lordship gave no opinion, as it might prejudice the question between the other parties. But, as between the plaintiff and Mr. Mousley, the time was far too short (the relations of solicitor and client having continued the whole of it) to produce such an effect, and nothing had occurred since to vary their rights. As to the third point, namely, the form of the decree: the sale had been set aside by the Vice Chancellor altogether as against Sir Roger Gresley and Lady Sophia Des Vœux. But there might be circumstances affecting one defendant which might not affect others; and it was not proper to decide the case altogether without inquiry. The decree must therefore be varied in this particular. His Lordship had said nothing about the payment of the purchase-money; but he agreed that there must be an inquiry as to that also. The following would be the minutes of the decree:—Declare that the sale, and the indentures of the 17th and 18th of February 1837, were void in equity as against Sir Roger Gresley and the present plaintiff; that notwithstanding those deeds the plaintiff was entitled to be tenant in tail in remainder of the estates, subject to the life interest of Lady Sophia Des Vœux, and subject to any sales or leases which may have been made of any part of the estates; an inquiry whether the sum of 6,940*l.*, or any part thereof, was paid or satisfied; an inquiry what sums were due and owing over and above the sum of 7,000*l.* secured by the mortgage in the pleadings mentioned; an inquiry what sales and leases had been made by Mr. Mousley and the defendants; an inquiry as to the amount of sums of money received by Mr. Mousley and the defendants in respect of such sales, and from the rents of the estates. The decree to be made without prejudice to the rights of the parties as to what had been received from the sales, and from the rents of the estates; and without prejudice to the life interest of any of the defendants.

M.R. }
March 23. } *In re* KNIGHT'S TRUSTS.

Trustees' Relief Act—Costs.

A trustee paid money into court under the Trustees' Relief Acts (1) without making inquiries for the parties entitled to the fund:—Held, that he must pay the costs which the cestuis que trust, who were officers in the Austrian service, had been put to in obtaining payment of the money out of court.

Sir John Knight, by his will, dated the 12th of September 1830, gave the residue of his real and personal estate to his daughter Emily, otherwise Amelia, Walker, and appointed her sole executrix, with power, by any writing under her hand, to appoint two other persons to be executors, to whom probate should be granted.

The testator died on the 16th of June 1831, and a suit was instituted, disputing the validity of his will; this was compromised: and, under an agreement, dated the 12th of May 1832, a deed of arrangement between the parties, dated the 21st of November 1832, was executed, whereby it was declared that George William Henry Knight (since deceased) and John Edward Paddon, who had been appointed, by writing under the hand of the said Emily, otherwise Amelia, Walker, executors of the testator's will, should hold the testator's property, of which they should become possessed, upon trust, after payment of the testator's debts, funeral and testamentary expenses, and the legacies given by his will, and certain other sums therein specified, to pay out of the surplus 4,000*l.* to the said Emily, otherwise Amelia, Walker, and to divide the remainder into equal one-sixth shares, and to pay five sixth parts unto the five several persons therein named, and to pay and apply the remaining one-sixth part and the accumulations thereof to and for the benefit of the children of Hood Knight, deceased, who should live to attain twenty-one, in equal shares. Hood Knight had left three children, Louisa Ann Knight (who died in 1836, an infant) and (John Keppel Knight and Charles George Knight), who afterwards attained twenty-one.

(1) 10 & 11 Vict. c. 96; 12 & 13 Vict. c. 74.
NEW SERIES, XXVIII.—CHANC.

On the 14th of May 1832 probate of the testator's will was granted to G. W. H. Knight (since deceased) and J. E. Paddon.

An advertisement was inserted in the daily papers early in 1858, to the effect that an application had been made to the Bank of England to direct the re-transfer from the Commissioners for the Reduction of the National Debt of the sum of 344*l.* 6*s.*, 3*d.* per cent. reduced annuities, theretofore standing in the names of G. W. H. Knight and J. E. Paddon, such sum having been transferred to the said Commissioners in consequence of the dividends thereon not having been received since April 1834, and notice was given that at the expiration of three months the stock would be transferred and the dividends thereon paid to J. E. Paddon, the survivor, unless some other claimant should make out his claim thereto.

On the 31st of March 1858 Messrs. Loftus & Young, the solicitors of Mr. Paddon, wrote to Madame De Lewenan, the mother of the petitioners, as follows:

"Madame,—Mr. Reneau, of Charrington Street, has referred us to you for the address of the three children of your former husband, Captain Hood Knight, to whom his father, many years since, acted as next friend in a Chancery suit, wherein they were declared to be entitled to a sum of money, which they received. It has been lately ascertained that they are entitled to a further sum, and the object of our present inquiry is to learn their address, that we may communicate with them."

On the 2nd of April Madame De Lewenan wrote to Messrs. Loftus & Young, requesting them to inform her what was the amount of the sum remaining in Chancery for her sons, and what form was required to obtain it.

No notice was taken of this letter, and in June Mr. Murray, the solicitor of Madame De Lewenan, wrote to Messrs. Loftus & Young on the subject, but the only information obtained was that Mr. Paddon was trustee of the fund in question, and that on receipt of the money he would pay it into court under the Trustees' Relief Act, and that the parties entitled would have to apply to the Court.

In September Mr. Murray wrote to J. E. Paddon, stating that Madame De Lewenan had called his attention to the advertisement which had appeared in the papers relating to the re-transfer of a sum of 344*l.* 6*s.*, 3*l.* per cent. reduced annuities, belonging to Captain H. Knight's estate, of which he appeared to be surviving trustee, and that the same was divisible among Madame De Lewenan's family, and requesting to hear from him on the subject. Mr. Paddon referred Mr. Murray to Messrs. Loftus & Young, but they declined to give any further information than that when the money was paid into court he would have the opportunity of seeing J. E. Paddon's affidavit.

On the 13th of October Mr. Murray again wrote to J. E. Paddon, requesting further information, but he received no reply.

J. E. Paddon, in December 1858, transferred into court the 344*l.* 6*s.*, 3*l.* per cent. reduced annuities, together with a sum of 206*l.* 0*s.* 3*d.*, like annuities, which represented accrued dividends thereon, and by his affidavit he stated that J. K. Knight and C. G. Knight were in the Austrian military service, and that he had applied to their mother for their address, but had been unable to obtain it, and that he was not aware where either of them resided.

On the 7th of January 1859 Mr. Murray was served with notice that J. E. Paddon had paid the funds in question into court under the Trustees' Relief Acts; and from the affidavit accompanying the payment the petitioners first became aware of the source from which the fund arose, and of the deed of the 12th of May 1832 having been executed.

Mr. Murray then wrote to J. E. Paddon, inquiring why payment had not been previously made to the petitioners, and in reply was informed by Mr. Paddon's solicitor that the original investment had been forgotten, and that Mr. Paddon was unable to ascertain whether Capt. H. Knight's children were in existence or not.

J. K. Knight and C. G. Knight, who were both in the Austrian service, and resident in the Austrian dominions, then assigned the funds to Mr. Murray, and appointed him their attorney to receive

what might be due to them from the funds arising from the testator's estate.

This petition was then presented. It stated that under two orders of this Court, dated respectively the 12th of November 1841 and the 9th of February 1844, made in a suit of *Knight v. Knight*, instituted by J. K. Knight and C. G. Knight and Louisa Ann Knight, deceased, against G. W. H. Knight and J. E. Paddon, for payment of a legacy for 1,500*l.*, bequeathed by the will of Sir J. Knight to the children of H. Knight, the shares of the petitioners in the invested proceeds of the legacy were paid out of court to the petitioners, and that the executor was consequently aware that the petitioners had attained twenty-one, and that the execution of the deed of trust of the 12th of May 1832 was never communicated to them or their solicitors. It then alleged that the payment of this fund into court was uncalled for and vexatious; and it prayed for a transfer of the funds to the petitioners, and also that J. E. Paddon might pay the costs of and incident to the application.

Mr. Selwyn and *Mr. Murray*, in support of the petition, insisted that a trustee was bound to make inquiries respecting his *cestuis que trust* before paying money into court. The act was not passed to enable them to denude themselves of trusts they had undertaken to perform. Mr. Paddon ought, therefore, to pay the costs of the petition which he had rendered necessary.

In re Woodburn's Trusts, 1 De Gex & Jo. 333; s. c. 26 Law J. Rep. (N.S.) Chanc. 522.

In re Heming's Trusts, 3 Kay & J. 40; s. c. 26 Law J. Rep. (N.S.) Chanc. 106.

Mr. R. Palmer and *Mr. Freeling*, for the trustee.—The act was passed to relieve trustees from the responsibility of administering trust funds where they desired to be so relieved. Mr. Paddon knew nothing of the family; he had accordingly complied with the provisions of the act, and he ought not to be made liable for the costs of this application—*In re Jones* (2).

THE MASTER OF THE ROLLS.—If the trustee is to have his costs, there is no case in which he ought not, unless it be when the trustee acts fraudulently or maliciously with the view to injure his *cestuis que trust*. It is impossible to conceive a clearer case. Mr. Paddon had accepted the trusts relating to a sum of money for the benefit of the children of Capt. H. Knight. He was a party to the suit in which it was ascertained by the Master's report that there were only three children, and that one of them had died in 1836. Not only is it found by the Master's report, but the fact is proved to the satisfaction of the Court, and the Court makes an order upon it for the payment of the money to the children in a cause to which Mr. Paddon is a party and in which he has access to all the papers. The trustee cannot claim any advantage from the lapse of time, while on the other hand he must not be prejudiced by it. He had the means of ascertaining who the children were and that the money was payable to them at twenty-one; and as the money was transferred into his name in 1832, he must have known that in 1858, if the children were then alive, they had attained twenty-one, and consequently that they were entitled to the payment of the fund. The question is, what is the duty of the trustee? Is it not his duty to perform his trusts? Is it not his duty to inquire whether the persons entitled to the fund are alive? and, upon proper evidence that they are living and that they have appointed a person to receive the money, to pay it over to the person so appointed? *Lowson v. Copeland* (3) and other authorities have established that the executor is not entitled to put his *cestuis que trust* to the expense of filing a bill for the purpose of establishing their claim to a fund when their right is perfectly clear and it is simply a question of evidence whether the person entitled is still alive. So far as I can ascertain from the affidavits, the trustee was well aware of the finding of the report at the time he paid the money into court. It is true that the parties entitled are serving in the Austrian army. That would entitle him to require evidence as to their existence and identity, but when

he was applied to by a person professing to act on behalf of the persons entitled, he was not entitled to require, and the Court does not require the solicitor to shew his authority if he professes to act on behalf of the party and offers proper evidence that he was authorized to receive the money. That was all the trustee was entitled to. That is how the matter would stand if a bill had been filed by the *cestuis que trust*. Does it stand differently under the Trustees' Relief Act? If so, it is new to me. No doubt this act was passed for the relief of trustees, to enable them to pay the money into court and discharge themselves of the trust. At the same time, they are not without sufficient cause to put their *cestuis que trust* to the expense of paying the money into court. It was not in the contemplation of the legislature to sanction such a course, when there is no doubt as to the trusts; the trustee cannot say to his *cestuis que trust*, I will pay the money into court, and you must apply to get it out. If he is desirous to get rid of the trusts, he must appoint a new trustee. If the trusts are exhausted, and nothing remains but to pay the trust monies, he may require evidence as to the parties entitled, but he is not entitled to resort to the Court without first making those inquiries, otherwise it would be a source of great oppression. I had a case before me of this description. Some parties filed a bill against trustees for the payment of trust monies. The answer of the trustees was, that they intended to pay the money into court, and they did so. I made an order upon the trustees to pay the amount admitted by their answer to be in their hands. I said, it was not necessary for you to pay the money into court, and you must bear the costs both of paying it in and of getting it out again. I afforded them every facility in getting it out, but it was at their own expense. A trustee cannot say, I do not choose to require any evidence, and although all the parties entitled are ascertained I choose to pay the money into court. I admit that there is a distinction between this and the case of *Woodburn's Trusts*, because in that case the trustees acted vexatiously; here the trustees did not, but only incautiously, and it is said that he acted upon the advice of counsel. But

Doyle v. Blake (4) establishes that if trustees act upon the advice of counsel, and the Court is of opinion that what they do is contrary to law, they must nevertheless take the consequences, and the fact of their having taken counsel's advice does not exonerate them. It is also said that no objection was offered by the *cestuis que trust* to the course pursued by the trustee. But what is the case? A trustee has a sum of money in his hands; he knows who are the persons entitled to it, and all he has to do is to obtain a proper discharge. Instead of taking this course, he pays the money into court. If a bill had been filed, the Court could not in such circumstances have allowed the trustee his costs; and I cannot see anything in the acts of parliament to place the trustee in a different position because the *cestuis que trust* have to proceed by petition. The money, therefore, must be paid to Mr. Murray, the petitioner, and the trustee must pay the costs of paying into court and also of this application.

[*In re Buckley's Trusts*, 17 Beav. 110; s. c. 22 Law J. Rep. (N.S.) Chanc. 934.]

M.R. { *In re THE MEXICAN AND SOUTH*
March 4. { AMERICAN COMPANY, *ex*
 parte LUND.

Winding-up—Contributory—Transferor of Shares.

A holder of 100 shares in a company, transferable by delivery, knowing that the company was in difficulties, and was likely to be wound up, handed his shares to a workman in his employ for 2s. 6d. the lot. Five days afterwards a resolution was passed to obtain an order to wind up the company:—Held, that the transfer could not be supported to the prejudice of other shareholders; and that the vendor, and not the purchaser, must be placed on the list of contributories.

The Mexican and South American Company was established in 1837 as a scrip

company; they issued scrip certificates or shares, which were to pass from hand to hand by delivery.

On the 27th of November 1857 an order was made to wind up the company.

It appeared that William Lund held 100 paid-up shares in the company. On the 6th of November 1857 he attended a meeting of the company, when a most unsatisfactory statement was made of its affairs. The state and prospects of the company were then discussed, but nothing effectual was done, as sufficient shareholders were not present to constitute a meeting. A minute of the proceedings was entered in the minute-book, to the effect that it was considered expedient to call a meeting of the shareholders, and that measures should be taken for winding up the company.

Mr. Lund attended this meeting, and in consequence of what passed he determined to disconnect himself from the company, sell his shares and submit to lose his paid-up capital, to save himself from being pressed to make further advances on the shares he held. He accordingly on the next day offered to sell the whole of his shares to William Edward Hopkins for 2s. 6d. He at the same time explained to him the state of the company, and stated his belief that the supposed balance of 65,000*l.* in favour of the company was a fallacy, and would turn out to be nothing, though, possibly, some small amount might ultimately be received on account of the shares; but that, at any rate, no loss could arise as they were fully paid-up shares. W. E. Hopkins accepted the offer, and at the same time paid to Mr. Lund the 2s. 6d., and received the certificates. Mr. Lund stated that at the time he did not believe that there would be any ultimate loss, or that he was legally liable to be called on to contribute in respect of the shares to the debts of the company; but that he sold the shares to avoid being pressed by the directors (to some of whom he was personally known) to share their loss, as well as to avoid the annoyance and unpleasant position of having to refuse such request. W. E. Hopkins stated that he was a mechanic, and the foreman of Mr. Lund; that he received 30s. a week, and had four rooms in Mr. Lund's premises to live in; and that he had a few pounds

(4) 2 Sch. & Lef. 291. See *Maling v. Hill*, 1 Cox, 186; *Devy v. Thornton*, 9 Hare, 222; s. c. 22 Law J. Rep. (N.S.) Chanc. 163.

of his own, but very little; that he considered the purchase he made was for his own benefit, and that the shares were as much his as his coat; and that if any money were received in respect of the shares he should not have to hand it over to Mr. Lund; that he supposed there was no liability attaching to the shares, as they were fully paid up; and that he might make a few pounds of them.

Mr. Lund told the secretary of the company that he had sold his shares, but he attended a meeting of the company held on the 12th of November, having obtained permission to do so; but he took no part in the proceedings. At this meeting the expediency of winding up the company was resolved on.

The secretary of the company, in his affidavit, stated that Mr. Lund, when he informed him that he had sold his shares, also said that he was ready to pay up his quota as soon as it was demanded, as it would prejudice him as a tradesman to have his name made public in any proceedings for winding up the company.

The chief clerk placed the name of Mr. Lund on the list of contributories; and the case now came on before the Court upon an adjournment from chambers.

Mr. Selwyn and Mr. Hobhouse, for W. Lund.—The question is, whether Mr. Lund is liable upon the shares he held in the company. He was not an original member of the company. The respondents say that he is liable, because he transferred the shares at a time when he knew the company was in difficulties, and for the purpose of getting rid of his liability. It has, however, been held that a person may get rid of his shares at any time, even after it has been resolved to wind up the company, and that it absolved him from liability. Now these shares passed by delivery, and to hold them is to own them; such was the constitution of the company, and the Court must support that. Being, therefore, the holder of 100 shares, he had a right to hand them over to any person at any time without the consent of the managing body of the company, but up to that time he was no doubt liable to creditors. The case is analogous to that of an assignee of leaseholds. He may assign

to an insolvent, or he may give an insolvent a bonus to take the lease off his hands, and still it has not been held to be a fraud, so to get rid of his legal liability; and Lords Cottenham and Langdale, in *Rowley v. Adams* (1), after referring to *Onslow v. Corrie* (2), made executors liable because they did not assign the lease to a man of straw.

[The MASTER OF THE ROLLS.—I entertain doubts whether, in such circumstances, the Court could make executors liable for a breach of trust. The case seems to me at variance with the fundamental principles of equity. It is a startling proposition. The law has always held that an assignee may get rid of a lease by assignment, but the lessee cannot get rid of his covenants; though an assignee can get rid of the consequential liability for the future, because he is liable only during the time he holds the lease.]

Mr. Selwyn.—Mr. Lund is an assignee of these shares; they have come into his hands, and he was desirous of getting rid of them. It has hitherto been understood that it is the existing company that is being wound up; but suppose all the shareholders should turn out insolvent, or the holder of any set of shares should be insolvent and not able to contribute to the debts of the company, might not proceedings be taken by creditors against former holders? It would be a second winding up. Such a case has not arisen, but why may it not? and why may not previous holders be made to contribute to so much of the debts as were incurred during the time they held the shares? As yet these questions have not arisen. The principle of the cases hitherto has been, that if a person can by relinquishment or transfer get rid of his shares, the Court will not take into consideration the liability to creditors upon a question whether he is or not to be put upon the list. Of course, in none of the cases could it be contended that, as between himself and the creditors, he is not liable up to the time of his relinquishment. Much, therefore, must depend upon whether this was a *bona fide* transfer of the shares. In this case, however, both parties knew their relative

(1) 4 Myl. & Cr. 534; a.c. 6 Law J. Rep. (N.S.) Chanc. 24; 8 Sim. 205.

(2) 2 Mad. 330.

position, one as seller and the other as purchaser, and the smallness of the purchase-money is not an objection, as in some cases less than nothing has been paid for the shares. Mr. Lund's name, therefore, must be taken from the list of contributories.—

In re the Royal Bank of Australia, Sutton's case, 3 De Gex & Sm. 262.

In re the Pennant and Craigwen Lead Mining Company, Fenn's case, 4 De Gex, M. & G. 285; s. c. 22 Law J. Rep. (N.S.) Chanc. 692; 1 Sm. & G. 26.

In re the Welsh Potosi Mining Company, Birch's case, 2 De Gex & Jo. 10; s. c. 27 Law J. Rep. (N.S.) Bankr. 4.

In re the Welsh Potosi Mining Company, Lofthouse's case, Ibid. 69; s. c. 27 Law J. Rep. (N.S.) Bankr. 1.

Ex parte Jessop, in re the London and County Assurance Company, 27 Law J. Rep. (N.S.) Chanc. 757.

In re the Mexican and South American Company, ex parte Barclay, 27 Law J. Rep. (N.S.) Chanc. 660.

Mr. Southgate, for the creditors' representative.

Mr. R. Palmer and Mr. Roxburgh, for the official manager, were not called upon.

THE MASTER OF THE ROLLS. — This is not a *bond fide* sale of these shares. Upon Mr. Lund's own statement, I am satisfied he could not have sold them in the market; he, therefore, parted with them to a person who is entirely under his control, and as he himself states, for the purpose of getting rid of them. *Ex parte Jessop* puts the question upon the *bona fides* of the sale. It was there said, that the Court will watch strictly a transfer made under such circumstances, and if it appeared to be tainted with any unfairness, the Court will interfere; but if it was in all respects open and fair, it would not set it aside, especially when a shareholder had full right to transfer to whom he pleased. Observe what the case was: there Jessop was a shareholder of the company, and it was proposed to wind up the company, and then an arrangement was made for the purpose of resuscitating it, through an

actuary of the name of Sheridan. Mr. Jessop disapproved of that arrangement, and thought that the company ought to be wound up, and then, as Lord Justice Turner observes, he had no option if the company were not to be wound up, except to get rid of his shares, or he would be involved in all the liabilities which might ensue in case the resuscitation of the company should fail; accordingly he was in this position: a majority of the directors would not concur with him as to winding up the company, and he had no remedy but to wind up the company himself or retire from his connexion with it by the transfer of his shares. Under these circumstances he transferred his shares to Mr. Sheridan, who was a *bond fide* purchaser, and a respectable person, or rather they were transferred to Mr. Spence, the nominee of Mr. Sheridan. That case is perfectly distinct from a case where, not only there was a proposition to wind up, but where that was actually carried out in the course of a little more than a fortnight. The meeting at which it was stated that it was expedient to wind up the company, was on the 6th of November, and the winding-up order was actually made on the 27th of the same month; in the mean time Mr. Lund sold his shares to a person to whom he is paying 30s. a week, who has been in his employ for twenty years, and he transfers them for the purpose of getting rid of his liabilities; that cannot be treated as a *bond fide* sale: it is quite distinct from selling to a person in the market who knows exactly what the state of the circumstances of the company is, and who knowing that agrees to take the shares; it is quite distinct also from a case where there was an arrangement entered into for winding up the company, which the shareholder disapproved of, and therefore sold his shares. I concur in the observations of Lord Justice Turner. The only question is, whether this is what the Court considers a *bond fide* getting rid of the shares by the holder of them; I do not think it is, and Mr. Lund must remain on the list of contributories.

See *The North of England Joint-Stock Banking Company, Hawthorn's case*, 1 Mac. & G. 49; s. c. 18 Law J.

Rep. (n.s.) Chanc. 179; s. c. 1 De Gex & Sm. 571; 1 Hall & Tw. 225.

Harrison v. Heathorne, 6 Man. & G. 81; s. c. 12 Law J. Rep. (n.s.) C.P. 158.

In re the North of England Joint-Stock Banking Company, Ex parte Holmes, 2 De Gex, M. & G. 113; s. c. 22 Law J. Rep. (n.s.) Chanc. 226; affirming 4 De Gex & Sm. 312; 20 Law J. Rep. (n.s.) Chanc. 300. 11 & 12 Vict. c. 45. s. 3. } Winding-
20 & 21 Vict. c. 78. } up Acts.

M.R. }
May 12. } *In re THE MEXICAN AND*
LORDS JUSTICES. } SOUTH AMERICAN COM-
June 1. } PANY, ex parte ASTON.

Witness—Privilege—Dealing in Shares—Company.

A company, formed in 1837, and issuing scrip certificates transferable from party to party by delivery, is not an illegal company.

A scrip company was established previous to the 7 & 8 Vict. c. 110. The transfer of the scrip certificates to new purchasers does not create new members or vary the company, or bring the holders within the provisions of the statute, or render parties dealing in the scrip certificates of the company liable to penalties:—Held, therefore, at the Rolls that a stockbroker, who had as a matter of business bought and sold shares in the company, is liable to answer questions respecting his dealings; which decision, on appeal, was affirmed.

The official manager, appointed under the order made on the 27th of November 1857 for winding up the Mexican and South American Company, summoned Mr. Aston, a stockbroker, as a witness for examination before the examiner, when the following questions were put to him:—

Q. What is your profession, business or employment?—A. I am a stockbroker.

Q. Have you ever bought any scrip certificates or shares in the company?—A. Never for myself; and as I am advised the company is illegal, and that I may render myself liable to criminal or penal proceedings, I decline further to answer the question.

Q. Have you ever purchased any scrip certificate for any other person?—A. I decline to answer, fearing the consequence as stated above, from the illegality of the company's proceedings throughout.

Q. Have you ever had any scrip certificates or shares in your possession?—A. I have no scrip certificates or shares in the company in my possession at this time.

Q. Have you had any of these scrip certificates or shares in your possession at any time since November 1857?—A. I decline to answer that question.

The examiner certified these facts, and it was now asked that the witness might attend the examiner at his own expense, and submit to be further examined, or otherwise that he might be committed.

Mr. R. Palmer and Mr. Roxburgh, for the official manager.—The witness is not a shareholder: he cannot refuse to answer merely because his answers may implicate his friends. The Bubble Act, 6 Geo. 1. c. 18. s. 19, which inflicted a sort of mysterious punishment, is now repealed by the 6 Geo. 4. c. 91, and the whole is left to the common law, and at common law such a company is not illegal. The case of *The King of the Two Sicilies v. Wilcoxon* (1) shows that no witness can be allowed the discretion of refusing to give evidence in a court of justice, by merely suggesting, "I may be exposed to penalties if I do," unless he is able to connect that objection with some law, which from the nature of the case may by possibility affect him with regard to his evidence; and it is for him to shew the existence of such a law.

The King v. Webb, 14 East, 406.

Harrison v. Heathorne, 6 Man. & G. 81;

s. c. 12 Law J. Rep. (n.s.) C.P. 158.

Sheppard v. Oxenford, 1 Kay & J. 491.

Blundell v. Winsor, 8 Sim. 601; s. c.

6 Law J. Rep. (n.s.) Chanc. 364.

Mr. Southgate, for the creditors' representative.

Mr. Edward James, Mr. Selwyn and Mr. J. J. Aston.—A witness is not bound to answer any questions which may by

(1) 1 Sim. N.S. 301; s. c. 20 Law J. Rep. (n.s.) Chanc. 417.

possibility tend to criminate him, or subject him to any pains and penalties. Were it not so, the answers to an innocent question would soon involve him in a mesh from which he would find escape difficult; for instance, Where were you on such a night? Answer, I decline to answer that, it may subject me to punishment. It has been held, therefore, that the witness is the best judge of his own liability. This was a partnership registered, but not completely registered, under the Joint-Stock Companies Act; they took upon themselves to act in a *quasi* corporate capacity, and they issued, not to shareholders merely, but really to the public, what are called scrip certificates; there is no deed, and the power of transfer by mere delivery is unlimited. Now to sell such shares, and represent that the holder of such shares would be entitled to the profits and liable to the debts of the company so long only as he held the shares, and that by transferring them to another he would be free from all previous liability, would be an illegal pretending—a cheat—which would come within the meaning of indictable offences; it would be a conspiring fraudulently to misrepresent. It would also be an indictable offence so to misrepresent the law as to induce the unwary to enter into such a company. The Bubble Act merely declared what the law was, and added penalties. The witness would also be liable to penalties, under the 7 & 8 Vict. c. 110. s. 2, for upon the sale of every share after the 1st of November 1844, a new member was introduced into the partnership, and thereby a new and illegal partnership was formed; it also restrains the receipt of all dividends and profits. The exemption from the operation of the act, by the company having existed before the act passed, fell with its becoming a new partnership: its name no longer protected it. The company, which assumed to issue shares as if it were legal, was an illegal company, and the broker by trafficking in such shares has made himself responsible.—

Garbet's case, 1 Den. C.C. 236.

Fisher v. Ronalds, 12 Com. B. Rep. 726; s. c. 22 Law J. Rep. (N.S.) C.P. 62.

Duvergier v. Fellowes, 5 Bing. 248; s. c. 8 Law J. Rep. K.B. 270; 10

B. & C. 826; 1 Cl. & F. 39; 7 Law J. Rep. C.P. 15; 2 M. & P. 384.

Jackson v. Cocker, 4 Beav. 59; s. c. 10 Law J. Rep. (N.S.) Chanc. 236.

Josephs v. Pebrer, 3 B. & C. 639; s. c. 3 Law J. Rep. K.B. 102; 5 D. & R. 542; 1 C. & P. 341, 507.

Short v. Mercier, 2 De Gex & Sm. 635; s. c. 18 Law J. Rep. (N.S.) Chanc. 490; 3 Mac. & G. 205; 20 Law J. Rep. (N.S.) Chanc. 289.

Re the Mexican and South American Company, ex parte Barclay, 27 Law J. Rep. (N.S.) Chanc. 660.

Nelme v. Newton, 2 You. & J. 186, n.

Maccullum v. Turton, *Ibid.* 183.

Green v. Weaver, 1 Sim. 404; s. c. 6 Law J. Rep. Chanc. 1.

Taylor on Evidence, 11, 35, 735.

Smith's Mercantile Law, 66.

2 *Phillips on Evidence*, 487, 10th ed.

THE MASTER OF THE ROLLS.—There are three grounds upon which it is argued that this witness is not bound to answer the questions put to him:—first, that the association is illegal at common law; secondly, that he would incur penalties under the 7 & 8 Vict. c. 110; and, thirdly, that he may have made representations contrary to law, which have induced persons to enter into engagements which may make him liable to criminal indictments. Is a witness to determine for himself whether he is liable to any penalty? There are, no doubt, a great number of cases in which the witness must be the only person to determine it; but when it is a question of law, and all parties are before the Court, it is then for the Court to decide; and that is the present case. Is then this an illegal association at common law, totally independent of any statute, it being argued that such a society cannot legally act as a corporation without the royal charter? I am disposed to assent to that proposition, but I cannot discover anything that amounts to acting, or assuming to act, as a corporation. What is meant by acting as a corporation is not easily defined; it would seem to be a society of persons who, under a common seal, shall be able to bind the corporation aggregate, and to do those things which are authorized by the powers conferred by royal charter. If the illegality be that they do without a

charter what the power of a charter can alone give, it can only be illegal if they do those things which the charter gives power to do, which is nothing more than to sue and be sued under a particular name, to use a common seal, and matters of that description. In the present case there is nothing like it. In the comment made upon *Duvergier v. Fellowes* in *Harrison v. Heathorne*, it was admitted, on demurrer, that the company did act as a corporation, and, consequently, they were open to the objection. The case was affirmed in the House of Lords (2), on the ground of an illegality of the assignment, and not on the ground relied on in the Common Pleas. The present case is not affected by any statute; and I find no case in which it is said that a partnership of persons who agreed among themselves that their shares should be legally assignable, *in perpetuum* or indefinitely, is absolutely void and illegal at common law; I find no case which lays that down as a proposition, nor am I able to say why such an association should be void at common law. It does not offend against society; it does not injure any class of individuals; and, in the absence of authority, I shall not be the first to hold that such an association is void at common law. In *Harrison v. Heathorne*, however, such an association was not considered illegal. I am referred to *Blundell v. Winsor*; but the judgment there proceeded upon the ground, that it was nothing more than a fraudulent attempt by various persons to draw in others to subscribe to an association, under pretence that they could get rid of their liability, and so make a profit of their shares and dispose of them; but if that were established, it would, no doubt, be a fraudulent and void association.

If these facts were before the Court upon the demurrer, there was ground for supporting the judgment; but if it proceeded upon the ground of its being a void association, then it is at variance with *Harrison v. Heathorne*, the case I should be disposed to follow. As, therefore, the association is neither illegal nor void at the common law, the next question is, whether there

was any penalty incurred under the 7 & 8 Vict. c. 110. That act contains a restriction with respect to the disposal of shares. Section 26. directs that with regard to subscribers, and any person entitled to any share in any joint-stock company, "*the formation of which shall be commenced after the 1st of November 1844.*" The company, then, was commenced in 1837, under the style of the Mexican and South American Company; and it has professed to carry on its business ever since under that name. The words "*the formation of which shall be commenced after the 1st of November 1844*" were therefore used in their ordinary meaning, and they cannot be considered as having any technical meaning, from which it is to be inferred that whenever an alteration was made in the existing partnership, by a variation of the number or by a change of its members, subsequent to that date, it was to be treated as a new partnership, and come within the provision of the 7 & 8 Vict. c. 110, rendering registration necessary, and without it to make any person contracting for shares liable to the penalty mentioned in section 26. I am of opinion that this is not the meaning of the words, and that when the section speaks of the "*commencement of the formation of the company,*" distinguishing between "*the formation of the company*" and the "*commencement of the formation of it,*" it was clearly intended to use words as stringent as possible to point out that which does not mean an accidental variation of the number of the members of the company, which is to create a new contract within the provisions of this act. Entertaining really no doubt on that point, I am of opinion that under the statute no penalties are incurred. The only remaining ground of refusal to answer is this: that a representation was held out by this company to the world at large that all persons may get rid of their liability by a transfer of their shares; which is wrong in point of law, because they do not get rid of their liability in respect of contracts entered into by the company during the time they were members of it, and that this being a false representation held out to the world, upon the faith of which persons may have acted, they may be indicted

(2) 1 Cl. & F. 39.

COURTS OF CHANCERY:

... false representation. I am of opinion that this does not amount to more than that it is a contract between the parties themselves; but I feel satisfied that if it was actually so stated, and a person *ad fide* made an accidental misrepresentation on a point of law, that would not entitle him to say that he would not answer any questions on the subject; though if he had made such a misrepresentation fraudulently, with an intention of deceiving somebody, he might be indicted. Certainly, according to our experience in this court, we make persons answer interrogatories to bills infinitely more stringent, without anybody thinking that they could raise any objection that it would render them liable to such a penalty. I confess that not only my strong feeling is that this is a correct view of the case, but I am bound to say that I am mainly influenced by the very serious consequences which would follow from holding the opposite view. If I decide on the objection raised, whether a witness is bound to answer a question that this is an illegal association, the result would be, that the *ad fide* transactions of a company existing for a period of twenty years would be all unravelled, and most serious consequences would ensue. This Court has itself distributed a large amount of money, under the winding-up order made in this case, and am of opinion that both at common law and upon the words of the act of parliament, and upon the cases, there is no justifiable ground on which this witness can refuse to answer the question. And I determine the question upon the act, without taking into consideration the fact of its being a penal statute, and therefore to be construed most strictly against making any person liable to penalties under it.

June 1.—From this decision Mr. Aston appealed, the same counsel appearing for the appellant and for the official manager respectively as were engaged in the court below.

Mr. Southgate was for the creditors' representative.

The Court did not call upon any of the counsel for the respondents.

Besides the cases cited at the Rolls, the appellant's counsel referred to—

Harvey v. Collett, 15 Sim. 332; 2. c. 15 Law J. Rep. (n.s.) Chanc. 376.
Pasley v. Freeman, 2 Smith's Leading Cases, 55.
The Statute 7 Geo. 2. c. 8, the Stock Jobbing Act.

LORD JUSTICE KNIGHT BRUCE considered that there was not the least pretence for this appeal motion. There might possibly have been some ground if the case had been affected by the 26th section of the 7 & 8 Vict. c. 110, but clearly it was not so. This company was established in 1837, and the circumstance that since that time, and before and since the passing of that statute, shares had been transferred could not have the effect contended for of bringing the company, however constituted, within this section. The real question was, whether this gentleman, having given a reason for not answering, had given a reason which could be accepted for his not doing so. He says, "I have never bought any shares for myself, and as I am advised the company is illegal, and I may render myself liable to criminal proceedings or penalties, I decline to answer further." He was then asked, "Have you ever bought shares for other persons?" and he said, "I decline to answer on account of the company's illegal proceedings." But at the witness "being advised" that the company was illegal was nothing. If he had shewn that it was illegal, he might have advanced a step. But, independently of the fact that the order for winding up had been in existence for nearly two years, his Lordship had not heard a single particle of evidence that there was any illegality in the company. He desired to be understood as giving no opinion either way on the observation made by Mr. Justice Maule in *Fisher v. Ronalds* (3). That applies to

(3) *Ubi supra*. The passage in the report is this:—"It is the witness who is to exercise his discretion, not the Judge. The witness might be asked, 'Were you in London on such a day?' and though apparently a very simple question, he might have very good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the Judge can know anything about that. The privilege would be worthless if the witness were required to point out

a case where the witness had given no reason; but here the witness had given as his reason, and his only reason, for not answering that which (if he might use the expression) was no reason at all. The motion must be refused, with costs.

LORD JUSTICE TURNER entirely agreed, and said that the witness, in refusing to answer, had gone further, and given a reason that professed to cover a question which it would not cover.

Mr. Southgate applied for the costs of the appearance of the creditors' representative.

LORD JUSTICE KNIGHT BRUCE.—I think the creditors' representative has a right to appear in the proceedings. He ought to have his costs out of the estate.

M.R. }
Dec. 6. } SCOTT & COLBURN.

Company—Borrowing Powers—Directors—Bills of Exchange—Mortgage of Buildings.

The directors of a company, in contravention of their deed of settlement, drew bills of exchange to secure a debt incurred in building a music-hall, and at the same time mortgaged the building to secure the payment of the bills of exchange. In a suit by the mortgagee for foreclosure,—Held, that the mortgage was valid, that the legal estate was vested in the plaintiff, and that the company could not, in this foreclosure suit dispute the power of the directors to give such security for a past debt.

A company was formed for carrying on the Royal Surrey Gardens; it was provisionally registered under the Limited Liability Act, 1855 (18 & 19 Vict. c. 133.) in December 1855, and subsequently it was completely registered on the 13th of April 1856. On the 6th of September 1856 it was registered under the Joint-

how his answer would tend to criminate him." And the Lord Chief Justice Jervis, in giving judgment in the same case said, "We must allow the witness to judge for himself, or he would be made to criminate himself entirely."

Stock Companies Act, 1856, 19 & 20 Vict. c. 47.

The deed of settlement empowered the directors to erect a hall on the company's premises, and for that purpose to enter into such contracts or arrangements with builders and others as they might think proper. The directors were forbidden to accept bills of exchange on behalf of the company; they were empowered to borrow 10,000*l.*, and also, with the sanction of a general meeting, a further sum of 10,000*l.*, and to raise such sums on the security of the company's property; and the lenders were not to be bound to inquire into the occasion for the loan, or the validity of the resolution authorizing it; and, except as aforesaid, it was declared that it should not be lawful for the company, or the directors on behalf of the company, otherwise than in the ordinary course of business, and for the current expenditure of the company, to contract any debt or debts whatsoever. And it was declared that, for the further security of the directors, all deeds under the common seal of the company should be binding on the company in any court of law or of equity; and that the company should not be at liberty to dispute any statement therein contained, or to allege in bar thereof any irregularity in the manner of obtaining them.

On the 23rd of February 1856, before the company was completely registered, James Coppock, the chairman, and two other provisional directors, were appointed a sub-committee to arrange a contract for building a music-hall.

On the 27th of the same month they entered into a contract with the plaintiffs to build the said music-hall, which provided that the plaintiffs should be paid the sum of 17,000*l.*, at the times and by the instalments following; that is to say, three-fourths of the amount of work done up to the 31st day of March 1856; three-fourths of the amount of work done up to the 30th day of April 1856; three-fourths of the amount of work done up to the 31st day of May 1856; three-fourths of the amount of work done up to the 30th day of June 1856, as soon after such periods as the same should be ascertained and certified; and on the 30th day of September 1856, such a further sum as, with the previous

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s, would make up or amount to of 12,000*l.*, and the remaining with interest thereon at the rate of cent. per annum, on the 31st day of December 1857. At the foot of the said act was added the following memorandum, signed by James Coppock:—

And in consideration of the contract having commenced the work, James Coppock, of No. 40, Parliament Street, does and undertakes to pay to the contractors, John Alderson Scott and Edward Cornwall, the first portion of the 17,000*l.*, namely 12,000*l.*, at the times hereinbefore mentioned; the remaining sum of 5,000*l.* to be secured by a mortgage of the gardens, and by engagement under the common seal of the said company, as soon as the same can be affixed."

At a meeting of the directors, held on the 16th of April 1856, the following resolution was passed:—

"Resolved, that all the proceedings of the committee of management as entered in this book, and all contracts and agreements provisionally made to this date by them or by any sub-committee duly appointed, be ratified and confirmed, and be adopted and fulfilled, and become contracts and agreements of the Royal Surrey Gardens Company, Limited, and that the common seal of the company be affixed to these minutes in confirmation and ratification thereof." And the seal of the company was affixed thereto at a meeting held on the 24th of April 1856.

The plaintiffs completed their contract, and executed various extra works, and obtained the architect's certificate for 18,976*l.* 16*s.* 7*d.*, of which sum 12,000*l.* was paid in cash pursuant to the agreement, and a mortgage was prepared to secure 5,000*l.* of the balance upon the property of the company, pursuant to the arrangement entered into; and it was agreed that the payments of principal and interest should be further secured by bills of exchange, in addition to the security of the company's premises—the directors in the deed respecting the non-acceptance of bills of exchange on behalf of the company having escaped attention. Bills were accordingly accepted for the 5,000*l.* and interest. The mortgage recited that the plaintiffs had agreed to accept pay-

ment in this form, on having the payment of the bills secured as followed, and witnessed that, "for further securing the payment of the said principal and interest monies at maturity of the said bills of exchange given for the same as aforesaid," the company assigned the premises to the plaintiffs, subject to redemption, on payment of the said bills of exchange when they should become due.

The seal of the company was affixed to this deed on the 6th of November 1856.

The plaintiffs filed the bill in this suit, praying for a decree of foreclosure, the object being to determine the priority of several mortgages upon the property of the company, which was now in a course of liquidation.

The defendant Colburn, as holder of a second mortgage, given to cover advances made from time to time, contended that the plaintiffs' deed was void, because the directors had no power to accept bills of exchange, and also because the mortgage was not given for an advance of money, but in payment for work done under their contract. It was also contended that, independently of the mortgage-deed, the contract did not bind the company, and that what had passed did not amount to adoption.

Mr. Hemming (with whom was Mr. Palmer) appeared for the plaintiffs. Mr. Follett and Mr. H. F. Bristowe, the defendant Mr. Colburn. Mr. Barber, for the liquidators. Mr. Selwyn and Mr. J. H. Palmer, for the executors of James Coppock, deceased.

THE MASTER OF THE ROLLS. — Two objections have been taken to the validity of the plaintiffs' mortgage. The first is, that it is a mortgage to secure the payment of certain bills of exchange, accepted by the directors, which was an act *ultra vires*. The deed recites the execution of works by the plaintiffs; that a sum exceeding 5,000*l.* was due from the company to the plaintiffs; and that bills of exchange were given for 5,000*l.* and interest; and then it witnesses that the mortgage is made for securing the said principal and interest monies, at the maturity of the bills of exchange. It is therefore

in fact, a mortgage to secure the principal debt of 5,000*l.* and interest, and not the payment of the bills of exchange. It is true that the proviso for redemption is on payment of the bills of exchange as they became due; but that was because it had been arranged, as already recited, that the payment should be made in that way. If the bills were paid at maturity the proviso would be satisfied, and the only possible question on the form of the proviso would be, whether a subsequent payment of principal and interest would entitle the mortgagee to a reconveyance, about which there could be little doubt. This is a case for a liberal construction of the deed; for there is no doubt that money's worth was given by the plaintiffs to the company, and that for the very purpose of the company's existence; and that being so, and a technical objection being taken to the security, I am bound to look at it strictly to ascertain whether it applies. As to the second objection, I am disposed to agree that the equitable mortgage contained in the agreement did not bind the company, unless they were bound by estoppel by the recital on the deed; but it is not necessary to go into that. The legal estate clearly passed by the deed to the plaintiffs; it is under the seal of the company, and were I to assume that the deed was fraudulent and void, before advantage could be taken of it a suit must be instituted to set aside the deed; and, for the purposes of this suit, I am bound to assume the validity of this deed, which passes the legal estate. There will, therefore, be a declaration that this was a valid mortgage. It is very much for Mr. Colburn's interest to treat it as a good security; because any argument founded on the objection that it was given for a past debt by which the plaintiffs' security could be invalidated, would apply equally to the defendants' mortgage; their security was given for a past debt, and it does not seem material how the debt arose—but I do not enter into the question. There will be an account of what is due on the mortgage of the 6th of November 1856, and inquiries as to the subsequent incumbrances.

KINDERSLEY, V.C. } *Ex parte* BARTON, in
March 21. } re THE NATIONAL
LORDS JUSTICES. } STEAM FUEL COM-
April 16, 18. } PANY.

Winding up—Contributory — Forfeiture of Shares—Allottee.

B. having applied for shares in a company, and having had 100 shares allotted to him, sold them without having signed the deed of settlement, or attended any meeting of the company. The directors, with the sanction of the shareholders, at a general meeting, declared all the shares to be forfeited where the shareholders had not signed the deed, but no power was given them under the deed to take this course:—Held, that B. was not discharged from his liability in respect of such shares, and his name was placed on the list of contributories. On appeal, this decision was affirmed, the directors having no power to declare a forfeiture.

This case came on upon an adjourned summons from chambers.

The National Steam Fuel Company was completely registered in September 1852. In October 1853 the directors of the company ordered a notice to be inserted in the newspapers, and to be sent to the shareholders, to the effect that those shareholders who had not signed the deed of settlement in respect of the shares held by them, were required to execute the same on or before the 21st of November next, or in default the shares would be absolutely forfeited. On the 29th of December following an annual general meeting of the company took place, when it was resolved that the question of the forfeiture of those shares for which the deed of the company had not yet been signed be considered and determined at a special meeting of the shareholders, to be held on the 27th of April 1854. The special meeting was held on that day, and it was then resolved, "that the whole of the shares for which the deed of settlement of the company shall not have been signed on or before the 31st of May instant, be thereafter absolutely forfeited." And the directors were authorized to re-issue the remaining forfeited shares of the company. On the 12th of July following the directors issued

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circular to the shareholders, stating that about 2,000 shares, on which 1l. per share had been paid, had been forfeited, in conformity with the resolutions passed at general and extraordinary meetings of the shareholders, and that to this extent the company had been benefited."

It appeared that there was no power given to the directors by the deed of settlement to forfeit the shares of original shareholders, but by the 67th section of that deed it was provided, that in case any transferee of shares should neglect to execute the deed within three calendar months after the transfer to him, his shares should be immediately and irredeemably forfeited to the use of the company. It was admitted that Mr. Barton had applied for shares in this company, and that 100 shares were allotted to him, and that he paid the deposit upon them, but that he had never signed the deed of settlement nor attended any meeting of the shareholders in the company. Mr. Barton re-sold the shares so allotted to him prior to the month of October 1853, in the market, but without giving notice of such sale to the company or effecting any transfer of them to the purchaser. The question now was, whether Mr. Barton was relieved from liability in respect of such shares by reason of their having been declared to be forfeited.

Mr. Glasse and Mr. Baggallay, for the official manager, contended that the directors had no power given them by the deed of settlement to declare the shares of original shareholders forfeited, nor had they any inherent right to declare such shares to be forfeited. They, consequently, acted *ultra vires*, and Mr. Barton had not been relieved of his liability in respect of the shares allotted to him. The fact of Mr. Barton not having signed the deed of settlement did not affect his liability. They cited—

Harris v. the North Devon Railway Company, 20 Beav. 384.
In re Kollman's Railway Locomotive and Carriage Improvement Company, (Beresford's case), 2 Mac. & G. 197; s. c. 19 Law J. Rep. (n.s.) Chanc. 166, 332; 2 Hall & Tw. 3 De Gex & Sm. 175. Cas. 633.

Ex parte Baily, 20 Law J. Rep. (n.s.) Chanc. 145.
Mansfield's case, 2 Mac. & G. 57; s. c. 19 Law J. Rep. (n.s.) Chanc. 258; 1 Hall & Tw. 593.
Cookney's case, ante, 12.
Yelland's case, 5 De Gex & S. 395; s. c. 21 Law J. Rep. (n.s.) Chanc. 852.
Hawkins's case, 2 Kay & J. 253; s. c. 25 Law J. Rep. (n.s.) Chanc. 221.
Blackburn's case, 3 Drew. 409.

Mr. Baily and Mr. Waley, for Mr. Barton, submitted that the directors, by their acts, had relieved him from his liability. He had never signed the deed, and had never, therefore, been an actual shareholder. He had only entered into a contract to become a shareholder by signing the deed of settlement. He had sold the shares allotted to him, and the purchaser from him would be recognized as the holder of those shares. This distinction had been laid down by Lord Cranworth in *Beresford's case*.

They also cited—

Prendergast v. Turton, 1 You. & C. C.C. 98; s. c. 11 Law J. Rep. (n.s.) Chanc. 22; 13 Law J. Rep. (n.s.) Chanc. 268.
Goldsmid's case, 16 Beav. 262.

KINDERSLEY, V.C.—This is a case in which Mr. Barton, by his acts, has become not an actual and complete shareholder, but has put himself under an obligation which might have been enforced upon him to become a shareholder. He became liable to be put upon the list, and liable to be compelled to execute the deed and make himself a complete shareholder. He did not execute the deed, and when called upon to do so, he either declined or neglected to execute it. The company was completely registered on the 21st of September 1852, and it was previously to that registration that Mr. Barton had put himself in this position; so that at the time when the company was completely registered, the directors might and were bound to compel him, and other persons who were in a similar position, to execute the deed and become shareholders. In October 1853 the directors came to a resolution

tion intimating an intention that the shares of those who did not execute the deed should be forfeited. Now there is no power of forfeiture whatever in the deed of the company. There is not only no power of declaring the shares of persons who do not execute the deed forfeited, as in *Beresford's case*, but there is no power to compel the forfeiture of the shares of parties who would not pay calls or perform the other obligations imposed on them. There is only a clause, which it is admitted does not apply to the present case. That is the 67th clause, and that does not embrace the case of persons who were original shareholders. Under these circumstances, the directors thought fit in perfect *bona fides* to resolve, that the shares of those persons who did not execute the deed by a certain time should be forfeited, and a circular notice to that effect was issued. In the November following there was a resolution that there should be an advertisement inserted in the newspapers, and in December 1853 there was an annual meeting, at which it was resolved that the question of forfeiture of the shares should be considered at a special meeting in the month of April following. A resolution was then passed for the forfeiture of the shares of the persons who did not sign before the 31st of May following. At a meeting held in July a report was made by the directors to the shareholders, stating that they had declared forfeited the shares of those who had not executed the deed at the time fixed, and they recommended the re-issue of the forfeited shares. There appear to have been about 2,000 shares forfeited, and no doubt it was intended to include Mr. Barton's shares among them. In January 1855 there was an annual general meeting, at which there was a report, stating that there was a re-issue of the forfeited shares, but that about 1,300 remained unissued, and there was a resolution confirming the re-issue, and a list of the shareholders was sealed, which did not include Mr. Barton's name; and no doubt the intention of the directors and of Mr. Barton at that time was that his shares should be forfeited.

But then comes the question, can I say that directors have an inherent right of

forfeiture? I apprehend they have not; unless there be in the deed a clause authorizing them to forfeit shares, the directors have no power by which they can do so.

The distinction has been taken, and very justly so, between this case and many others which have been referred to, namely, that Mr. Barton was not a shareholder properly constituted, but had only entered into a contract to become a shareholder; and there is certainly a distinction in that respect. The question then is, whether that varies the powers of the directors. I should be very glad to find an authority which would justify me in deciding in favour of Mr. Barton, but no such case has been produced. How, then, can I say that for the first time I will introduce this principle? If the intention had been that the directors should have the power to deal differently with those persons who had only agreed to become shareholders from those who were actual shareholders, that power would have been inserted in the deed. In *Beresford's case* there was expressly such a power introduced; but there is none here. It has been contended that an inference may be drawn from the language of Lord Cranworth in *Beresford's case*, that the distinction did exist in the mind of the Judge; and there is no doubt that the language does, to a certain extent, justify the contention; but the language does or does not justify the contention, according as you interpret the words, "it was competent for them," that is, the directors, "so to do." What does that mean? Did Lord Cranworth mean to lay down a general proposition that it was competent for all directors so to do? It would be too strong to say that these words must have that interpretation; and I think I ought to put this interpretation on them, taking what precedes and what follows, that it was competent to those directors, under the circumstances in which they were placed, and having regard to the deed, to do as they did. Now, in that case there was a special clause authorizing the directors to declare forfeited the shares of those persons who had not within a certain period executed the deed. But then that clause only applied to the persons named in a certain schedule, and it happened that

there was no schedule; and the question was, whether that was such a matter of exigency as that they could not exercise their power of forfeiture because there was no schedule. I came to the conclusion when that case was before me in the Master's office, and the present Lord Justice Knight Bruce and the Lords Commissioners came to the conclusion that that made no distinction. There was that irregularity; but another question arose which does not arise here, whether the forfeiture, if it operated at all, operated as a complete discharge of the shareholder from all past and future liability. It appears to me that I cannot put such an interpretation upon that judgment of Lord Cranworth as to justify me in saying that he meant to decide as an abstract proposition that, with or without power in their deed, the directors have an inherent power to deal with persons in the position of shareholders in this way. And therefore I must decide (although reluctantly) that Mr. Barton has not been discharged from his liability. I cannot help feeling that if I were to deal with this question on the principle of general equity, there has been such a dealing between the parties that one could have no claim upon the other; but I think that the principle of general equity does not apply here, and therefore I can only say that Mr. Barton's name must be placed on the list of contributories.

April 16, 18.—From this decision Mr. Barton appealed.

The same counsel appeared as in the court below.

Besides the cases cited on behalf of Mr. Barton in the court below, the following were relied upon:—

Woodfall's case, 3 De Gex & Sm. 63.

Beresford's case, on appeal, 2 Mac. & G. 127; s. c. 2 Hall & Tw. 388; 19 Law J. Rep. (N.S.) Chanc. 332.

Morgan's case, 1 M. & G. 225; s. c. 18 Law J. Rep. (N.S.) Chanc. 265; 1 De Gex & Sm. 750; 1 Hall & Tw. 320.

And for the official manager:—

In re the St. George's Benefit Building Society, 27 Law J. Rep. (N.S.) Chanc. 96.

Davidson's case, 3 De Gex & Sm. 21; s. c. 18 Law J. Rep. (N.S.) Chanc. 254.

Stat. 7 & 8 Vict. c. 110. s. 26.

LORD JUSTICE KNIGHT BRUCE considered that the most material consideration was that the declaration of forfeiture was without authority on the part of the directors and the company, and therefore insufficient; but if, on Mr. Barton's part, or on the part of the present holders of the scrip certificates for the shares allotted to him, there had been submission or accession to the forfeiture, that fact might have told in his favour. But the evidence did not shew or lead to the conclusion that there had been any such accession or submission. He was afraid that the consequence must be that the rights of Mr. Barton and of the present scripholders were preserved to them, and therefore also their liabilities, which liabilities must be held to fall on Mr. Barton. The case did appear a hard one, and one not perfectly clear, and for that reason the Court would relieve Mr. Barton from the costs of the appeal. The official manager, however, would have his costs out of the estate.

LORD JUSTICE TURNER added that his opinion also agreed with that of Vice Chancellor Kindersley. There was, of course, no doubt that Mr. Barton had, by taking the scrip, become liable as a contributory to the company; and it rested, therefore, with him to shew that he had been absolved from that liability. It had been said that a Court of equity would not have enforced the agreement to take shares; but his Lordship thought that he could not escape upon that ground. There were two separate principles to be considered: the one as to the ground upon which specific performance would be ordered by this Court; the second as to the power of directors of a company acting as trustees for the shareholders. These were distinct principles. It did not appear to him that the considerations which were applicable in the one case were applicable in the other; nor did he think that the fact of the contract being executory would extend the powers of the directors to forfeit shares. In

truth, the real question was, whether the contract was one which the directors, being trustees for the body of shareholders, had power to enter into; that contract between the directors and Mr. Barton being that they would absolve him from all liability. His Lordship thought that the directors had no such power to absolve him unless there had been some assent to that agreement on the part of all persons interested, like that which was suggested in *Morgan's case*. He concurred with his learned Brother in relieving Mr. Barton from the costs of this appeal; but he did not do so from any doubt in his own mind of the principle which the case involved.

<p>STUART, V.C. April 19. LORDS JUSTICES. July 8.</p>	<p>In the matter of JAMES CANT'S ESTATE. In the matter of THE LANDS CLAUSES CONSOLIDATION ACT; And of THE EASTERN UNION AND HARWICH RAILWAY COMPANY.</p>
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Will—Construction—Pre-emption.

*A testator, by his will, gave all his real and personal estate to be enjoyed by his widow for life, and after her death to be sold, and the proceeds to be divided among his ten children equally. The testator directed that one of his sons should have a right of pre-emption for 450*l.* of a particular parcel of garden land, part of the real estate. After the death of the testator, and before that of the widow, the parcel of garden land was purchased by a railway company under their compulsory powers; the compensation money paid therefor, when freed from incumbrance, being represented at the death of his widow by the sum of 882*l.* 18*s.* 2*d.* standing in court:—Held, by the Lords Justices (reversing the decision of one of the Vice Chancellors), that the testator's son to whom the right of pre-emption was given was entitled to the compensation money, subject to the deduction of the price fixed by the testator.*

James Cant, gardener, of Manningtree, by his will, dated in 1827, gave all his estate real and personal to his executors,
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upon trust to permit his widow to receive the rents and profits of his real estate, and the interest of his personal estate, and to have the use, but not the disposal, of his household furniture, stock-in-trade, and the profits of his business, which he directed his executors to carry on for her benefit, during the term of her natural life; and from and after her decease, upon trust, within four months after that event, to convert the whole of his said real and personal estate into money, and, after payment thereof of all expenses of carrying the trusts of his will into execution, to divide the same into ten equal parts, and when so divided he gave one-tenth part to each of his ten children (naming them). The will then contained a clause, by which it was provided that the executors of the will, previous to selling and disposing of the garden the testator had purchased of John Golding, and also the garden formerly Mr. Burton's, should offer both the said gardens to his (the testator's) son, Charles Cant, at the sum of 450*l.*; and if his said son Charles Cant should be desirous of purchasing the said gardens at the sum of 450*l.*, and should give to the said executors three calendar months' notice in writing, such three calendar months' notice to be computed from one calendar month next after the decease of the testator's said wife, of such his desire to purchase them, then the testator directed his said executors, upon payment of the purchase money at the expiration of such notice, to stand possessed of the said gardens upon trust to convey the same to his said son Charles Cant. And in the event of their not receiving such notice, or of the said purchase-money not being paid, or ready to be paid at the expiration of such notice, then that the said executors should stand possessed of the said gardens in trust, to be sold in manner thereinbefore directed. And further, that in the event of the testator's said son Charles Cant purchasing the said gardens, the tenth part or share so thereinbefore directed to be paid and given to his said son Charles Cant should be taken and considered as part of his purchase-money, and be allowed to him out of the said consideration-money, at the time of the execution of the conveyance to him.

Prior to the date of the will the testator

had caused eight cottages to be erected on the garden-land, the right of pre-emption in which was given to his son Charles Cant.

The testator died in July 1828.

In 1853 the Eastern Union Railway Company, under their compulsory powers, took the two pieces of garden ground, and the eight cottages standing thereon, for which they paid into the bank 550*l.* for the cottages, and 700*l.* for the land, making 1,250*l.* Out of this, by an order of the Court, dated in June 1854, a mortgage of 430*l.* and interest, to which the purchased land was subject, was paid off, and the residue carried to the account of the trustees and executors of the testator's will. It was ordered also that the money should be invested, and the dividends paid to the testator's widow. The purchased premises were conveyed to the company by a deed, dated in December 1854.

The testator's widow died on the 27th of January 1859; and on the 5th of February 1859 Charles Cant gave notice to the surviving executor of the testator's will of his desire to purchase the gardens and hereditaments at the sum of 450*l.*, according to the proviso to that effect in the will; and that he claimed the whole of the purchase-money which had been paid into the bank therefor by the company, and which then stood invested, on his paying to the executor 450*l.*

Upon an application to the Court for payment to the parties beneficially entitled to the money, represented by 882*l.* 18*s.* 2*d.* consols, which had been paid into court and invested as above mentioned, the question arose whether the fund belonged or not to Charles Cant by virtue of the right of pre-emption of the premises, from the sale of which it had arisen, given to him by the testator's will.

Mr. Bacon, Mr. Shebbeare and Mr. H. F. Shebbeare, for the children of the testator other than Charles Cant, contended that Charles Cant, being a gardener, the intention of the testator was to give him the choice of enjoying the garden in specie upon payment of the specified sum, and not to give him any sum of money which might represent the value of the garden. The power of carrying this intention into effect having been rendered impossible by

the sale to the company, there no longer existed any subject-matter upon which the right of pre-emption given to Charles Cant could be exercised.

Mr. De L. Giffard and Mr. F. C. Millar, for Charles Cant, contended that the right of pre-emption was not taken away by the sale of the gardens to the company. The money paid into court represented the land for every purpose of the will, and was subject to every trust and direction in the will, just as the gardens would have been had they not been sold.

Mr. Bacon, in reply.

STUART, V.C. said a clear and imperative trust for sale was created by the testator, the leading purpose of the will being to effect a conversion into money, to be distributed amongst all his children equally. Upon that trust the right of pre-emption was grafted, and the trust for sale having been extinguished by the compulsory sale to the company, it would seem that the right of pre-emption must fall with the trust upon which it was grafted. The right of pre-emption could not be regarded as an absolute devise of the gardens, on condition of paying 450*l.* Unless by actual purchase and conveyance to C. Cant of these gardens in specie in the manner and on the conditions prescribed by the will, there were no words which gave him a right to anything in respect of the gardens, except his share of the money to be produced by the conversion. The right of pre-emption having thus become extinguished, there must be an order for payment of the compensation-money, in equal tenth shares according to the provisions of the will.

From this order Mr. C. Cant appealed. The same counsel appeared as in the court below, and for the respondents in the appeal the case of *The Earl of Radnor v. Shafto* (1) was referred to.

LORD JUSTICE KNIGHT BRUCE.—By a contract of purchase under the powers of a railway act, a sum of money was substituted for land, and became subject to all

the rights which affected the land. The land was devised with other property, by the testator to his wife for life, and after her death all was to be sold, and the testator, in effect, said this, "As to a particular portion, namely, the land now in question, one of my sons shall have it if he chooses to be charged with 450*l.* as between himself and my estate." This right remains unaffected by the act, and the son is entitled to take the purchase-money, whether it is worth hundreds or hundreds of thousands, on paying the sum which the testator has specified in his will, just as he would have been entitled to the land itself, if it had not been taken by the railway company.

LORD JUSTICE TURNER.—The whole argument of the respondents rests on this, that the testator only intended to benefit his son Charles in the event of his continuing to be a gardener. The true test of this is whether, if he ceased to be a gardener in his father's lifetime, he would still have been entitled to the land. This question admits of no doubt; and the only consideration then is, whether, if the right remained at the death of the testator, the fact of a subsequent act of parliament passing can affect the rights of the parties? I am of opinion that it cannot. The order of the Court below must therefore be reversed. It must be ordered, that Charles Cant paying 450*l.* to the credit of the general estate of the testator, he is to be declared entitled to the 700*l.* paid into court by the company. The costs of all parties of the appeal to be borne out of the estate of the testator.

M.B. }
March 22, 24. } STRINGER v. HARPER.

Administration of Estate—Costs.

In a suit for the administration of the testator's real and personal estate, it was decided that the debts ought to be paid out of his real in exoneration of his personal estate; and upon a question as to the payment of the costs,—Held, that they must be paid out of the personal estate.

This suit was instituted for the administration of the real and personal estate of

William Harper, deceased, who, by his will, had directed a part of his real estate to be sold and divided; the remainder descended upon his heir-at-law.

By the decree, it was declared that the debts of the testator, and also his funeral and testamentary expenses, ought to be borne by his real, in exoneration of his personal estate.

Upon the suit being brought on for further directions, a question was raised, whether the costs ought to be paid out of the real or out of the personal estate, or proportionately by each.

Mr. Marten, for the plaintiff and other parties interested in the personal estate.—The plaintiff has found it expedient to institute the suit to obtain, first, a sale of the real estate directed to be divided; and secondly, for directions respecting the administration of both estates and the payment of debts. The costs, therefore, ought to be paid out of the descended real estate, or otherwise they ought to be apportioned between the descended real estate and the personal estate.—

Morrell v. Fisher, 4 De Gex & Sm. 422.

Alsop v. Bell, 24 Beav. 451.

Sanders v. Miller, 25 Ibid. 154.

Mr. C. T. Simpson, for those interested in the real estate.—The personal estate is the primary fund for the payment of costs. *Sanders v. Miller* is inconsistent with the established practice.—

Broune v. Groombridge, 4 Mad. 495.

Ripley v. Moysey, 1 Keen, 578.

Pickford v. Brown, 2 Kay & Jo. 426;
s. c. 25 Law J. Rep. (N.S.) Chanc. 702.

Mr. Bovill, for a mortgagee.

Mr. Marten, in reply.

March 24.—THE MASTER OF THE ROLLS.—After consideration, I must direct the costs to be paid out of the personal estate.

LORDS JUSTICES. }
 April 29. } *In re* —, A LUNATIC.

Lunacy—Supersedeas—Costs.

A person had been duly found lunatic by inquisition, but before a committee of person or estate had been appointed, and before any report as to his estate had been made, he recovered his reason. A supersedeas of the commission was ordered. The Court has no jurisdiction to order the party who sued out the inquisition to be paid his costs out of the estate.

This was a petition presented by a gentleman who had served in the army, and having been afflicted with sunstroke, which deprived him of reason, had been found a lunatic. He had recovered, and now presented his petition praying a supersedeas.

Mr. Beck, in support of the petition, stated that the petitioner, whilst serving with his regiment in India, had, in consequence of a sunstroke, been afflicted with insanity, and having returned to this country recovered. In the autumn of last year, however, he relapsed, and in October experienced medical men declared him insane. His father, upon this, procured a commission to issue, and in November the son was duly found a lunatic. The usual reference was then made to the Master to make inquiries as to his estate, and to appoint committees, upon which the father carried in a claim to be appointed committee of both person and estate. This was opposed, and the Master proposed to appoint an independent person committee of the estate, and the lunatic's wife and a medical gentleman joint committees of his person. Before however this was effected, and before any property was taken possession of by the Crown, the lunatic in February 1859 completely recovered, and now presented a petition to supersede the commission. This application, the learned counsel added, was not opposed; and the only question on the present application was whether certain costs incurred by the father in promoting the commission should be allowed to him, or whether he must himself bear them. The estate of the lunatic

amounted to about 1,200*l.* a year. *Mr. Beck* contended that where no possession of the lunatic's estate had been taken by the Crown, there was no jurisdiction in the Court to give costs, and referred to *Ex parte Ferne* (1), *Sherwood v. Saunderson* (2), and *Ex parte Loveday* (3), where Lord Cranworth had said that the Court thought the case a perfectly fit one to give costs if he had the jurisdiction to do so. He also cited *Ex parte Glover* (4).

[LORD JUSTICE KNIGHT BRUCE.—In *Mr. Phillips's* excellent book on *Lunacy*, at p. 369, I find a reference to *In re Pinks* (5), which does not seem to be noticed in any other book on the subject.]

Mr. Eddis appeared for the father of the petitioner, and argued that as there was no denial that these costs had been properly incurred, for the insanity was not disputed, the father ought to be indemnified. If the son had applied for a traverse the Court would have been enabled to impose terms as to the costs. Proceedings were going on regularly in the Master's office when the lunatic recovered. The 152nd section of the Lunacy Regulation Act, 16 & 17 Vict. c. 70, empowered the Lord Chancellor, where liberty to traverse had been applied for, and it appeared expedient that the inquisition should be superseded on terms and conditions, to "order the inquisition to be superseded on such terms and conditions to be fulfilled by the lunatic, &c., and subject to such arrangement respecting the lunatic's estate as he may, under the circumstances of the case, think proper." Under the 152nd section the Lord Chancellor was empowered, notwithstanding traverse, to make orders for the management of person & estate. The cases referred to for the petitioner were all previous to this statute. In *Re Pinks* the lunatic was dead, and therefore the Court had no jurisdiction. In *Sherwood v. Saunderson*, there being no fund in the possession of the Crown under the lunacy, the Court had ordered payment of the costs of the proceedings.

(1) 5 Vea. 832.

(2) 19 Ibid. 280.

(3) 1 De Gex, M. & G. 275; a. c. 22 Law J. Rep. (N.S.) Chanc. 231.

(4) 1 Mer. 269.

(5) 12 Law J. Rep. (N.S.) Chanc. 57.

out of a fund belonging to the lunatic in court in a cause.—The learned counsel also referred to the statute 6 Geo. 4. c. 53.

LORD JUSTICE KNIGHT BRUCE.—As the case now before the Court is, as I understand it, simply upon the application of the son to supersede the commission, I am of opinion that the order for the *superseas* should go, but it must be without prejudice to any action which the father may be advised to bring against the son.

LORD JUSTICE TURNER.—I am afraid that the Court has, under circumstances like those of the present case, no jurisdiction to make any order for costs against the petitioner, who seeks to supersede the finding. It has been contended that this Court ought, before issuing the *superseas*, to make provision for payment of costs properly incurred; but here there is precisely that question to be tried, and therefore I agree with my learned Brother.

WOOD, V.C. }
May 30. } **CAMPBELL v. BEAUFOY.**

Plea—Duplicity—Will—Probate.

To a bill against an executor for payment of a legacy the defendant pleaded that the testator was at the time of making his will and of his death domiciled in France, and all the bequests of personal estate affected to be made by the said will were by the laws of that empire null and void:—Held, that the plea was not double, as it did not state two bars to the suit, but two averments leading up to one bar.

Although probate of a will is conclusive so far as relates to the appointment of executors, it is not conclusive as to the validity of the particular dispositions therein contained; and the above plea therefore was held not to be bad on that ground.

The bill in this case was filed, on behalf of an infant plaintiff, against the widow and executrix and the two daughters of Charles Beaufoy, the grandfather of the

plaintiff, and it stated the will of the testator in the following terms:—

“I give and bequeath unto my dear wife Marie Rosalie Beaufoy all my household goods, furniture, linen, china, paintings and portraits in England and France for the term of her natural life, provided she so long continues my widow; and after her decease or next intermarriage I give and bequeath the same unto and equally between my two daughters Emma Ellen Victorine Beaufoy and Caroline Beaufoy, share and share alike, to be divided equally between them. Also I give and bequeath to my dear wife all my books for her life, and at her decease to be divided equally between my two daughters already named as above. I give and bequeath to my dear wife whatever monies I may have in England at the time of my decease. Should my daughters aforementioned die unmarried, then all the furniture, &c., everything without reserve to my grandson James Campbell. Also to the said James Campbell I now give and bequeath all my gold and silver buttons, dressing-cases, guns and pistols. I give and bequeath to my dear wife for her life the cottage purchased by me at Upton Gray, and at her decease to my aforementioned daughters, or, if they should die unmarried, then to my grandson James Campbell. . . . I give and bequeath to my grandson James Campbell the sum of 100*l.* sterling, one moiety to be paid before the expiration of twelve months after my decease, and the remaining 50*l.* sterling before the expiration of the second twelve months after my decease.” And the testator appointed his wife executrix of his will and the guardian of his two daughters.

The testator died in June 1858, and his will was proved, by the executrix, in the Court of Probate on the 17th of September 1858.

The bill prayed for payment of the legacy of 100*l.* bequeathed to the plaintiff, and for a declaration that, according to the true construction of the will, the plaintiff would, in the event of the death of both the daughters unmarried, and subject to the life estate of the widow, become absolutely entitled to all the household goods, &c. of the testator, and to all his books

and monies in England at the time of his decease, and to the cottage at Upton Gray, and that an inventory might be made and accounts taken, &c.

The defendant Marie Rosalie Beaufoy pleaded to the whole bill, except so much as sought relief in respect of the cottage at Upton Gray, that the testator was, at the date of his will, and also at the time of his death, domiciled in the empire of France, and all the bequests of personal estate affected to be made by the said will were, by the laws of the said empire, null and void.

The plea was set down for argument.

Mr. Giffard and *Mr. Bedwell*, in support of the plea.—The fact of probate having been granted in this country does not preclude the Court from saying that this instrument, although a valid will so far as it appoints an executor, has no other operation if the law of England requires that the law of France should be applied in the distribution of the property—per Lord Eldon, in *Thornton v. Curling* (1).

They referred also to—

Whicker v. Hume, ante, 396.

Allen v. M'Pherson, 12 Law J. Rep.

(N.S.) Chanc. 97: reversing s. c.

11 Law J. Rep. (N.S.) Chanc. 59;

5 Beav. 469; 1 H.L. Cas. 191.

Code Civil, liv. 3. tit. 2. ch. 7. art. 1078 (2).

Mr. W. J. Bovill (with *Mr. Rolit*), for the plaintiff, contended that, probate having been granted, the validity of the will could not be disputed. The plea was also bad for multifariousness.

Mr. Giffard, in reply, cited—

Ricardo v. Garcias, 12 Cl. & F. 368.

Mitford on Pleading, 5th ed. 845.

Wood, V.C.—The case before Lord

(1) 8 Sim. 310.

(2) "Si le partage n'est pas fait entre tous les enfans qui existeront à l'époque du décès et les descendans de ceux prédécédés, le partage sera nul pour le tout. Il en pourra être provoqué un nouveau dans la forme légale, soit par les enfans

Eldon (*Thornton v. Curling*) is precisely in point, and there is not a shadow of authority the other way. *Allen v. M'Pherson*, in which the validity of the probate was sought to be impeached, has clearly no application. When probate has been taken out it is conclusive against everybody that a will has been made, but it does not at all establish the validity of the dispositions contained in the will. Mr. Justice Williams, in his *Treatise on Executors*, says (p. 1367, 5th ed.)—"It appears that a different doctrine prevails with respect to the distribution of the personal estate of a deceased when in the hands of an executor or administrator from that which is established with respect to the grant of probate or administration by which he is empowered to possess himself of such estate, for with regard to the latter the *situs* of the property regulates the jurisdiction. Although the right to succession is to be regulated according to the law of the country where the deceased was domiciled, yet the administration of the estate must be in the country where possession of it is taken and held under lawful authority." Therefore, you must take out probate in the country where the property exists, and then comes the question how the property is to be distributed. The plea very properly admits the will, but avers that by the law of the country where the testator was domiciled every single disposition which he has made is null and void. The only question is whether the plea is sufficiently precise, since it might be that the bequests are void, because the instrument itself is void. That question, however, you cannot raise, because the probate is conclusive that it is a valid instrument *quæ* will, according to the law of the country where probate has been granted. The defendant's plea, therefore, must be taken as admitting that, according to the law of this country, it is perfectly valid and good for the purpose of making herself mistress of the property, though not for the purpose of shewing what is to be done with the property when obtained:

ou descendans qui n'y auront reçus aucune part, soit même par ceux entre qui le partage aura été fait."

that is, that it is effectual for the appointment of executors, but invalid with respect to the particular dispositions.

Then, as to the plea being double. It does not state two bars to the suit, but two averments leading up to one bar. In order to get at a complete bar, you are obliged to aver two facts, neither of which taken singly would be sufficient. The facts are properly averred, and the plaintiff must take issue upon the plea, which will be allowed, but without costs.

STUART, V. C.
April 29.

{ *In the matter of J. H. WELCHMAN AND ANNA MARGARETTA, HIS WIFE; and in the matter of THE TRUSTEES' RELIEF ACTS.*

Baron and Feme—Wife's Property, and Settlement thereof.

*The whole of a fund in court belonging to a married woman was settled (under the circumstances) upon herself and children, in exclusion of the assignee, for value, of her husband; though she was in the receipt of a farther income for life of 26*l.* a year, and was living with her husband.*

Upon the death of her father, in June 1858, Anna Margareta, wife of John Henry Welchman, became entitled, under the trusts of an indenture dated in February 1806, to an absolute interest in possession in one-sixth part of two sums of 5,000*l.* 3*l.* per cent. reduced, and 1,984*l.* 12*s.* 3*d.* 3*l.* per cent. stock, standing in the names of trustees, upon the trusts of the indenture. The trustees, after paying off, by the direction of the husband and wife, a mortgage of 300*l.* and interest, which they had effected upon the trust funds, paid the balance of the proceeds of her share of the trust funds, amounting to 800*l.*, into court, under the provisions of the Trustees' Relief Acts. The fund was claimed, on the one hand, by the petition of J. H. Welchman and Anna Margareta his wife, and on the other, upon cross-petition, by William Parton, to whom J. H. Welchman and his wife had assigned it for valuable consider-

ation, by an indenture dated in June 1854.

The question was, whether Anna Margareta Welchman's equity to a settlement out of the fund extended, under the circumstances, to the whole fund, or only to a part thereof.

The facts disclosed by the evidence were the following:—The marriage between J. H. Welchman and his wife took place in January 1847, and there was issue thereof one child only. No settlement or agreement for a settlement upon the wife had been made or entered into by the husband upon or since the marriage; and in November 1855 the husband was adjudicated a bankrupt. The husband had not since been engaged in any business or calling, and was wholly unable to aid in maintaining his wife and child, whose only means of support (exclusive of the trust fund, of which a settlement was now asked for) were derived partly from the lady's friends, and partly from the annual income of 26*l.* arising from the dividends of a sum of stock in which she was entitled to a life interest under the will of her father.

Mr. Bacon and Mr. H. C. Ward, for Mrs. Welchman, argued that, under the circumstances, considering the inability of the husband to aid in maintaining his wife, and the slender means possessed by her, Mrs. Welchman was entitled to have the whole fund settled upon her. The amount to be settled upon the wife was in the discretion of the Court, according to the particular circumstances of each case; and the fact of desertion of the wife by the husband was not necessary in order to induce the Court to settle the whole fund upon her.—

Scott v. Spashett, 3 Mac. & G. 599; s. c. 21 Law J. Rep. (N.S.) Chanc. 349.

In re Cutler's Trust, 14 Beav. 220; s. c. 20 Law J. Rep. (N.S.) Chanc. 504.

Kæber v. Sturgis, 22 Beav. 588.

Squires v. Ashford, 23 Ibid. 132.

Mr. Shebbeare, for W. Parton, submitted that, unless the wife had been deserted by the husband, or was under some other

special circumstances of destitution, the Court would not settle the whole fund upon her. Here there were no such circumstances; and the proper course would be, therefore, to act upon the general rule, that one half should be settled on the wife, and the other half be given to the assignee of the husband—*Bagshaw v. Winter*, 5 De Gex & Sm. 466. He cited also—

Vaughan v. Buck, 1 Sim. N.S. 284;
s. c. 20 Law J. Rep. (N.S.) Chanc.
335.

Scott v. Spashett, ubi supra.

Ex parte Pugh, 1 Drew. 202.

Mr. Roxburgh appeared for the trustees.

STUART, V.C. said he did not consider it essential to the claim of the wife to have the whole fund settled upon herself and her children, that she should have been deserted by her husband. The question to be considered was, whether her whole income, from whatever source derived, would afford a reasonable means of subsistence for herself and children. In the present case, the whole of such income, including that of the whole of the fund sought to be settled, appeared but a very slender provision for them. There must, therefore, be the usual settlement of the whole fund left, after payment thereof of the costs of all parties to the present application.

STUART, V.C. } *Ex parte BOUTS.*
May 27. }

Stock—Unclaimed Dividends—Retransfer to Claimant—Statutes, 56 Geo. 3. c. 60. and 8 & 9 Vict. c. 62.

Retransfer of stock which had been transferred to the Commissioners for the Reduction of the National Debt, under the provisions of the statute 56 Geo. 3. c. 60, ordered upon a clear title to the legal interest, but a prima facie title only to the beneficial interest, being shewn to be in the petitioner.

In 1806, Mrs. Bouts, a widow, purchased the sum of 148*l.* stock, and placed it in the joint names of herself, her infant

son Henry Bouts, and her brother. Mrs. Bouts died in 1821, and her brother in 1838. Since that time no dividends had been received, and the sum of stock had been transferred to the Commissioners for the Reduction of the National Debt.

This was a petition, under statutes 56 Geo. 3. c. 60. and 8 & 9 Vict. c. 62, for the retransfer of the sum of stock to the son, and for payment to him of the arrears of dividends accrued due in respect thereof. The petition stated that it was believed that the purchase was made out of the residue of the estate of the deceased husband of Mrs. Bouts, of which she was administratrix; but there was no satisfactory evidence for what purpose the stock had been invested. The question was whether, in the absence of further evidence as to who was entitled to the beneficial interest in the stock, the Court could direct a retransfer to the son.

Mr. J. Pearson appeared to support the petition.

Mr. Wickens, for the Attorney General and the Commissioners for the Reduction of the National Debt.

STUART, V.C. said, that in *Ex parte Ram* (1) an inquiry had been directed as to the beneficial title, the Court there holding that the course to be adopted was matter of discretion to be exercised in each particular case. In the present case everything appeared to be doubtful, except the legal title of the petitioner, who was satisfactorily shewn to be the survivor of the three persons in whose names the stock had stood. It appeared, however, reasonably probable that the son was also entitled to the beneficial interest in the funds. The order, therefore, would be that, on payment of the costs of the Attorney General and of the Commissioners for the Reduction of the National Debt, the stock be transferred and the dividends paid to the petitioner H. Bouts.

(1) 3 Myl. & Cr. 25.

WOOD, V.C. }
 April 30 ; } BERNARD v. MINSHULL.
 May 2, 11. }

*Will—Construction—Precatory Trust—
 Failure of particular Trust—Residuary
 Bequest—"Other"—1 Vict. c. 26. s. 27.
 —Feme Covert.*

In order to raise a trust by precatory words in a will there must be a certain subject-matter and a certain object; but it is not necessary that the object should be so defined that it can be distinctly ascertained: if there is a definite object intended, that is a sufficient creation of a trust to exclude the legatee from taking beneficially.

*Thus, where a testatrix bequeathed to her husband absolutely a specific sum of 13,000*l.*, and requested that after reserving to his own absolute use and benefit 2,000*l.*, he would make such disposition of the remainder, as he might deem most desirable, to carry out her wishes, often expressed to him by word, and it appeared that she had never expressed any wishes on the subject, it was held, that there was a definite object intended; and though that object could not be ascertained, there was a sufficient creation of a trust to exclude the husband from taking the beneficial interest in the remainder of the fund, although the trust itself failed.*

Under the 27th section of the Wills Act, a general bequest by a married woman will include property over which she has a power of appointment.

A bequest of "all and singular other my property and estate" will include not only everything not before mentioned in the will, but everything the previous disposition of which fails, unless it appears from the will that the property comprised in the previous disposition was intended to be excepted for all purposes from the residuary bequest, and not merely for the purpose of giving it to the particular legatee.

William Minshull, by his will, dated the 4th of July 1834, bequeathed to trustees a sum of 13,000*l.*, upon trust for investment; and after the decease and failure of issue of his daughter, Martha Louisa Minshull, upon such trusts, &c. as his said daughter should by will appoint; and in default of appointment for her next-of-kin, according to the statutes.

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The testator died in 1836; and Martha Louisa Minshull afterwards intermarried with the plaintiff, Thomas Tyringham Bernard. There never was any issue of the marriage, and Martha Louisa Bernard died in the lifetime of her husband, having first executed a will or testamentary appointment, whereby, after reciting the will of her late father, she proceeded to appoint as follows:—"I hereby appoint the said 13,000*l.*, and the said other trust property so vested in trustees by the will and codicils of my late father, to go as follows, that is to say, the whole to my husband, Thomas Tyringham Bernard, Esq. absolutely; but it is my request to him, that after reserving to his own absolute use and benefit the sum of 2,000*l.*, and applying all the interest, rents and dividends arising from the above settled property to his own sole use and benefit during the term of his natural life, he will make such disposition of the remainder by will, deed or settlement, as he may deem most desirable, to carry out my wishes often expressed to him by word. . . . And as to all and singular other my property and estate, real and personal, whatsoever and wheresoever situate, whether secured to me by marriage settlement or otherwise, I give, devise and bequeath the same absolutely to my said husband, T. T. Bernard, Esq.; and I appoint my said husband, T. T. Bernard, my sole executor of this my last will and testament."

The bill was filed, by T. T. Bernard, against the next-of-kin of his deceased wife, claiming to be entitled for his own absolute benefit (after giving credit for a sum of 2,000*l.* which he had already received) to the whole of the 13,000*l.* and other trust property; and it prayed for a declaration in accordance with this claim and consequential relief.

In an affidavit, filed by the plaintiff, the following passage occurred:—"The said Martha Louisa Bernard never during her life expressed to me, by word or otherwise, any intention or wish as to the disposition of the sum of 13,000*l.*, over which she had, by the will of her father, the said testator, W. Minshull, a power of appointment or disposition (less the sum of 2,000*l.*, which by her said will or testamentary appointment she gave to me for my absolute use

and benefit), or of the other trust property over which she had a power of disposition under the said will of the said testator W. Minshull, and of which she disposed by her will, or of any part thereof respectively. She often, in conversations with me, referred to a disposal of her property, but never expressed herself definitely on the subject; and I believe from such conversations that at the date of her will, and also at the time of her decease, she had not made up her mind for whose benefit she would wish the said trust funds, or any part thereof, to be applied after my decease. It is, however, my opinion, judging from such conversations which I had with her during her last illness, that it was her wish, at the period of her decease, that her own relations, of different degrees, or some of them, should be the parties benefited (exclusively of my children, whose mother was her second cousin). This conclusion I have drawn from the tenor of her observations to me respecting her own kindred; but she was averse to giving, and never gave to me, any specific plan to guide me, nor did she ever name any specific object, or any specific objects, in whose favour she wished to bestow any benefit, nor did she ever name any specific sum or sums as the amount she desired any object, or class of objects, to receive. She apparently had not confidence in her own judgment on the subject, and often spoke of future circumstances which might occur to affect the condition of her kindred; and, under the circumstances aforesaid, there is no person or object, nor class of persons or objects, in whose favour I could, by deed, will or settlement, dispose of the said trust funds, or any part thereof, after my decease, in pursuance of any wish or desire ever expressed to me by my said wife, the said Martha Louisa Bernard."

Mr. Dart (with *Mr. Roll*), for the plaintiff, contended that he was entitled to the whole of the 13,000*l.* In the first place there was no trust; for in order to create a trust the words must be so used that upon the whole they ought to be construed as imperative, the subject of the recommendation or wish must be certain, and the objects or persons intended to have the benefit must also be certain—*Knight v.*

Knight (1), and these three requisites must co-exist.—

Cary v. Cary, 2 Sch. & Lef. 173, 189.

Sale v. Moore, 1 Sim. 534.

Meredith v. Heneage, Ibid. 542.

Bardswell v. Bardswell, 9 Ibid. 319;

s. c. 7 Law J. Rep. (N.S.) Chanc. 268.

Johnson v. Rowlands, 2 De Gex & Sm.

356; s. c. 17 Law J. Rep. (N.S.)

Chanc. 438.

Macnab v. Whitbread, 17 Beav. 299.

Green v. Marsden, 1 Drew. 646; s. c.

22 Law J. Rep. (N.S.) Chanc. 1092.

Palmer v. Simmonds, 2 Ibid. 221.

But, at all events, if a trust were intended, none has been created, and this is not a case where the next-of-kin can claim as for a failure of a trust, because the plaintiff is clearly entitled under the residuary bequest—1 *Vict. c.* 26. s. 27.

He also referred to—

Briggs v. Penny, 3 Mac. & G. 546;

s. c. 21 Law J. Rep. (N.S.) Chanc.

265.

Re Harries' Trust, 1 Johns. 199.

Re Pinckard's Trust, 27 Law J. Rep.

(N.S.) Chanc. 422.

Williams v. Williams, 1 Sim. N.S. 358;

s. c. 20 Law J. Rep. (N.S.) Chanc.

280; 22 Law J. Rep. (N.S.) Chanc.

639; 17 Beav. 156.

Cogswell v. Armstrong, 2 Kay & J.

227.

Cambridge v. Rous, 8 Ves. 12.

Easum v. Appleford, 5 M. & C. 56;

s. c. 10 Law J. Rep. (N.S.) Chanc. 81;

affirming 10 Sim. 274.

Wood, V.C.—Mr. Shapter, you need not argue the question whether the plaintiff was or was not intended to be a trustee. *Briggs v. Penny* is conclusive upon that point.

Mr. Shapter, *Mr. Giffard*, *Mr. Tripp* and *Mr. C. T. Simpson*, for the next-of-kin, contended that a valid trust had been created in favour of the testatrix's relatives.—

Brown v. Higgs, 4 Ves. 708; s. c. 5

Ibid. 495; 8 Ibid. 561.

(1) 3 Beav. 148, 172; s. c. 9 Law J. Rep. (N.S.) Chanc. 354; and on appeal, *nom. Knight v. Boughton*, 11 Cl. & F. 513.

Pope v. Whitcombe, 3 Mer. 689: corrected from the Registrar's Book, 2 Sugden on Powers, App. No. 29, 7th ed.

Tiffin v. Longman, 15 Beav. 275.

Finch v. Hollingsworth, 21 Ibid. 112; s.c. 25 Law J. Rep. (N.S.) Chanc. 55.

Or if no trust was created, then there was an intestacy, and the next-of-kin were entitled under the will of the original testator, as the residuary bequest will not include the property, the testatrix having evinced a contrary intention.—

1 *Vict. c. 26. s. 27.*

Doe v. Pearson, 6 East, 173.

Upjohn v. Upjohn, 7 Beav. 59; s.c. 10 Law J. Rep. (N.S.) Chanc. 328; 4 Beav. 246.

Circuit v. Perry, 23 Ibid. 275.

Pomfret v. Perring, 5 De Gex, M. & G. 775; s.c. 24 Law J. Rep. (N.S.) Chanc. 187; 18 Beav. 618.

Besides, the 27th section of the Wills Act does not apply, for by the 8th section no will made by any married woman is valid except such a will as might have been made by a married woman before the passing of the act; and before the passing of the act a gift of residue would not have operated as an appointment. They cited also *Griffiths v. Gale* (2).

Mr. Dart, in reply.

May 11.—Wood, V.C.—In this case I reserved my judgment more on account of the numerous authorities which were cited than on account of any difficulty I felt in determining the points that were argued. The question arises simply upon a testamentary appointment made by Mrs. Bernard under a general power of appointment contained in her father's will.—[His Honour read the will of the testatrix and proceeded]—Now, the first question that arose upon this will was, whether or not the husband, who is the plaintiff in this suit, took the whole 13,000*l.* absolutely and discharged from any trust, regard being had to the words which follow the absolute gift, and which words are not in the form of a trust, but only of a request that, "after reserving for his own absolute use and benefit the

sum of 2,000*l.*, and applying all the interest, &c. arising from the above settled property to his own sole use and benefit during his life, he will make such disposition of the remainder by will, deed or settlement as he may deem most desirable to carry out my wishes often expressed to him by word." The plaintiff argued upon that part of the case that, he having denied that the testatrix ever expressed to him any definite intention or wish as to the disposition of the money, the Court could not hold that any intention to create a trust existed; but upon that part of the argument I did not hear the defence, considering that, whether a valid trust was created or not, there was, at all events, an intention to create one.

It was then contended that there was no trust created by this instrument, inasmuch as formal words expressive of a trust have not been used; and in order to create a trust where formal words have not been used, but only words expressive of a hope or request, there must, according to the authorities, be both a certain object and a certain subject of the bequest. With reference to that, I prefer using the words of other Judges to my own, and I find the matter very well considered in the judgment of Lord Cranworth in *Williams v. Williams*. At the conclusion of the argument he says, "The real question in all these cases always is, whether the wish, or desire, or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed; or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party; leaving it, however, to the party to exercise his own discretion. That is the real question." Those words appear to me accurately to express the rule of the Court. I apprehend that in laying down the rule that, in order to create a trust by precatory words, there must be a certain subject-matter and a certain object, it was not intended to lay it down that it must appear with certainty who were the objects intended to be benefited; because if by the precatory words the legatee were requested to apply the property "for the benefit of ———," or "for the benefit of the person named" in a certain paper, and no

(2) 12 Sim. 354; s.c. 13 Law J. Rep. (N.S.) Chanc. 286.

such paper is found, that is not the species of uncertainty which is referred to in the rule. But I apprehend that what is meant by the rule is this, that you are to ascertain whether the precatory words amount merely to a recommendation, leaving a discretion to be exercised by the legatee, or whether they constitute a definite direction to him; and if from the uncertainty of the amount and the want of any explicit direction as to the objects to be benefited, you infer that the words are used not for the express purpose of creating a trust, but simply as indicating a reliance upon the discretion of the legatee, and a wish to leave it to his discretion whether he will adopt the suggestions of the testator or no, the Court will not in such a case hold that any trust has been created.

On a subsequent day, Lord Cranworth made the following remarks:—"It has been said that the points to be inquired into are, first, whether the subject-matter to which the precatory words apply is clear; and, secondly, whether the favoured objects are distinctly ascertained: and when these two requisites concur, that is, when there is no doubt as to the property to which or the persons to whom the precatory words refer, there it would seem to have been sometimes assumed, that such words are as obligatory as words creating an express trust. I confess that this reasoning has never carried conviction to my mind. I doubt if there can exist any formula for bringing to a direct test the question whether words of request, or hope, or recommendation are or are not to be construed as obligatory. It may be very safe in general to say that when there is uncertainty as to the subject-matter, or as to the objects in whose favour the request, or hope, or recommendation is expressed, there precatory words cannot have been intended to be absolutely binding; but the converse of the proposition is by no means equally true. The subject-matter of the bequest and the objects of the testator's bounty may be perfectly ascertained, and yet the context may shew that words of hope, or request, or recommendation were not intended to interfere with the absolute discretion of the legatee." In other words,

as affording a general rule for the guidance of the Court in the absence of particular expressions; but in the construction of every will the whole document must be carefully weighed and considered.

Here it appears to me that I am really concluded by the authority of *Briggs v. Penny*, for that was a case far less strong than the present for holding that a trust was created, because in that case there was an absolute gift with only these words superadded, "well knowing that she will make a good use and dispose of it in a manner in accordance with my views and wishes." "Well knowing," it may be said, is somewhat stronger than the word "request," as leading somewhat nearer to the implication of a trust; but, on the other hand, "that she will make a good use and dispose of it," were words extremely apt for shewing that the legatee was to have the disposal of it absolutely, according to her own will, instead of the will of the testatrix. I ought to observe that there was in that case a gift to Sarah Penny of 3,000*l.*, and a likesum of 3,000*l.* in addition for the trouble she would have in acting as executrix; but the grounds on which Lord Truro placed his judgment are the following, and I must say I think they apply much more strongly here. He says (3 *Mac. & G.* 555), "With reference to the third condition, it has been contended that the object is not certain, and it has been stated, and with truth, that vagueness in the object is regarded as evidence that no trust was intended to be created; and it has been, in effect, argued, and, indeed, with very great plausibility, that the words which are superadded to the bequest are merely expressive of the testatrix's full conviction from her reliance on the character of Miss Penny, that she would make as good use of what was given her as of her own property, and would, in fact, dispose of it in such a way as would further those objects which, as the intimate friend of the testatrix, she well knew that the testatrix was desirous of promoting. Specious, however, as this construction undoubtedly is, I am of opinion that it is not the true construction of these words. It is assuming the whole question to say that 'views and wishes' are too vague to import a trust. The fact,

that the testatrix 'well knew' or believed that Miss Penny would dispose of the property in a manner in accordance with the testatrix's views and wishes, of necessity implies that the testatrix assumed that such views and wishes were already, or would thereafter either in writing or verbally be made known." That is a strong way of putting it, no doubt, but it shews what is meant by the Court in speaking of the certainty of the object; that is to say, the question is not whether or not the object is so defined that it can be distinctly ascertained, but whether it has been purposely left undefined in order to give the donee the power of selection, in which case it would, of course, be very strong evidence to shew that what was expressed by way of wish was not intended by way of trust; but where there is a definite object intended, although you may not be able to ascertain what that object is, there a clear trust is created.

In this case, it is quite clear that the testatrix never intended her husband to have the beneficial enjoyment of the property. The expression used in the appointment of the 13,000*l.* is "to my husband Thomas Bernard *absolutely*," and not "for his own absolute use and benefit," which occurs with reference to the 2,000*l.* She shews most distinctly what she intends him to have for his own use, and then she proceeds to a request as to the residue, giving him merely a discretion, whether he will dispose of it by will, deed or settlement, "as he may deem most desirable to carry out my wishes often expressed to him by word." It is true the husband says, she never did express by word or otherwise any intention or wish as to the disposition of this property, but however mistaken she may have been in that respect, it is clear that she had some wishes impossible now to be ascertained, which it was her intention should be carried into effect; and it appears to me, therefore, in vain for the husband to contend that he is entitled to the beneficial interest.

Then, it is contended, on the part of the next-of-kin, that if the beneficial interest is not intended for the husband, it must go to them either as being undisposed of, or else by virtue of the trust which they say is disclosed in the statement of the hus-

band, by which they can fix his conscience with the particular objects of her intention, for the statement amounts to an admission that there was a definite class of objects, viz. his wife's own relations, amongst whom she has given him a power of disposition; and they say that where there is a power of division among definite objects which is not exercised by the donee, the Court will execute it in favour of all the objects, treating those words as creating a valid trust in their favour. It appears to me, upon the statement of the husband, impossible to contend that there was a definite trust in favour of any class of objects. Upon that point *Williams v. Williams* is an express authority, that the doctrine of *Brown v. Higgs* cannot be applied to such a statement as this. The statement amounts to nothing more than an opinion that it was the wish of the testatrix, not that her own relations of different degrees, but that they, or some of them, should be the parties benefited. In some respects the expression is weaker than that which occurred in *Williams v. Williams*, where the same contest arose. The words which were relied upon as creating a trust in that case were, "It is my wish that you should enjoy everything in my power to give, using your judgment as to where to dispose of it amongst your children when you can no longer enjoy it yourself. But I should be unhappy if I thought it possible that any one not of your family should be the better for what I feel confident you will so well direct the disposal of." And it was held there that the word 'family' was not confined to children, but included descendants in every degree, and that the wife was entitled to the property absolutely, and not merely for life, with a power in the nature of a trust for her children. Lord Cranworth says, "I think that the word 'family' as used in the codicil is not confined to children only, but would include descendants in every degree. The word 'family' is one of doubtful import, and may according to the context mean children, or heir, or next-of-kin. But, here, I think the words 'of your family' are equivalent to 'of your blood,' that is, 'your posterity, your descendants';" and he says afterwards, "the power, if it be a power, is one of distribution not of selection; and so, if the

widow should die without exercising the power, leaving children, grandchildren and great-grandchildren, they would all take as a class *per capita*. It is impossible to imagine that this was ever contemplated by the testator, and so the only other contention must prevail, namely, that which would enable the wife to give to any descendant, by virtue of an absolute interest vested in her by her husband." Those observations are quite sufficient to shew, that where the class is so indefinitely described as here, there is no trust which the Court can execute, independently of the circumstance that there is no evidence of the intention of the testatrix to benefit so vague and indefinite a class beyond the mere opinion of the husband; and the case of *Brown v. Higgs*, therefore, is not applicable.

Then the husband says, that if the will had imported into it his statement of what took place between the testatrix and himself, then, the objects being so indefinite, it is intended to leave the property to be dealt with at his absolute discretion, but I cannot import into the will what the husband, however honestly, says he understood as being what she understood at the time of making her will. What she understood was something that, as she distinctly says, she believed to be distinctly known to her husband, which were some wishes, as she says, often expressed to him by word. It is, I think, a fallacy to say that I can, by importing the wife's wishes into the will, be led on that ground to construe it in his behalf as a gift to him absolutely. The question then arises whether the original appointment having failed from the impossibility of ascertaining its object, the husband is entitled to the fund under the residuary bequest in the will.—[His Honour read the residuary bequest, and proceeded]—Now, in the first place, I will put out of consideration the mention of the testatrix's wishes often expressed to him by word, because some little change may take place in the character of this case, from it appearing that the husband was, in a certain sense, benefiting by his want of recollection, or his want of accuracy in ascertaining what the intentions of this lady were, and I will suppose the original appointment to have been to the husband "in trust for

(blank)." Would the residuary clause have comprised the property which was the subject of such an appointment? The plaintiff relied on the 27th section of the Wills Act, which enacts that "a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." I apprehend that if this were a simple case of a residuary bequest not preceded by any exercise of the power of appointment, there could be no doubt that it would include all property over which the testatrix had a disposing power, unless Mr. Giffard's objection, founded on the 8th section of the act, were to prevail, viz., that the 27th section does not apply to the will of a married woman. The 8th section enacts "that no will made by any married woman shall be valid except such a will as might have been made by a married woman before the passing of this act," and it was argued by Mr. Giffard that, inasmuch as before the passing of the act a residuary bequest in the words here used would not have had the effect of passing property over which the testatrix had merely a power of appointment, it cannot have that effect since the passing of the act. I did not hear a reply upon that part of the argument, because it appeared to me to be plain, looking to the whole scope of the act, that such a construction could not be contended for. It is quite plain what was the intention of the act, when you come to examine the several sections. By the 3rd section, it shall be lawful for every person to devise, bequeath or dispose of by his will, executed in the manner hereinafter required, all real and personal property which if not so disposed of would pass to his real and personal representatives. Then the 7th section says that, "no will made by any person under the age of twenty-one years shall be valid;" and then comes this 8th section, which enacts that "no will made by any married woman shall be valid, except such a will as might have

been made by a married woman before the passing of this act." The obvious meaning is, that she shall not dispose of any property by will which she could not have disposed of before. If I were to hold upon that section that all the rest of the act was inapplicable to wills made by married women, I must hold that an appointment which by the terms of the power is required to be made by an instrument under seal is not good if made by a married woman by will executed in the form prescribed by the act, unless it is also sealed. I apprehend the act merely meant that the capacity of a married woman to execute a will should be regulated by the rules which existed before the passing of the act, and when her capacity to make a will is established, the other provisions of the act apply to the will made by her, just as they would apply to the will of any other person. I have no difficulty, therefore, in holding that a residuary bequest in the will of a married woman passes property over which she has a power of disposition.

Then the question occurs, whether the word "other" in this bequest makes any difference by way of excepting this property out of the residuary gift. I do not think any distinction can be taken between the words "all and singular other my property" and "all and singular my residuary property." Upon this point Mr. Dart cited a case which was decided by myself, but I would rather refer to a case which I there relied on, of *Evans v. Jones* (3), before Knight Bruce, V.C., in which the residuary bequest was of the testator's other personal estate, after excepting money laid out in stock, mortgages and bonds, which he gave to B, and a portion of the gift to B. failed; and the question was, whether the residuary legatee was entitled to the property so excepted. The Vice Chancellor held that she was. He said:—"It has been argued that the next-of-kin are entitled to a moiety of John Evans's share. That, however, is not my opinion. The case seems to me to fall within the rule most correctly, I believe, stated by Sir William Grant in *Cambridge v. Rous* and *Leake v. Robinson* (4), notwithstanding

the expression of exception, which appears to me to mean no more than saying that the testator intends to make certain bequests afterwards made by him." And elsewhere, I think in the same case, he says the question to be considered is, whether the property is intended to be excepted for all purposes, or only for the purpose of giving it to somebody else. If the latter, then on the failure of the particular purpose it falls into the residue notwithstanding the exception. In *Cambridge v. Rous* there was a gift of the "residue" in terms, but there Sir William Grant said, "It has been long settled that a residuary bequest of personal estate (for it is otherwise as to real) carries, not only everything not disposed of, but everything that in the event turns out not to be disposed of;" the rule being that you look to the general object of the bequest, which is to prevent an intestacy and to sweep in everything that may fall by any means within the residue rather than the testator should die intestate; "not," as Lord Cottenham says in *Easum v. Appleford*, "that it effects in specie what the testator intended, for he probably contemplated nothing beyond the particular legacy taking effect; but because the residuary clause is understood to be intended to embrace everything not otherwise effectually given; because, as Sir William Grant expressed it in *Cambridge v. Rous*, the testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee; so that upon failure of the particular intent, the Court gives effect to the general intent." I think, therefore, that the words of the residuary clause are sufficient to comprise the 13,000*l.* "unless a contrary intention appears by the will," and it becomes necessary to see whether such a contrary intention appears. Mr. Shapter says, the testatrix has plainly dedicated this fund in a particular way, and this, coupled with the use of the word "other" in the residuary clause, affords such a clear manifestation of a contrary intention, that I ought to hold this fund to be excepted out of the residuary clause. But I cannot say that any of the cases cited by him bear out his argument. The earliest of those cases was *Doe v. Pearson*. That was the case of a will of real estate; and by the old law, if a devise of

(3) 2 Coll. 516.

(4) 2 Mer. 363.

real estate failed, it would not be comprised in the residuary devise. If you once find any real estate given out and out, whatever is given as residue is subsequent. If a testator happens to have Blackacre and Whiteacre, and he gives Whiteacre out and out, the residue is Blackacre, and nothing else; but if he does not give Whiteacre in fee, but only for life, then the residue would be Blackacre, and the reversion in fee of Whiteacre. In *Doe v. Pearson* the fee was given defeasible upon condition; and it was held, that the heir-at-law was the only person who could avail himself of the condition being broken, and therefore the estate being given out and out the residuary devisee took nothing. *Upjohn v. Upjohn* was a similar case.

Again, in the case of *Circuit v. Perry*, the will, after a devise of freehold hereditaments and copyhold estate upon certain trusts, contained the following recital:—"As my nephews and nieces are provided for by the will of their late grandfather, and the property left to me and my brother under that will will, on failure of our issue, devolve on them at our death"; and by a subsequent clause, after a bequest in favour of his wife, the testator gave all the residue of his estate to trustees. It turned out that the property referred to as devolving upon his nephews and nieces had actually descended upon himself in fee; and upon the question whether it was included in the general devise of all his real estate, the Master of the Rolls held that it was not, on the ground that as he treated the estate as not being his to dispose of, the Court could not hold that he intended to pass it. In *Pomfret v. Perring* the testatrix having, under a settlement and a will respectively, a power of appointment over two funds, appointed the will fund, reserving a power of revocation and new appointment; and afterwards by will devised and bequeathed and by virtue of every power given by the settlement, "or otherwise however enabling her," appointed all the real and personal estate which she might at her decease, under the powers contained in the settlement, "or otherwise," have power to appoint; and it was held that this appointment was confined to the settlement fund, because it did not necessarily imply

an intention to revoke the previous appointment. All those cases, therefore, are clear upon the face of the will; but here I have nothing but the fact that a particular disposition is made of this fund which fails, and none of those cases, therefore, are an authority for saying that a contrary intention appears. *Easum v. Appleford* was a case of an appointment of a particular share of a sum of stock, and then an appointment of the residue of the same sum; and Lord Cottenham there said:—"The appellant relied upon the well-known rule that a residuary gift will, in general, carry a lapsed legacy, and that the same rule has been held to apply to gifts by way of appointment as to legacies. *Oke v. Heath* (5) was the first case referred to, and that case is important as containing Lord Hardwicke's opinion, that, in these questions, the appointment being by will, the same rule must be followed as in other cases of legacies; but the facts of that case prevent its being any authority for the present. In that case the donee of the power gave, by her will, part of the fund absolutely to a person who died in her lifetime, and gave all the rest and residue of what she had power to dispose of to her niece, in whose favour Lord Hardwicke decided; not the fractional part of a specified fund, but all that should remain subject to her power, which at the time of her death was that interest which had been appointed to the deceased." And then he held, in the case before him, that what was given over was the residue of a specific fund, after deducting therefrom a fractional part; and that it amounted to the same thing as if the part given over had been specified (6). But the case before me is not the case of a gift of a fractional part of a specific fund, and then a gift over of the residue of that fund; but I have a simple failure of the appointment, and then what I have held to be a general residuary gift, and therefore if the appointment had been to the husband, in trust for —, it must fall into the residue and pass with it; and I think, upon the facts before me, I must take it as if the appointment had been in

(5) 1 Ves. 135.

(6) Upon this point, see the cases collected in *Booth v. Alington*, 6 De Gex, M. & G. 613; s. c. 26 Law J. Rep. (N.S.) Chanc. 138.

trust for —. In the absence of evidence to the contrary, I must take the statement of this gentleman to be perfectly true when he says that the testatrix really pointed out no objects, and the result is, that it is a total blank. Where a part of a particular fund is given, and then the residue of that fund is given over, the particular part is excepted out of the residue; but where there is a general residuary bequest, it sweeps in, according to *Cambridge v. Rous*, everything which turns out to be undisposed of; and consequently I must hold the husband entitled to the whole of the 13,000*l*.

M.R. { PHILPOTT v. ST. GEORGE'S
March 22, 26. { HOSPITAL.
THE ATTORNEY GENERAL
v. PHILPOTT.

Charity — Scheme — Jurisdiction of the Court.

If a testator points out clearly the purposes of a charity he intends to establish, this Court cannot speculate upon whether it would be better for the community if a different application of the funds had been established, but it is bound to carry them into effect, provided they are not in opposition to the law of the country.

The Right Hon. John R. P. Earl Beauchamp, by his will, dated the 18th of June 1847, said, I have contemplated erecting and endowing almshouses, either upon some part of my estate or elsewhere, in the hamlet of Newland, in the county of Worcester, for the residence of twelve or such larger number of poor men and women, members of the Church of England, who shall have been employed in agriculture, and have been reduced by sickness, misfortune or infirmity; now, in case I happen to die without effecting such object, and any person or persons should within twelve months after my decease, at their, his or her expense, purchase or give a suitable piece of land in Newland aforesaid as a site for such almshouses, and with intent that the same should be devoted to such purpose, then I empower and direct the trustees or trustee for the time being of this my will, when and so soon as such land

shall have been legally dedicated to charitable uses, provided they, he or she shall approve of the scheme of the intended charity, and the rules and regulations proposed for the government thereof, to pay to the trustees of the said intended charity out of such part of my personal estate as is hereinafter mentioned the sum of 60,000*l*., to be by them devoted to the several purposes of the said charity in the manner to be determined in respect of the funds of the same, but so nevertheless that the said sum or any part thereof shall not be applied in or towards the purchase of any lands for the purposes of the said charity; and if and in case no such piece or parcel of land shall be found and provided as aforesaid, or being such the scheme of the intended charity, or the rules and regulations for the government thereof shall not in the opinion of the majority of my said trustees be in accordance with what they may consider my wishes upon the subject to have been, then I give and bequeath the said sum of 60,000*l*. to the trustees for the time being of St. George's Hospital, situate at Hyde Park Corner, to be by them applied to the purposes of that institution.

The testator died on the 22nd of January 1853; and on the 6th of December following, a piece of land was dedicated to the use of the charity.

A suit was afterwards instituted in this Court, by the trustees of the will, for the establishment of the charity, and for the erection of the almshouses. It was, however, held, in accordance with *Trye v. the Corporation of Gloucester* (1), that the bequest for the erection and endowment of almshouses was void under the Statute of Mortmain; and upon the cause being again brought on, it was held that the gift to the hospital also failed (2). The plaintiffs appealed against this decision to the House of Lords (3).

The Attorney General was not made a party to the suit; and upon a certificate of the Charity Commissioners, dated the 30th of June 1855, he, after the decree made in

(1) 14 Beav. 173; s. c. 21 Law J. Rep. (N.S.) Chanc. 81.

(2) 21 Ibid. 134; s. c. 25 Law J. Rep. (N.S.) Chanc. 33.

(3) 27 Law J. Rep. (N.S.) Chanc. 70.

the suit, considering that the interests of the charity were not sufficiently protected, filed an information *ex officio* against the trustees of the charity. This information was dismissed at the hearing; but, upon appeal, the House of Lords reversed the decree made in both the suits, and the cause was remitted to this Court, which made an order in both the suits, directing a scheme to be settled in chambers, and the carriage of the order was given to the plaintiffs in *Philpott v. St. George's Hospital*.

The plaintiffs accordingly prepared a scheme, which provided for the erection of the almshouses, at a cost not exceeding 12,700*l.*, to be called the "Beauchamp Almshouses," which were to contain a house for a chaplain, and necessary offices and accommodation for twenty-four alms-people—viz. eight sets of rooms for married couples, eight sets for single men and widowers, and eight sets for spinsters or widows, who were to consist of persons who had been engaged in agriculture, and were not under fifty-five years of age. The alms-people were to consist of eight married men, eight single men or widowers and eight spinsters or widows. It provided for the appointment of a matron, who was to perform such duties with reference to the alms-people as the trustees should direct. The trustees were also to appoint from time to time a master or porter, and also a medical practitioner in the neighbourhood, at a remuneration not to exceed 30*l.* per annum, to attend upon and supply medicines to the sick and infirm alms-people.

The Attorney General proposed an alteration in the scheme, to the effect that the building should consist of a centre, for the residence of the chaplain and the necessary offices, and two wings, for the accommodation of twenty-four alms-people; twelve of the twenty-four sets of rooms were to be for persons married or single labouring under some permanent or chronic disease; one wing to be called "the almshouse wing," and the other "the hospital wing." Twelve of the alms-people were to be persons married or single labouring at the time of their admission under some permanent or chronic disease, curable or incurable. There was to be a nurse in addition to the matron.

The matron was to have the superintendence, under the direction of the chaplain, of all the alms-people, and in particular those of the hospital wing, and to be specially charged with attendance on the latter. The nurse was to assist the matron in such attendance under her directions, and to perform such duties as to attendance on the sick poor living near the almshouse as the trustees should direct. The stipend of the medical practitioner was to be 100*l.* per annum.

The plaintiffs objected to this alteration in the scheme, and they alleged that such a charity was not in the contemplation of the testator; the question was, therefore, adjourned into court.

Mr. R. Palmer and *Mr. T. H. Terrell*, for the Attorney General.

Mr. Lloyd, for the plaintiff, Thomas Philpott.

Mr. Wickens, for the Crown.

Mr. C. T. Simpson, for two of the trustees.—The altered scheme is not in accordance with the intention of the testator, and the Court will not lose sight of that part of the gift over if the purposes of the will are not carried into effect.

Mr. R. Palmer, in reply.—The Court, whilst paying every attention to the trustees, must exercise its discretion: an almshouse for the reception and lodging of the poor is within the term "hospital"; a school also implied education. In the present case, the almshouse clearly included relief in sickness, and the Court would say in what way it should be administered.

March 26.—THE MASTER OF THE ROLLS.—The cases of *Ashton's Trust* and *Philpott v. St. George's Hospital* are so connected that I propose to give my judgment upon them conjointly. Having come to what would appear *prima facie* opposite conclusions in the two cases, it becomes important that I should explain the principle which regulates cases of this description. It has been too much of late considered, that whenever the Court had to direct a scheme to be framed for the establishment of a charity, it had power to deal with the property just as it pleased, and that in point of fact anything which within certain limits it thought expedient might be done with

the property. A more erroneous opinion, and one less in accordance with the decisions of this Court in matters of charity, can hardly be conceived. But the confusion and error have arisen from this—that in certain cases the Court has the power to do what it pleases where it makes a scheme, or very nearly so, and that in other cases it has not. The distinction consists in this:—If the testator or the testatrix has by the will pointed out clearly what is intended to be done, provided always that the directions are such as are not contradictory to the laws of this country, this Court is bound to carry that into effect; and the Court has not any right, nor is it at liberty to speculate upon whether it would be more expedient, or better for the community, if a different application of the charity had occurred to the mind of the testator, and he had appointed some different scheme to be carried into effect. Accordingly, this Court has had instances of charities of the most absurd description, which the Court has considered itself bound to carry into effect. I remember one, before Lord Justice Knight Bruce, when Vice Chancellor, where a gentleman left a large sum of money to reprint and circulate books that nobody would buy, which was clearly a mere throwing away of so much paper and printing; but the Court, nevertheless, was bound to carry that into effect as well as it could. This distinction arises in a case, where a testatrix has devoted funds to the charity, but has not specified any charity at all; and if the Queen, by her sign-manual, does not appoint the charity, but directs it to be carried into effect by the Attorney General, or by this Court, then the Court has full power to adopt any scheme which the Attorney General, after considering the matter fully, should consider to be expedient. So, also, if there are accretions of a charity; if there are sums of money which have accrued which are not specifically disposed of, the Court in that case may act. So, also, where the fund is given for a particular object which entirely fails, as in the case of *Lady Mico's Charity* (4), where a large property was given for freeing poor slaves,

(4) *The Attorney General v. Gibson*, 3 Beav. 317, n.

and the charity entirely failed for want of objects. In all those cases the Court, under what is called the doctrine of *cy-pres*, may regulate it as far as it can be considered consistent with the laws of the country and with the views of the Attorney General. But in the case of *Philpott v. the St. George's Hospital* the gift is of this description. It is to be observed, this is to carry into effect a charity founded by the testator himself, and therefore this Court is not in any one of those positions which I have described, in which it is at liberty to do what it pleases, but it must do that which is in accordance with the will of the testator. Here he says, "Whereas I have contemplated erecting and endowing almshouses either upon some part of my estate, or elsewhere, in the hamlet of Newland aforesaid, for the residence of twelve or such larger number of poor men and women, members of the Church of England, who shall have been employed in agriculture and have been reduced by sickness, misfortune or infirmity." He then proceeds to describe how the charity is to be founded, gives 60,000*l.* for that purpose, and directs it to be carried into effect, and also gives a considerable discretion to his trustees. "Provided they, he or she shall approve of the scheme of the intended charity, and the rules and regulations proposed for the government thereof, to pay to the trustees of the said intended charity out of such part of my personal estate as is hereinafter mentioned the sum of 60,000*l.*" A scheme is framed for founding almshouses, the land having been given, which was a necessary condition for the establishment of it, and the Attorney General, to whose opinion and suggestions this Court on all occasions pays the greatest possible regard, suggests an addition to the almshouses, or rather an application of a part of them, which would, in his opinion, and probably in the opinion of most persons, be a more beneficial application of the fund than simply giving it for alms-persons generally who are reduced to poverty by reason of sickness, misfortune or infirmity, and something, in fact, in the nature of an hospital to be attached to it. It occurred to me in the course of the argument that I might, to a certain extent, adopt the view

of the Attorney General, still making it an almshouse, directing that the trustees should have regard in the first instance and give priority to persons who were reduced by sickness or infirmity over those who were reduced by misfortune. But, upon looking through the clauses (I find nothing else in the will which bears on the subject), I do not think there is anything in the will which justifies that view of the case. No doubt the approbation of the trustees is a matter of importance; but only to this extent: that the Court regards their view of the case, because the testator has entrusted them with the consideration of the case. Otherwise, of course, the whole discretion is vested in the Court; but I regard their opinion in the matter with very considerable respect. They being opposed to this, not considering that it comes within the scope of the will, and I not thinking there is anything in the will to give precedence to one over the other, I think they must all stand on their own footing, always considering that the trustees themselves in the selection of the objects will be regulated by that which they think will really be most beneficial, and most conduce to the advantage of the community.

Accordingly, in the case of *The Attorney General v. Philpott*, I am of opinion that I cannot vary the scheme in the manner proposed, but the scheme must stand as it at present stands. It was a proper case to be brought before the Court. There must be an allowance of counsel, and the costs of all the proceedings must be paid out of the charity.

STUART, V.C. }
 April 19, 20, 21. }
 LORDS JUSTICES. } PERRY v. SHIPWAY.
 June 6, 7.

Trust—Trustees of Chapel—Powers, Rights and Duties of.

The duly elected pastor of a society of Baptists having been charged with conduct unbecoming his position of minister, the majority of the trustees of the chapel of the society and a considerable number of the members of the society, at a meeting convened

for the purpose of considering such charges, passed a resolution, in execution of which he was removed from his office of pastor, and the chapel and pulpit were closed against him. The deposed pastor, alleging that the meeting at which he was deposed had been irregularly convened, and that its resolutions were not binding upon the society, procured, at a meeting irregularly convened, a resolution to be passed by a portion of the society, including the minority of the trustees, reinstating him in his office, and, in execution of such resolution, took forcible possession of the chapel and held it against the majority of the trustees.

An injunction was granted by the Vice Chancellor, restraining the pastor and the minority of the trustees from molesting or interfering with the majority of the trustees in the exercise of their right to the possession and management of the chapel; and, on appeal, this decision was affirmed by the Lords Justices.

This cause came on upon motion for decree, on behalf of nine out of the twelve trustees of the Baptist Chapel at Sible Hedingham, in Essex, first, that the trusts of certain indentures, dated respectively the 21st of September 1808 and the 13th of December 1814, might be administered under the direction of the Court; secondly, that the defendant Charles Shipway might be restrained by injunction from disturbing, hindering or molesting the pastor, deacons and members of the congregation of Calvinistic Baptists in the performance of divine worship, or from otherwise disturbing any of the members in the enjoyment of the use of the said chapel; thirdly, that the defendant Shipway might be restrained from officiating as pastor of the said congregation, and from preaching or intermeddling with the service to be performed in the same chapel; and, fourthly, that the defendants Ruggles, Barrell and Finch might be restrained from sanctioning or permitting Shipway to preach or officiate in the said chapel.

By the indentures of the 21st of September 1808 and the 13th of December 1814, land which had been purchased and a meeting-house which had been erected thereon at Sible Hedingham with money subscribed by a society of Protestant Dis-

senters, called Particular or Calvinistic Baptists, were conveyed to trustees "upon trust for the use and benefit of the society or congregation of Protestant Dissenters, called Particular or Calvinistic Baptists, then assembling at the said meeting-house, under the pastoral care of William Scandrett (one of the trustees named in the said indentures), maintaining the doctrines of the one living and true God, three equal persons in the Godhead, eternal and personal election, original sin, particular redemption, free justification by the imputed righteousness of Christ, regeneration, conversion and sanctification by the spirit and grace of God, the final perseverance of the Saints, the resurrection of the body to eternal life, the future judgment, the eternal happiness of the righteous and everlasting misery of such as die impenitent; and practising baptism by immersion to such as are of years of understanding, upon their own personal confession of repentance towards God and faith towards our Lord Jesus Christ, for the exercise of divine worship by them at the meeting-house aforesaid. And, upon further trust, to convey the said messuage, tenement or meeting-house and premises, with the appurtenances, from time to time, to such persons, for the purposes aforesaid, as the men members, communicants of the said society or congregation of Particular or Calvinistic Baptists, holding the doctrines aforesaid, for the time being, in their church-meeting duly assembled, or the major part or number of them so assembled, shall, by any deed or instrument in writing, from time to time direct or appoint, so that the same may be made use of only as far as it lawfully can or may, as a place of convenient worship for Particular or Calvinistic Baptists, holding the doctrines before mentioned. But in case the society or congregation of Particular or Calvinistic Baptists shall be totally dissolved or dispersed, and the public worship at the said meeting-house discontinued by them for the space of twelve calendar months together, then, upon further trust, to convey the said messuage, tenement or meeting-house, hereditaments and premises, with the appurtenances, unto such person or persons in such manner and for such purposes, either religious or civil, as the men members, communicants of the

said congregation or society, who at the time of such dissolution or dispersion shall have been members, communicants and subscribers to the support of public worship for the space of twelve calendar months then next preceding, and contributing thereto, or the major part in number of such men members, communicants, shall, by any deed or deeds, writing or writings, direct or appoint."

From the evidence in the suit it appeared that a Calvinistic Baptist church or society consists of three classes, the pastor, the deacons, and the other communicants who are called "members"; that the society is governed by general ordinances, which are settled by the general body of Calvinistic Baptists; and that every person seeking to become a member of a church of Calvinistic Baptists is admitted a member of such church at a meeting called for that purpose, and his admission is duly enrolled in the book of such church. Any member charged with an offence against the ordinances of the church to which he belongs, is liable to be temporarily separated from such church by the resolution of a majority of the members and communicants of such church called to investigate the charge, and if deemed incorrigible, to be finally separated; an entry of the said resolution is made in the church book, and the said temporary or final separation is thereupon indorsed. The pastor of such congregation or church is first invited to officiate for a given time, by way of probation, and if approved, is then elected a pastor by a majority of the church present at a meeting called for that purpose. He is also liable to temporary or final separation for the same causes as the other members.

The defendant Shipway had, by the invitation of the congregation, preached by way of probation from Christmas 1857 to Christmas 1858, and had also continued to officiate as pastor until April 1858. The deacons and trustees having been informed that Shipway had attempted to seduce the wife of one of the congregation, on the 10th of April (with the exception of the trustee Goss, who took no part in the dispute), requested the attendance of Shipway at a meeting at which this charge against him was about to be taken into consideration. Upon his excusing himself

from attendance on the ground of illness, they proceeded at once to the consideration of the matter for which the meeting was called, and having come to the conclusion that the charge was proved against him, they resolved that the chapel should be closed against him, and that he should occupy the pulpit no more.

A written notice of this resolution, signed by all the trustees of the chapel, &c., except the trustee James Goss and some of the deacons, was sent to Shipway on the evening of the same day. Two of the trustees and deacons (*viz.* Ruggles and Barrell), and Finch, one of the deacons who had signed the above notice, afterwards became adherents and supporters of the defendant Shipway as against the plaintiffs and their supporters. On the following day the chapel was closed, and a constable stationed at the door by order of the plaintiffs. On the 27th of April Shipway was convicted before the magistrates of Sible Hedingham of a common assault on the wife of a member of the congregation, and herself a member, and fined 1*l*.

On the 15th of May 1858 a resolution was passed at a church meeting, a minute of which was entered in the church-book as follows:—

"1858.—At a church meeting, held at noon, the 16th of May, being Lord's Day, the church then expressed their satisfaction at what had been done in keeping Mr. Shipway out of the pulpit, and passed a resolution never to allow him to occupy the pulpit again."

After the 16th of May, up to which time the chapel had remained closed, the trustees got several other ministers to officiate.

On Sunday, the 30th of May, a church meeting, consisting of from thirty to forty members, male and female, was held, for the special purpose of giving the opinion of the congregation with reference to those members who adhered to Mr. Shipway, and to many of whom he had, since his ejection from the chapel pulpit, preached at his own house and elsewhere. The meeting expressed its opinion that those persons were disorderly in trying to uphold such a character, and resolved not to acknowledge them as members so long as they followed him.

On the 4th of July 1858 a Mr. Murrell Plaice, by direction of some of the trustees and deacons opposed to Mr. Shipway, officiated at the chapel in the morning and afternoon.

At the conclusion of the afternoon service Shipway, accompanied by a large number of his adherents, entered and took possession of the chapel, and, professing to hold a church meeting, passed resolutions to the effect following:—First, that Charles Shipway be elected a member of the church; secondly, that he become pastor; thirdly, that new locks be placed on the chapel-doors. At the termination of the proceedings watchmen were left in the chapel, and remained there all night under the direction of Shipway, who supplied them with beer from a neighbouring public-house; and on the next day new keys were, by his order, placed upon the doors of the chapel.

The present bill was then filed against Shipway, Barrell, Goss, Ruggles and Finch; and a motion for an injunction was made before his Honour on the 29th of March. It was on that occasion arranged that an answer should be put in by the defendants, and that the plaintiffs should give notice of motion for decree.

By the answer of the defendants, it was stated that in the interval between the motion for an injunction and the present motion for decree, the defendants Ruggles, Barrell and Finch, on the 2nd of April, gave notice, by printed circular sent to every member of the congregation, male and female, that on the 3rd of April, being Sunday, at twelve o'clock, a church-meeting would be held to enable the men members, communicants of the society, to resolve whether or not they desired that Shipway should continue to be the minister of the chapel. The answer stated that the meeting was accordingly held, and that Shipway was then and there elected by about eighty members; and that the whole congregation did not consist of more than 120 members.

The defendants, by their answer and evidence, denied the charges against Shipway of immorality and intoxication, and endeavoured to shew that the meetings at which the resolutions relied on by the plaintiffs were passed, were informal, not having been convened on notice.

Mr. Malins and Mr. J. T. Turner appeared for the plaintiffs.

Mr. Bacon, Mr. Craig and Mr. Graham Hastings, for the defendants.

STUART, V.C. said, that under the deeds of September 1808 and December 1814 the legal estate in the chapel was clearly vested in the trustees for the use and benefit of the society or congregation assembling therein for public worship. Having accepted the trusts of the deed, they had not only the right to the legal estate, but had imposed upon them the duty of seeing that the chapel was used for the purposes and in conformity with the trusts declared by the deeds. One of their plainest duties was to see that the possession of the chapel, legally vested in themselves, was not improperly disturbed. The only question in this case was, whether the proceedings of the defendants amounted to an illegal disturbance of the estate vested in the trustees. A minority of the trustees were defendants to the suit; but it was settled law that where a trust was created of such a general or public character as that of this chapel, it was essential to the due execution of the trust that the majority should have the power of binding the minority—*Wilkinson v. Malin* (1). Now the defendant Shipway had asserted his right against the will of the majority of the trustees to retain possession of this chapel; to officiate as pastor therein. It was unquestionably the law that when the legal estate in a chapel is vested in trustees, a pastor or minister, though duly elected, is only tenant at will of the trustees—*Doe d. Jones v. Jones* (2) and *Doe d. Nicholl v. M'Kaeg* (3). According to law, therefore, the plaintiffs, as the majority of the trustees, were the landlords of this chapel. The defendant Shipway was in possession against their will, and was at law a trespasser on their right. It then remained to consider the position he occupied with regard to them in this court. It appeared that early in 1858 dissatisfaction was felt at his continuing minister, and he was served with notice to attend a meeting at which

certain charges were preferred against him. It was immaterial to consider whether that notice was duly served, or to examine the grounds on which the trustees proceeded. Without going into the particulars of the evidence, it appeared that the trustees, in the exercise of their duty, and acting honestly, according to their own discretion, and with the sanction of a considerable portion of the congregation, thought right to close this chapel against Shipway for several Sundays. If this step of the trustees met with the disapproval of any portion of the congregation, it was open to them to call the trustees to account in the regular way. On the last Sunday in May 1858, at a church meeting regularly held, it was resolved that Shipway should no longer continue to officiate as pastor. It was said that this meeting was irregularly held, and that the resolution passed at it did not bind the whole society. Assuming that there might be a question as to this, it was plain that a church meeting might have been regularly convened for arranging any disputes or differences between the members of the congregation, or between them and the trustees; but the proceeding which was shewn to have taken place on the 4th of July was highly irregular and improper, and such as could not meet with the approbation or sanction of this Court. On the morning and evening of that day the trustees had the chapel opened for divine service, which was performed by a minister of the name of Plaice, apparently in an orderly manner. When the afternoon service was concluded and the trustees would have closed the chapel-doors, they were prevented from so doing by the defendant Shipway, who thought it consistent with his duty as a minister of the Gospel to enter the pulpit, keep forcible possession of the chapel and keep persons in possession of the chapel all night, and then change the locks, so as forcibly to exclude the majority of the trustees. This seemed to be as much a violation of the trusts and purposes for which the legal estate was vested in the trustees, as it was a trespass at law upon that legal estate.

His Honour then pronounced a decree, awarding an injunction to restrain the defendant C. Shipway, his servants and agents, from disturbing, hindering or mo-

(1) 2 Tyrw. 544.

(2) 10 B. & C. 718; s. c. 8 Law J. Rep. K.B. 310.

(3) Ibid. 721.

lesting the pastor, deacons and members of the congregation of Particular or Calvinistic Baptists in the plaintiffs' bill named, in the performance of divine service in the said chapel of Sible Hedingham, in the said bill mentioned, or from otherwise disturbing, hindering or molesting any of the members aforesaid in the employment or use of the said chapel and hereditaments conveyed by the said indentures of the 21st of September 1808 and the 13th of December 1814, or either of them, and also to restrain the defendant C. Shipway from officiating as pastor of the said congregation, and from preaching or intermeddling with the service to be performed in the said chapel and hereditaments conveyed by the said indentures, and to restrain the defendants J. Ruggles, W. Barrell and C. Finch from in any way aiding or permitting the said defendant C. Shipway to preach or officiate in the said chapel. And it was ordered that the defendants C. Shipway, J. Ruggles, W. Barrell and C. Finch should pay the said plaintiffs their costs of the suit when taxed. No order as to the costs of the defendant W. Goss. Liberty to apply.

From this decision the defendants appealed.

The same counsel appeared as in the court below, and the following cases were then referred to—

The Attorney General v. Gascoigne, 2 Myl. & K. 647; s. c. 1 Law J. Rep. (N.S.) Chanc. 122.

The Attorney General v. Scott, 1 Ves. sen. 413.

Stat. 9 Geo. 4. c. 31.

LORD JUSTICE KNIGHT BRUCE, in delivering judgment, said, that for many years before this litigation a certain tenement had been vested in trustees, who were changed from time to time, and it was now vested in a body of trustees for religious purposes—namely, for the benefit of a particular class of Christians, described as Particular or Calvinistic Baptists. The trusts were general in that respect; but practically, by usage or otherwise, the temporal affairs of the congregation had been administered by persons selected for that purpose called deacons—trustees of the legal

estate, therefore, for providing for the religious purposes of the communicants. In the year 1858 disputes arose amongst those who were interested and concerned in this place of worship and its affairs, one consequence of which was the present suit, including as parties to it, either as plaintiffs or defendants, all the trustees and all the deacons. The object of that suit was not the general management of the affairs of the trust, but only protection against an alleged breach of trust of a particular kind. The substance of the suit was on behalf of all the persons interested in the trust, though it was not so in form; and as it included all the deacons and all the trustees, and as the objection had not been taken on the ground of absence of parties, this Court might well deal with the suit as not insufficient, if there were merits to support and justify it. Complaint was made by some of the persons interested, and was alleged to be without foundation by others of them, that the religious affairs were conducted by a minister against whom objections existed, that they were conducted by him without sufficient authority, and that his acts and interference prevented all proper management of the affairs, and that they were therefore entitled to the assistance of the Court. There was no doubt that the plaintiffs making this complaint had been so interfered with, and there was no doubt, if their allegations were correct, that this was a proper case for the interference of this Court at their instance. It appeared that in the course of the year 1857, Mr. Shipway, the defendant, had been elected temporarily, or on probation, to be the minister of this congregation; he accepted the office and continued to discharge the duties for two or three months, and at Christmas 1857 he was continued for another year, which would, of course, expire at the end of the year 1858. But the year 1858 was not far advanced when, either without or with sufficient reason, some dissatisfaction arose in the minds of some amongst the trustees and some amongst the deacons with Mr. Shipway, and, whether regularly or irregularly, by those who had the power of enforcing their opinions, Mr. Shipway was displaced from his position. Another minister then officiated in the chapel for several Sundays until, as it ap-

peared, that occurrence took place which had been described as having happened on the 4th of July. At the close of the afternoon service of that day, notice was given of a "church meeting" (as it was called) to be then and there held, and at that meeting Mr. Shipway was appointed, or re-appointed, or continued as minister of the congregation. He himself appeared to have been present at the meeting, and to have taken part in it; in fact he seemed to have entered the chapel, to have ascended into the pulpit, to have gone out, to have come back again and to have given a sort of "word of command" to his followers. He himself, or by his friends, retained possession of the building during the whole night, in order that the keys and locks might be changed, and placed in the power of his own supporters, so that they might be in a condition to keep out what his Lordship thought he might fairly term "the enemy." With this object in view, in order to sustain their spirits or their strength during the watch, Mr. Shipway himself very good-naturedly supplied them with beer from a neighbouring public-house, although to a very moderate amount only. From that moment he was virtually re-installed as minister; and although he (the Lord Justice) felt great regret at the whole course of proceedings, yet it was his duty to declare his opinion that this re-appointment was a nullity, and that it was accompanied by the most indecent irregularity. Mr. Shipway's opponents were, however, advised that he could not be lawfully displaced until the year of probation, for which he had been appointed, was over; and for this reason no suit was instituted until the month of January in the present year. Whilst the defendant Shipway was in possession thus irregularly, the ceremony called "ordination" took place; it did not appear what that amounted to, or what it precisely meant; but it was to be collected that it was equivalent to institution and induction in the Church of England, although there was no evidence upon that point. However, there were certainly some forms observed; ministers from other places attended and took part in them; but this ceremony was, under the circumstances which existed, wholly immaterial. Early in the present year this bill was filed, and affidavits were

made of great bulk, as his Lordship felt bound to say, and in respect to the length and bulk of which he certainly could not exculpate the plaintiffs, though the Court would of course hear their counsel on that point. A motion for an injunction was then brought on before the Vice Chancellor, but on that occasion it was suggested that an answer should be put in, and the motion converted into a motion for a decree; and it was arranged that it should be so. Whilst the matter was thus standing over, a notice was given, bearing date the 31st of March, but not delivered before the 2nd of April, which was a Saturday; that notice was to this effect: that on Sunday the 3rd of April, after morning service, a church meeting would be held in the chapel to enable the men members of the congregation to resolve whether they did or did not desire that Charles Shipway should continue to be their minister. This notice was signed by three of the deacons, who were defendants to this suit, and two of those three deacons were also trustees. His Lordship would not lay any stress on the words "men members," nor on the expression "continue to be their minister;" but not only was this notice given *pendente lite*, while the matter was standing over to be heard, but the practice, so far as the Court had the means of judging, had always been to give notice for any meeting in the chapel itself upon a Sunday, for which practice there was, no doubt, good reason. This notice was not given upon any Sunday, but upon a Saturday for the next following day; it was given in an entirely new form, and the meeting was called not only *pendente lite*, but while possession of the chapel itself, and the administration of its affairs, were in the condition induced, created and sustained by the anomalous, improper and highly irregular proceedings of the 4th of July of the previous year. Therefore this meeting also was a mere nullity, and notwithstanding the so-called ordination of September 1858, and the election of the 3rd of April 1859, the matter stood upon the election or re-election of the 4th of July 1858, which was no title at all. The decree of the Vice Chancellor had only protected the plaintiffs by declaring—not who was the minister of the chapel, but that a particular indivi-

dual was not. Although the plaintiffs' case might have been much narrowed, yet, remembering that it was quite impossible for a plaintiff to know what would be the particular parts of his case which would most powerfully influence the opinion of the Court, he (the Lord Justice) thought it was hard upon persons who had substantially a good case to punish them for having presented their case to the judgment of the Court in every way in which it might appear necessary to them, in the exercise of their discretion, to bring it before the Court. On these grounds his Lordship was of opinion that the circumstances did not warrant him from departing from the decree pronounced by the Vice Chancellor.

LORD JUSTICE TURNER said, that it was much to be lamented that such a case as this should have been brought into Court; it afforded a melancholy example of the extent to which strong personal feeling might be carried; but with these considerations the Court had nothing to do, and it was the duty of the Court to decide according to the legal and equitable rights of the parties before it. Some of the trusts of the deed of the 21st of September 1808 were as follows:—"And upon further trust to convey the said tenement or meeting-house and premises, with the appurtenances, from time to time to such persons for the purposes aforesaid as the men members, communicants of the said society or congregation of Particular or Calvinistic Baptists, holding the doctrines aforesaid, for the time being, in their church-meeting duly assembled, or the major part in number of them so assembled, shall, by any deed or instrument in writing, from time to time direct or appoint, so that the same may be made use of only so far as it lawfully could or might as a place of worship for Particular or Calvinistic Baptists, holding the doctrines before mentioned." Those trusts would necessarily involve the appointment of a minister, through whom divine worship might be performed in the chapel; but that appointment was to be made, not by the trustees, but by the congregation for whose benefit the appointment was to be exercised. If an election was not held according to the rules and practice of the body, every member had a right to complain of an un-

due exercise of the trust; and if he had such ground, he had a right to come to this Court for relief. This bill was, therefore, properly filed. But it was said, on behalf of the defendants, that the plaintiffs had seceded from the congregation, and had removed from the chapel the books and cushions which belonged to them. His Lordship did not look upon this as a withdrawal in the light of a cessation from being members, but simply a withdrawal in consequence of the unlawful conduct of the defendant Shipway and those who supported him; and, therefore, those persons were entitled to come to this Court. It might possibly have been more strictly correct if the bill had been filed by them on behalf of themselves and all others interested; but that was only a matter of form, and, if it had been necessary, leave would have been given to amend the bill in that respect. What, then, were the facts of the case?—[His Lordship here detailed the facts, and observed on the conduct of Mr. Shipway on the 4th of July 1858, and on the matters said to be then determined, viz., the resolution that Mr. Shipway should be elected a member of the congregation; that he should be elected pastor of the congregation; and that new locks should be placed upon the chapel-doors.]—His Lordship's opinion was, that the election was not valid, and could not be supported, and he thought so upon two grounds: in the first place, because no due notice had been given of the intention to hold the meeting; and in the next place, because this pretended meeting was composed of members and non-members alike, and there could be no due and valid election unless it was confined to the members of the congregation only, without the interference of those who had not the rights of membership. For these reasons the alleged election in July 1858 was entirely out of the case. Then in the September following there came the ordination, as it was called; and all that was before the Court upon that subject was contained in the answer of the defendants, which alleged that by the desire of the church and of the congregation, the defendant Mr. Shipway was ordained to be the minister; but who composed the church, and how the alleged desire was

expressed, in no way appeared, by the answer or otherwise. Then there remained nothing but the election of the 3rd of April 1859, and the question was, whether that election was a valid election, and one which entitled the defendant Mr. Shipway to retain his position as minister. He, the Lord Justice, did not intend to say that the circumstance of the whole case being under the jurisdiction of this Court would preclude the congregation from the right of expressing their views and opinions upon the subject, nor would he say that the Court would refuse to attend to those views and opinions; but the pendency of this suit rendered it imperative upon the parties that every rule and observance which had in former instances been observed, should be most strictly and regularly attended and adhered to. This had not been the case in the present instance, and the meeting then held was not of such a character that the Court would attend to the conclusions it might have adopted. It was contended, on the part of the defendants, that, if Mr. Shipway was not actually displaced by the congregation, he was continued as minister; but that rule could at all events have no application to a case where there was nothing more than an unauthorized assertion of a permanent appointment. The decree was therefore, in substance, right, and it would be upheld. The only question was as to the costs, on which he felt some doubt.

Mr. Bacon called the attention of the Court to the terms of the injunction, which he said would prevent the re-election of Mr. Shipway even if the congregation should be desirous of having his ministration.

LORD JUSTICE KNIGHT BRUCE.—I do not think that a re-election of Mr. Shipway would be a contempt of Court; for that re-election would confer on him a new title, about which we express no further opinion.

A discussion ensued as to costs, and it was determined that there should be no costs on the appeal beyond the deposit, which was ordered to be paid over to the plaintiffs.

M.R. }
March 26. } **BRADBURY v. DICKENS.**

Partnership—Periodical—Trade Name—Discontinuance—Advertisement.

If a partner in a periodical withdraws from the publication and determines the partnership, so that the right to use the name must be sold and the affairs wound up, he will not be restrained from advertising a work of a similar description under a new name, or the discontinuance of the former work, so far as his connexion with it was concerned.

The bill in this suit was filed by Messrs. Bradbury & Evans, printers and publishers, against Charles Dickens and William Henry Wills, praying that the partnership between them might be dissolved and its affairs wound up, and praying that the defendant Charles Dickens might be restrained from advertising or publishing any notice or advertisement announcing the discontinuance of a periodical called *Household Words*, or the substitution of any periodical in place thereof, or succession thereto, or continuing any announcement to the same or a similar effect. The bill also prayed that the copyright of the *Household Words* might be forthwith sold as a going concern.

On the 28th of March 1850 articles of agreement were entered into between Charles Dickens of the first part, William Bradbury and Frederick Mullett Evans of the second part, John Forster of the third part, and W. H. Wills of the fourth part, whereby they agreed to be and continue joint proprietors of the weekly periodical called *Household Words*, and to be interested therein upon the following terms:—That Mr. Dickens should have one-half part or share, the plaintiffs one-fourth, and Mr. Forster and Mr. Wills one-eighth respectively; that Mr. Dickens should be editor, and in that capacity exercise absolute control over the literary department, and over all agreements, rates of payment, and orders of payment made in respect of the literary department, and be entitled so long as he continued editor to receive 500*l.* per annum while he occupied that position, and to be paid in addition for any literary articles he might contribute, as well as to

participate in any profits that might accrue to him as part proprietor; that the plaintiffs should be printers and publishers of the work, as well as general managers, so long as they continued to be personally interested; and that as such they were to have the entire management of the commercial department, and "bear, pay and discharge," in the first instance, the rent of any premises required for carrying on the business of the same, as well as any expenses incident thereto, and receive and pay all monies due to, or which might become payable in respect thereof, and should charge the publication with any payments made on account of the publication; that Mr. Forster should, from time to time, in consideration of his share, contribute literary articles without any additional remuneration for the same; and that Mr. Wills, in consideration of the share reserved to him, should act as sub-editor, and should not be at liberty to withdraw therefrom without giving twelve calendar months' notice to his co-proprietors, and that he should receive 8*l.* a week as sub-editor in addition to any profits arising to him as part proprietor. Moreover, it was provided that Mr. Dickens might dismiss Mr. Wills on giving him six calendar months' notice, or the payment of a sum equivalent to his salary for that time, and that none of the proprietors "should sell, assign or transfer his share or interest in the publication, without first tendering or offering the same to his co-proprietors." It was further provided that meetings of the proprietors should be held on the second Tuesday in May and November of each year, at the counting-house of the concern, for the purpose of auditing the accounts, considering the state of the publication, and passing such resolutions as they might deem fit; and it was agreed also that at any special meeting of the proprietors there should be present at least two proprietors in addition to the plaintiffs. At the expiration of the publication, by agreement or otherwise, all the stock, chattels and property, except debts owing to the same, should, unless the parties agreed to the value thereof, or to some appropriation of the same, be sold by public auction to the highest bidder or bidders, with liberty for any or either of the parties to bid for the same.

Mr. Forster retired from the partnership some years ago, and with the consent of the other proprietors sold his share to Mr. Dickens, since which time the periodical had been carried on by the plaintiffs and the defendants as partners, under the articles originally agreed to. On the 15th of November last Mr. Dickens convened a meeting, at which he deputed Mr. Forster to represent him, and that gentleman attended the meeting, and proposed the following resolution:—"That the present partnership be dissolved, by the cessation and discontinuance of the publication on the completion of its nineteenth volume." That resolution was seconded by Mr. Wills, the defendant. The plaintiffs refused to recognize the right of Mr. Forster to be present at the meeting, and did not vote, considering such meeting as not being properly constituted, and that Mr. Dickens had no right to be represented and vote by proxy under the articles of the agreement. Mr. Dickens, having been informed that the validity of the resolution in question was disputed, on the 22nd of December sent a notice to Mr. Wills and the plaintiffs to the effect that upon the completion of the nineteenth volume of the work, which would take place in the month of May, the partnership should be dissolved, and that he would immediately afterwards take such steps as he might be advised for the winding up of the affairs of the partnership.

Mr. Dickens subsequently sent the following circular to the booksellers, and it afterwards appeared in the newspapers as an advertisement:—

"The story of our lives from year to year.

Shakespeare.

"On Saturday, the 30th of April 1859, will be published, price 2*d.*, the first number of *All the Year Round*, a weekly journal, designed for the instruction and entertainment of all classes of readers, and to assist in the discussion of the social questions of the day, conducted by Charles Dickens.

"Address.

"Nine years of *Household Words* are the best practical assurance that can be offered to the public, of the spirit and object of *All the Year Round*. In transferring myself and my strongest energies

from the publication that is about to be discontinued to the publication that is about to begin, I have the happiness of taking with me the staff of writers with whom I have laboured, and all the literary business and co-operation that can make my work a pleasure. In some important respects I am now free greatly to advance on past arrangements; these I leave to testify for themselves in due course. That fusion of the graces of the imagination with the realities of life, which is vital to the welfare of any community, and for which I have striven from week to week as honestly as I could during the last nine years will be striven for *All the Year Round*. The old weekly cares and duties become things of the past, merely to be assumed with an increased love for them, and brighter hopes springing out of them in the present and future, I look and plan for a very much wider circle of readers; and yet, again, for a steadily expanding circle of readers on the projects, I hope to carry through *All the Year Round*, and I feel confident that this expectation will be realized if it deserve realization. The task of my new journal is set, and it will steadily try to work the task out. Its pages shall shew to what good purpose their motto is remembered in them, and with how much fidelity and earnestness they tell the story of our lives from year to year. Charles Dickens."

At the foot of the circular it was stated, that "On Saturday, the 28th of May 1859, Mr. Charles Dickens will cease to conduct *Household Words*; that periodical will be discontinued and its partnership of proprietors dissolved."

The plaintiffs then filed this bill, alleging that Charles Dickens had no right to dissolve the partnership, but that he refused to continue as editor of *Household Words*; that the plaintiffs had refused his offer of 1,000*l.* for their share of the copyright, and that Charles Dickens was endeavouring to deprive them of all their share and interest therein, and to appropriate the benefit of the copyright to himself by establishing such a periodical and endeavouring to procure the discontinuance of the *Household Words*, and that he had with that view prepared the circular to the trade, which was injurious to the plaintiffs, and calculated to diminish the value of the

copyright. It insisted also that he had no right to announce that the work would be discontinued. The plaintiffs now asked that Mr. Dickens might be restrained from publishing the circular, or any advertisement announcing the discontinuing of the periodical called *Household Words*, or the substitution of any periodical in the place thereof or in succession thereto.

Mr. R. Palmer and Mr. Jessel, for the plaintiffs.—The articles fix no period for the continuance of the partnership; it was, however, co-equal with the publication, and it was provided, that the interest of a proprietor was not to cease at his death. It had all the essentials of permanency. The work was established, and the name *Household Words* had become of great value; and Mr. Dickens had, by his circular saying it would cease, been guilty of a violation of the duty of a partner. Provision was made for the sale of the work for the benefit of all; and Mr. Dickens had no right to seek a continuity or succession of the property of his partners by carrying on the work under another name, neither had he any right to announce that the partnership of proprietors in *Household Words* would be discontinued. The partnership must, in fact, continue until the publication was sold.

Mr. Selwyn and Mr. Hobhouse, for the defendants.—The partnership was not in the *Household Words* only, but in *Household Words* conducted by Charles Dickens, and the public were entitled to know that he had ceased to edit it, or to have any interest in it. The articles did not stipulate that Mr. Dickens was to give his sole literary service to this periodical; he was at liberty, therefore, during its continuance to set up another.

THE MASTER OF THE ROLLS.—A slight alteration after the words "about to be discontinued," by adding the words "by me" might obviate any objection.

Mr. Selwyn.—I can see no objection to it, except that it would seem to hold out the idea that this Court encourages what is felt to be nothing else than a most vexatious suit. Mr. Dickens, in his circular, has published only what is strictly true: he will cease to edit, his connexion

with it will terminate, the work agreed to be published will be at an end, and the partnership will be dissolved. Under such circumstances there surely can be no hesitation in refusing the application, as being at once unnecessary and vexatious.

Mr. R. Palmer, in reply.—The addition of the words “by me” will not protect the plaintiffs; it will still leave open the objection that the *Household Words* is to be discontinued. The name of Mr. Dickens was not essential either to the work or to its continuance. The articles provided that another editor might be appointed, and Mr. Dickens might have died; but still the articles contemplated a continuance of the publication as a serial work. If, then, there is no right to discontinue the work, he has no right to damage the sale by sending advertisements abroad, stating that it will be discontinued; and his adding “by him” or “by me” can make no difference: he has a right to say, I shall cease to be connected with it, or that my supervision and management will be discontinued, but he has no right to say that the periodical will be discontinued either absolutely or by himself.

THE MASTER OF THE ROLLS.—The property in a literary periodical is confined to the mere title, and the title to this work is *Household Words*; it has been made the subject of partnership articles, and accordingly it is a part of the partnership assets, and may be sold, such as it is, provided it has any existence. I stated during the argument that putting in the words “by me” or “by him,” or “by the editor” after the word “discontinued” in the Address and in the concluding paragraph would remove all grounds of cavil. On the part of the plaintiffs it has been argued, that Mr. Dickens has no power to put an end to the work; but I am not clear that he has not, or that his mere retirement will not *ipso facto* annihilate it, or that it is not considered as entirely and solely associated with his name; and that the name *Household Words* would be literally worth nothing as soon as it is known that he has nothing to do with it. However that may be, the statement that he has nothing more to do with it is properly represented by saying “it is discontinued by me”; that does not import the fact that

it is discontinued absolutely; it merely asserts that he himself, so far as he had anything to do with it, has discontinued it: that is all the plaintiffs are entitled to require. Accordingly, upon the undertaking of Mr. Dickens in the publication of future advertisements to put in those or equivalent words, I will make no order upon this motion; but I shall reserve the costs until I see the result when the partnership property comes to be disposed of.

KINDERSLEY, V.C. }
Jan. 17. } HOWARD v. ROBINSON.

Production of Documents—Mortgage-Deed.

A legatee under a will filed a bill against the trustee who had raised money to pay legacies, and against the mortgagee, who had lent the money, charging that the trustee had effected a certain mortgage; that he had borrowed the money for his own purposes, and not to pay off the legacies; and that the mortgagee knew of the alleged breach of trust. The mortgagee admitted the mortgage-deed, “and for greater certainty as to the contents thereof craved leave to refer to it when produced to the Court,” but denied the other allegations. The plaintiff obtained an order in chambers for production of the mortgage-deed:—Held, upon an adjourned summons, that the plaintiff, who did not allege that the deed contained anything which would support his case, was not entitled to the production, except upon redeeming the mortgage.

This was an application upon an adjourned summons from chambers to vary an order made for the production of documents.

The testator in the cause, Richard Chaffers, gave a legacy of 1,500*l.* to Ann Howard, and he vested all his real estate in two trustees named VEVERS and CHAFFERS, for a term of 800 years, upon trust to sell, or by other ways and means at their discretion, to raise money for the purpose of paying such debts and legacies as the personalty was insufficient to satisfy, and the receipts of the trustees were to be good discharges to purchasers, mortgagees, &c.

Ann Howard died shortly after the date of the will, and the testator, by a codicil, gave the aforesaid legacy of 1,500*l.* to the infant children of Ann Howard, to be paid to them at twenty-one, and in case of their death under twenty-one without issue, then he gave the said legacy to Thomas Chaffers and Benjamin Chaffers absolutely.

By an indenture of mortgage, dated the 1st of July 1853, B. Chaffers, the surviving trustee under the will, assigned the term of 800 years, by way of mortgage, to the defendants John Robinson and William Birtwhistle, to secure the sum of 1,000*l.*

The legacy not having been paid, the infant children of Ann Howard instituted this suit, by their next friend, for the purpose of having their legacy raised, and the bill charged that B. Chaffers had mortgaged the property to the other defendants, and had applied the money to his own purposes. The bill also charged that the mortgagees well knew that the plaintiffs were infants, and that their legacy had not been paid.

The defendants, the mortgagees, by their answer, admitted that they had possession of the mortgage-deed of the 1st of July 1853, and that it was to the effect set out in the plaintiffs' bill, "But for greater certainty as to the contents thereof they craved leave to refer to the same when produced to this honourable Court," but they denied that they were aware of the fact that the legacy of the plaintiffs was charged upon the lands devised by the testator, or that such legacy had not been paid.

On the 19th of November 1858 an order was obtained by the plaintiffs, in chambers, for production by the defendants J. Robinson and W. Birtwhistle of the several deeds, books, papers and writings, mentioned in the schedule to the answer of the defendants, and also the mortgage-deed of the 1st of July 1853 in the said answer referred to, and admitted to be in their possession.

The application now made was to vary the order for production by omitting the direction to produce the mortgage-deed.

Mr. Sidney Smith appeared in support of the application, and contended that a mortgagee could not be compelled to pro-

duce his mortgage-deed without the principal and interest being tendered to him. The fact of the defendants having referred to the deed for greater certainty as to its contents did not alter the general rule. This was merely to satisfy the defendants' conscience. The deed was not set up by the defendants, but only referred to in answer to the plaintiffs' allegation.—He cited—

Adams v. Fisher, 3 Myl. & Cr. 526; s. c. 7 Law J. Rep. (N.S.) Chanc. 289, (which explained the decision in *Hardman v. Ellames*, 5 Sim. 640; s. c. 3 Law J. Rep. (N.S.) Chanc. 74. *Greenwood v. Rothwell*, 6 Beav. 492; s. c. 7 Ibid. 279; 12 Law J. Rep. (N.S.) C.P. 259; 13 Law J. Rep. (N.S.) Chanc. 226; 5 Man. & G. 628.

The Princess of Wales v. the Earl of Liverpool, 1 Swanst. 114.

Tyler v. Drayton, 2 Sim. & S. 309.

Wigram on Discovery, 324, 340.

Mr. G. M. Giffard, *contra*, submitted that the defendants, having admitted the possession of the deed, and having asked leave to refer to it, had given the plaintiffs a right to call for inspection. It might be very material for the plaintiffs in making out their case to shew the form of the mortgage-deed, and if the deed, upon the face of it, was as alleged by the plaintiffs, then it would go to shew their title to the relief prayed.

KINDERSLEY, V.C. (without calling for a reply) said—My opinion is, that the defendants cannot be compelled to produce this deed. There is no doubt that as an abstract proposition the plaintiff has a right to inspection of every deed, paper or writing in the possession of the defendant, which would help to make out the plaintiff's case; but he has no right to see those documents in the defendant's possession which only tend to make out the defendant's case. The case of a mortgagee is supposed to stand on some special footing, but, in fact, it is only one of the cases within the general rule; and, ordinarily speaking, where a mortgagor files a bill against a mortgagee, he cannot see the mortgage-deed without redeeming the

mortgage. There may be cases in which a mortgagor, or a person in the same situation, may have a special case to entitle him to inspection, because the document might serve to make out the plaintiff's case; but, in other respects, a mortgagee may put the deeds in a box and defy the mortgagor to obtain inspection until he engages to pay principal, interest and costs. If a mortgagor files a bill simply to redeem, and states the mortgage-deed in his bill, and the defendant, by his answer, as he is bound to do, admits the deed to be to the effect stated, then, when the cause comes to a hearing, the mortgagor has a right to redeem in accordance with the deed, and then, for the first time, he has a right to see the deed. Supposing, in the case put, that the defendant admits the deed, and says, "I admit the effect of the deed to be as stated in the bill to the best of my knowledge," does it make any difference that he should go on to say—"but still, for greater certainty, and to satisfy my conscience that I am not misstating the facts, I crave leave to refer to it when produced"? How does this reservation give the plaintiff any special right to see the deed before the hearing? Another case might arise:—Suppose the plaintiff states a case upon which he considers he may have relief, and the defendant, by his answer, states a certain deed which the plaintiff has not referred to, and such deed, instead of helping the plaintiff, destroys his case. In that state of things the plaintiff would have no right to inspection of a deed, which does not assist him. But, suppose the defendant, after setting up a deed of this nature, goes on in the common form to refer to it for greater certainty. I am wholly at a loss to comprehend how a plaintiff who, without this reference, would not be entitled to production, should have any greater right owing to such a statement. There is no ground whatever for the proposition; but every principle of reasoning shews it to be the other way. These, then, are two cases which might arise on what may be called the technical grounds; but if the putting those words into the answer would, in either case, give a right to inspection, it would not be in the case where the deed referred to by the defendant is in opposition

to the plaintiff's case. Now, in the case of *Hardman v. Ellames*, Lord Cottenham held that a reference in the answer did entitle to production, but when he found that that decision was challenged in the subsequent case of *Adams v. Fisher*, he explained what he meant to decide in *Hardman v. Ellames*, which was that, where a defendant had thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, the plaintiff was entitled to see whether the defendant had rightly stated it. The decision caused great astonishment at the time to the profession at large, and I am bound to say that I cannot follow the reasoning. However, on the technical ground, this is not the case of *Hardman v. Ellames*; if it were, I might be bound to follow it, but it is the contrary, and the very point which Lord Cottenham said he did not mean to decide.

I must put the case, then, on the general footing. If the defendant's mortgage is prior to the plaintiff's claim he has no right to the production of the deed. If the defendant's title is posterior to the plaintiff's claim it would be immaterial to him to have production, and there is no rule, that I am aware of, which would give a prior mortgagee a right to see the deed of a subsequent mortgagee. Here the very contest is as to priority. The plaintiff claims to be first incumbrancer, and so does the defendant. It is clear that it would never do to let a plaintiff, on his mere allegation of being first incumbrancer, have inspection of the deed of a party whom he alleges to be subsequent to him, although there certainly might be cases in which, the plaintiff's right depending upon what is contained in the defendant's deed he would be entitled to inspection. Does the plaintiff's right to relief in this case depend at all on the contents of the deed —[His Honour then stated the facts, and said]—The plaintiff here charges the defendant with knowing certain circumstances at the time of taking his deed, which would make him a party to a breach of trust, and with neglecting to make further inquiries as to the facts, and alleges that the mortgage was effected for the private purposes of Chaffers, and not for paying off the legacies. If the plaintiff makes

out these allegations he establishes his case, but there is no other allegation that would entitle him to relief. The defendant denies the allegations, and the production of the deed will not assist the plaintiff in any way. The plaintiff alleges what the deed contains, but he does not allege that it contains anything which would support his case. If, at the hearing, the defendant proves that he did not know of the private purposes for which Chaffers obtained the money upon mortgage, then the plaintiff will have no right against him, except to redeem. On these grounds, therefore, I think that the order for production must be discharged. The costs to be costs in the cause.

M.R. }
Feb. 25, 26. } BECKTON v. BARTON.

Legacy—Vesting—Election.

*A testator gave his real and personal estate to trustees upon trust out of the income to pay an annuity of 500*l.* a year to his widow for life, or for so long as she should continue his widow, for the maintenance of herself and his children, and to invest the surplus; and after her death or marriage again upon trust to apply such annual income for the maintenance and advancement of such of his children as should be under twenty-one; and when the youngest of his children should attain the said age, then upon trust to distribute all his property equally between his children, except so much as would secure to his wife, if she should be then alive and married again, an annuity of 100*l.* a year for life. And in case of the death of any of his children, leaving lawful issue, the testator directed that the share of such child or children should go to his or her children:—Held, that the share of each child became vested on attaining twenty-one, that no division was to be made until the youngest child attained twenty-one, or during the life or widowhood of the testator's wife, and that the share of any child dying and leaving issue was given over to the children of such deceased child, on the death of a child before the period of distribution.*

*After the date of the above-mentioned will, the testator, on the marriage of one of his daughters, settled 2,000*l.* for the benefit*

of herself, her husband and children:—Held, that the daughter must elect whether to take under the will or the settlement.

Joseph Beckton, by his will, dated the 14th of October 1842, devised and bequeathed his real and personal estate to trustees, upon trust to convert the same and to stand possessed of the monies to arise therefrom, upon trust that they should pay out of the interest, dividends, rents and annual produce, unto his said wife, an annuity or clear yearly sum of 500*l.* for and during the term of her natural life, or for so long a time as she should continue his widow, for the maintenance of herself, and for the bringing up, maintaining and educating of all and every his child and children living at the time of his decease, or born in due time afterwards. . . . And that his trustees should pay to his sister-in-law, Mary Nuttall, a clear annuity of 80*l.* for her life. And after payment of the said annuities, he directed that the overplus of the interest, rents and annual income, when and as the accumulations thereof should amount to 500*l.* (unless the same should be required for the advancement in the world of his child or children as thereafter mentioned), should be invested as therein mentioned, and be applied as aforesaid; and from and immediately after the death or second marriage of his wife, then upon further trust to apply such part of the annual proceeds for the maintenance, education and advancement in life of all his said child and children as should be then under the age of twenty-one years, as they, in their discretion, should see proper, and when the youngest of his children should attain the said age, then upon further trust to call in all his monies, and pay, divide, distribute and convey all his property between his children, share and share alike, save and except so much as would secure to his said wife (if she should be then alive and married) an annuity or yearly sum of 100*l.* as thereafter mentioned; and at her death the principal thereof he directed should be equally divided amongst his children, as thereinbefore mentioned. And in case of the death of any of his said children leaving lawful issue him, her or them surviving, then it was his will that the

share or shares of such deceased parent or parents should go to the child or children of such parents. And the testator declared that in case his said wife should marry again, the said annuity of 500*l.* should cease, and in lieu thereof he bequeathed to her an annuity of 100*l.* for her own sole use and benefit for her natural life. And on each of his said children attaining the age of twenty-one years he directed that the sum of 500*l.* should be paid to him or her so coming of age, out of the accumulations of his property. And he empowered his said trustees to advance such further sum or sums of money (with the consent of his said wife, in case she should be then his widow) as they in their judgment should consider prudent and proper for the advancement in the world of such his son and daughter or sons and daughters respectively so arriving of age as aforesaid; and such 500*l.* and other sum or sums so advanced should go in part and be accounted for and be deducted from his, her or their share under his will.

On the marriage of his daughter, Mrs. Longshaw, the testator transferred a sum of 2,000*l.* to the trustees of her settlement, which was dated the 11th of November 1843, upon trusts for the benefit of her husband, herself, and their children; and their daughter, Jane Longshaw, was the only child of their marriage.

The testator died on the 5th of October 1844, leaving several children; two attained twenty-one in the life of the testator. The remaining children afterwards attained twenty-one. The testator's widow had not married again.

The annual income arising from the testator's estate was more than sufficient to satisfy the annuities payable to the widow and Mary Nuttall. Three questions were raised:—the first, at what time the shares of the testator's children were to vest; the second, at what period the gift over to the issue of children was to take effect, in the event of their dying leaving issue; the third, whether the settlement made by the testator upon the marriage of his daughter was a satisfaction *pro tanto* of her share given by the will.

Mr. R. Palmer and *Mr. Little*, for the plaintiffs.

Mr. Bardswell, for the trustees.

Mr. Roche, for the testator's widow.

Mr. Rowcliffe and *Mr. Dickinson*, for several of the children of the testator.

Mr. Bazalgette and *Mr. C. Hall*, for Mr. and Mrs. Longshaw.

Mr. Follett and *Mr. Piggott*, for the grandchildren of the testator.

Mr. Palmer, in reply.

The authorities cited were, on the first question—

In re Williams, 12 Beav. 317; s. c.

19 Law J. Rep. (N.S.) Chanc. 46;

9 Q.B. Rep. 976.

Tribe v. Newland, 5 De Gex & Sm.

236; s. c. 21 Law J. Rep. (N.S.)

Chanc. 283.

Earl of Newburgh v. Agre, 4 Russ.

454; s. c. 6 Law J. Rep. Chanc. 153.

Bouverie v. Bouverie, 2 Phill. 349;

s. c. 16 Law J. Rep. (N.S.) Chanc.

411.

Brockelbank v. Johnson, 20 Beav. 205;

s. c. 24 Law J. Rep. (N.S.) Chanc.

505.

Leeming v. Sherratt, 2 Hare, 14; s. c.

11 Law J. Rep. (N.S.) Chanc. 423.

Woodburne v. Woodburne, 3 De Gex

& Sm. 643; s. c. 19 Law J. Rep.

(N.S.) Chanc. 88.

On the second question—

Edwards v. Edwards, 15 Beav. 357;

s. c. 21 Law J. Rep. (N.S.) Chanc.

324; 22 Law J. Rep. (N.S.) Chanc.

1055; 10 Hare, App. lxiii.

Abbott v. Middleton, 21 Ibid. 143;

s. c. 25 Law J. Rep. (N.S.) Chanc.

113.

On the question of satisfaction—

Freemanile v. Bankes, 5 Ves. 79.

Farnham v. Phillips, 2 Atk. 215.

Davys v. Boucher, 3 You. & C. 397.

Pym v. Lockyer, 5 Myl. & Cr. 29; s. c.

10 Law J. Rep. (N.S.) Chanc. 153;

11 Law J. Rep. (N.S.) Chanc. 8;

12 Sim. 394.

Hervey v. M'Lauchlin, 1 Price, 264.

Thynne v. the Earl of Glengall, 2 H.L.

Cas. 131, 153.

Salisbury v. Petty, 3 Hare, 86.

The MASTER OF THE ROLLS.—The tes-

tator, by his will, gives an annuity of 500*l.* a year to his wife, with a direction that in case of her marriage the annuity shall be reduced to an annuity of 100*l.* a year; he then gives powers of advancement to the children, and directs that upon the youngest of the children attaining twenty-one, the property shall be divided amongst them, subject to the annuity of 100*l.* a year to his wife if married again; and he also directs that upon each of his children attaining twenty-one, he shall have 500*l.* Now, the point upon the question of vesting appears to be whether this clause, which directs a division of the property, is only to take effect after the death or marriage of the widow, or whether it is to take effect absolutely upon the youngest of the children attaining twenty-one; whether the only mode of reading this will, without inconsistency, is to say that this clause is to take effect only upon the death or marriage of the widow, and that it is not to take effect absolutely on the youngest child attaining twenty-one. When the whole of the will is read together, although undoubtedly some of its provisions are peculiar, and in many respects inconsistent, its effect appears to be this: the testator, in the first place, gives a direction that the trustees are to stand possessed of all his property, and to pay out of the income an annuity of 500*l.* a year to his wife for her life, or until she shall marry again; the surplus is to be accumulated in order to provide a fund for the advancement of the children, and this is to go on as long as the annuity continues, and there is nothing whatever to limit its duration. Then the will goes on, "and from and immediately after the death or marriage again of my said wife, then upon further trust to apply such part of the said rents, interest and annual proceeds for the maintenance, education and advancement in life of all my child and children, as shall be then under the age of twenty-one years, as they in their discretion shall see necessary and proper." Now, stopping here, it is quite clear what is to take place; if the widow shall marry again, or shall die, and any of the children are under age, then the trustees are to perform the duties and functions of providing for the maintenance and education of the children; and the widow, if she shall marry

again, is not to interfere with that matter. The will then goes on, "And when the youngest of my said children shall attain the said age, then upon further trust to call in all my monies, and pay, divide, distribute and convey all my property between my children, share and share alike, save and except so much as will secure to my said wife (if she shall be then alive and married) an annuity or yearly sum of 100*l.* hereinafter mentioned." If I read this clause as it stands, the annuity of 500*l.* a year to the wife is to be cut down to an annuity of 100*l.* merely because the youngest of the children shall have attained twenty-one. It is obvious that cannot be the meaning of the testator. If it is meant that the property is to be absolutely divided upon the youngest of his children attaining twenty-one, either these words respecting the 100*l.* a year must be omitted, or the testator himself must have omitted some such words as, "but in case she shall not be married again, subject to the annuity of 500*l.* a year"; but the testator has not said so, and I cannot introduce those words. If the words "after the death or marriage again of my wife" govern the whole sentence the will is consistent, because in that event if she is dead and the youngest of the children shall have attained twenty-one, the property is to be divided; or if she is alive and married again, the capital necessary for providing for the annuity of 100*l.* is to be set aside, and at her death the principal of the annuity is to be equally divided among the children; and then he directs, that in case the children cannot agree as to the division of the estate, it is to be sold by the trustees. The testator goes on thus: "and in case of the death of any of my said children leaving lawful issue, him, her or them surviving, then it is my will and mind that the share or shares of such deceased parent or parents shall go to the child or children of such parents." Now I pass over that for a moment. "Provided always, that in case my said wife shall marry again, I direct the said annuity or yearly sum of 500*l.* shall cease, and in lieu thereof I give her an annuity of 100*l.*," shewing that he must have intended to provide for this event in the clause which relates to the division of the property on the youngest child attaining twenty-one;

and then he says, that "on each of my said children attaining the age of twenty-one years, I direct the sum of 500*l.* shall be paid to him or her so coming of age, and out of accumulations of my property, which will have accumulated beyond my said wife's annuity of 500*l.*," and he gives power to the trustees, with the consent of the wife, if she shall be then a widow, to advance in the world such son or daughter so coming of age, and then both the sum of 500*l.* and the other sums for advancement are to be deducted out of their shares. The meaning of the will therefore seems to be clear—the widow is to have 500*l.* a year for her life if she does not marry again, and in that event according as every child attains twenty-one his share becomes absolutely vested, and therefore he receives 500*l.*, and the trustees may allow a further sum for the advancement of that child, and this is to go on until the death of the widow, and then upon the youngest child attaining twenty-one the whole of the fund is to be divided among all the children, each of them bringing into hotchpot the sums they may have already received; but if the widow marry again, though it is true that up to the time of the youngest child attaining twenty-one, those clauses with respect to the elder children receiving 500*l.*, and being advanced in life are in force, yet upon the youngest child attaining twenty-one the division is to take place. The will, therefore, does not require that any words should be added to or taken from it to make it consistent, and though in some events its provisions may be inconvenient, as it suspends the distribution of the fund until after the death or marriage of the widow, yet the Court cannot avoid that conclusion if the testator has expressly so directed it.

Upon the second question I am of opinion, upon the authority of the cases which I considered very fully in *Edwards v. Edwards*, that the period which is referred to by the words "in case of the death of any of my said children leaving lawful issue," is the death before the period of distribution, that is, before the youngest child shall have attained twenty-one, if the mother shall have married again, or before her death, in case of her death without marrying again.

Upon the question whether there was an advancement by the testator to his daughter upon her marriage, I have no doubt. The case of *Lord Thynne v. the Earl of Glengall* is decisive on the point, and removes any doubt as to whether the doctrine of satisfaction did not affect any case where residue was given, and it is impossible to draw that distinction which was advanced in argument on behalf of Mr. and Mrs. Longshaw, that though it would be a satisfaction where the will followed the advancement, it did not hold where the advancement followed the will. There is, however, no such distinction. The testator must be taken to have known what he had done by the will which he had previously executed, and whether the previous instrument was a will or a deed does not affect the question of advancement; this lady, therefore, must be put to elect whether she will take under the will or under her settlement. If she elects to take under the will she must bring into hotchpot the amount paid for her advancement.

M.R. April 18, 19, 21. LORDS JUSTICES. June 14.	}	HODGKINSON v. THE NATIONAL LIVE STOCK INSURANCE COMPANY.
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Company—Powers of Directors—Cancellation of Shares—Demurrer.

Directors of a company subscribed for a large number of shares in their respective names, but they paid the deposit upon a small number only. At a board they resolved to cancel the shares upon which they had paid no deposit, and they also purchased the shares of another director who desired to retire, and paid for them out of the funds of the company. At a general meeting the shareholders confirmed the resolution. Upon a bill of some of the shareholders, alleging that these acts were not authorized either by the constitution of the company or by the deed of settlement, and that they were a fraud upon the shareholders—Held, at the Rolls, upon demurrer, that the allegations were sufficient to support the bill, and that the demurrer must be over-

ruled (1); and this decision was affirmed on appeal.

The National Live Stock Insurance Company was established in the year 1853, for insuring the owners of horses, cattle and other live stock against loss from the death of or injury from accidental causes to the property insured. The capital was to be 250,000*l.* in 100,000 shares of 2*l.* 10*s.* each, with a deposit of 10*s.* per share. The deed of settlement was subscribed by various persons for 65,000 shares, and the company was completely registered on the 14th of September 1853.

The business of the company did not succeed, and a dividend declared for the half-year ending the 30th of June 1854 was paid out of the capital of the company.

George Hodgkinson, in his own name, subscribed for 1,200 shares, and in the name of his wife for 1,000 shares more. William Henry Turner and Thomas Sheffield subscribed for 1,000 shares each, and they all paid the deposit.

The directors of the company consisted of Edward Johnstone, who subscribed for 4,000 shares, John Thomas Croft, James Fennell, Robert Garland and Thomas Vaughan, who each subscribed for 2,000 shares, and John Moss, Edmond Sheppard Symes and Edward Lloyd, who each subscribed for 1,000 shares, but they each only paid the deposit upon 500 of such shares, though in the reports made to the company it was represented that the deposit had been paid upon the whole of the shares subscribed for.

The bill was filed, by G. Hodgkinson, on behalf of himself and his wife, and by Messrs. Turner and Sheffield, on behalf of themselves and all the other shareholders of the company, except the defendants, against the company and the directors and against William Gee, William Tanner Chave and John Trex, who had previously filed a bill against the directors, complaining of their acts, which they had afterwards compromised, to obtain a declaration that the cancellation of various shares made by them were wholly illegal, fraudulent and void against the plaintiffs

and the other shareholders of the company, and praying that the defendants might be decreed to pay the amount due for the deposit and calls in respect of such shares, and that it might be declared that the purchase by the defendants of 560 shares in the company out of its funds was fraudulent and void, and that the defendants might be decreed to make good the sum paid by them in respect thereof. The bill also prayed that in the mean time the defendants might be restrained from making any calls to pay the debts of the company.

The bill stated, paragraph 19, that, "In the latter part of the year 1853 the defendant Edward Johnstone, who had paid the deposit on 500 shares of the 4,000 shares for which he had subscribed the deed of settlement, was desirous of retiring from the company, and in fraud of the plaintiffs and the other shareholders of the company other than the defendants, the directors, agreed with the other defendants, his co-directors, that he should be exonerated from all liability in respect of the 4,000 shares for which he had subscribed the deed of settlement as aforesaid, and that he should be deemed to be, and should be made to appear as the holder of 500 shares in the said company, and upon which he had paid the deposit, and that the company out of its funds should purchase of the defendant Edward Johnstone such 500 shares, and that he should transfer the same to the company, or some nominee or trustee on its behalf, and that some provision should be made to indemnify him from the consequences of having subscribed the said deed of settlement for 4,000 shares."

The plaintiffs, upon an investigation made in March 1858, for the first time, discovered that 280*l.*, part of the funds of the company, had been paid to the defendant Edward Johnstone by the directors for the purchase of the 500 shares, part of the 4,000 shares for which he had subscribed the deed of settlement, and of 60 other shares of which he had become the holder and on which the deposit had been paid. This payment was authorised by a resolution of the defendants, the directors, dated the 14th of January 1856.

The 22nd paragraph stated "In February 1856, to carry into effect the said arrangement for the release of the defen-

(1) See *In re the National and Provincial Live Stock Insurance Society*, 27 Law J. Rep. (N.S.) Chanc. 669.

dant Edward Johnstone, the defendants, the directors, agreed to, and in fraud of the plaintiffs and other shareholders did cancel 3,500 shares of the company, being the residue of the 4,000 shares for which the defendant Edward Johnstone had subscribed the deed of settlement as aforesaid, and the deposit whereon he had not paid; the defendants, the directors, in fraud of the plaintiffs and the other shareholders, agreed to and did cancel the 1,500 shares for which the said several defendants other than Edward Johnstone had respectively subscribed."

No return was made by the defendants, the directors, to the registrar of joint-stock companies of the cancellation of such shares until the month of March 1858, and the defendants appeared as the registered owners. Upon the discovery of these facts, a requisition was sent to the directors, to call an extraordinary general meeting of the shareholders, to consider the position of the company. On the 27th of March 1858 the directors, with a view, as the bill alleged, to frustrate any inquiry into these matters, made a call of 5s. a share on the capital of the company, payable on or before the 28th of April 1858, and in compliance with the requisition of the shareholders, convened an extraordinary general meeting of the shareholders, for the 4th of May 1858 (being six days after the call was made payable); at which meeting the shareholders of the company who had not previously paid such call would be, according to the terms of the said deed of settlement, prevented from voting or taking part in the proceedings. The plaintiffs, not having paid up the said call of 5s. per share, were consequently disqualified from attending and voting at such meeting. The meeting confirmed the purchase and cancellation of the shares.

The 51st paragraph of the bill stated that "The cancellation by the said defendants, the directors, of the shares for which they severally subscribed the said deed of settlement, was illegal and fraudulent and void as against the plaintiffs and the other shareholders in the said company, other than the defendants, the directors."

The 52nd paragraph stated, "The purchase by the defendants, the directors, on behalf of the company, and payment therefor, out of the funds of the company of the

560 shares in the company of the defendant Edward Johnstone, was a fraud upon the plaintiffs and the other shareholders of the company, and was not authorized by the constitution thereof, or by the provisions of the deed of settlement; and the plaintiffs insist that the defendants, the directors, have, by their acts and from and under the circumstances aforesaid, rendered themselves and are jointly and severally liable to make good to or for the benefit of the company and the shareholders therein, all sums of money paid or applied by the defendants, the directors, in or towards the payment for the shares; and that they are in like manner jointly and severally liable to the company and the shareholders therein for the deposit of 10s. per share."

Three demurrers were filed to this bill for want of equity and for want of parties, one on behalf of the company, and two on behalf of the directors and the other defendants.

Mr. R. Palmer and Mr. W. W. Cooper, in support of the demurrers, referred to

Foss v. Harbottle, 2 Hare, 461.

Hitchens v. Congreve, 4 Russ. 562; s. c. 1 Mont. 225.

Lord v. the Copper Miners Company, 2 Phill. 740; s. c. 1 Hall & Tw. 85; 2 De Gex & Sm. 308; 18 Law J. Rep. (N.S.) Chanc. 65.

Bailey v. the Birkenhead, &c. Railway Company, 12 Beav. 433; s. c. 1 Law J. Rep. (N.S.) Chanc. 377.

Kent v. Jackson, 14 Ibid. 367; s. c. De Gex, M. & G. 49; 21 Law Rep. (N.S.) Chanc. 438.

Yells v. the Norfolk Railway Company, 3 De Gex & Sm. 293.

Ex parte Morgan, 1 Mac. & G. 2; s. c. 1 Hall & Tw. 320; 1 De G. & Sm. 750; 18 Law J. Rep. (N.S.) Chanc. 265.

Exeter and Crediton Railway Company v. Buller, 5 Rail. Cas. 211.

Edwards v. the Shrewsbury and Birmingham Railway Company, De Gex & Sm. 537.

Taylor v. Hughes, 2 Jo. & Lat.

Mr. Selwyn, Mr. T. H. Terr Mr. Stiffe, for the plaintiffs, cited—*Preston v. the Grand Collier Company*, 11 Sim. 327; s.

Preston v. Guyon, 10 Law J. Rep. (N.S.) Chanc. 73.

Williams v. Page, 24 Beav. 654; s. c.

27 Law J. Rep. (N.S.) Chanc. 425.

Clements v. Bowes, 1 Drew. 684; s. c.

21 Law J. Rep. (N.S.) Chanc. 306;

22 Law J. Rep. (N.S.) Chanc. 1022.

In re the Athenæum Life Assurance Society, 4 Kay & J. 549.

The Attorney General v. the Corporation of Poole, 4 Myl. & Cr. 17; s. c.

8 Law J. Rep. (N.S.) Chanc. 27; overruling 2 Keen, 190.

Mr. Palmer, in reply, cited—

Holt's case, 1 Sim. N.S. 369; s. c.

20 Law J. Rep. (N.S.) Chanc. 413.

THE MASTER OF THE ROLLS.—I think this demurrer must be overruled. There are several matters on which I do not wish to express any opinion until the whole case is gone into, but the conclusion which I have come to, upon the point which has been principally argued, viz., the cancellation of the shares, looking at the allegations in the bill in the fairest way I can, is, that it is a subject-matter that could not be confirmed by a general meeting. I refer to the nineteenth and fifty-second paragraphs of the bill. It was suggested, taking everything most strongly against the pleader, that there must be taken to be no prohibition against the purchase and cancellation of the shares, but the allegation is, that this was not authorized by the constitution of the company or by the deed of settlement, because the directors could not do it unless it was authorized by the constitution of the company or by the deed of settlement, and if it was not authorized by either, and could not be, then that it was a matter which could not be confirmed by a general meeting. It is unnecessary to say anything upon *Foss v. Harbottle*, as I have always followed it. There is, therefore, a sufficient allegation to support the bill; but it is impossible to ascertain the extent of the other allegations until the hearing of the cause. The demurrer must be overruled, but the costs must be reserved.

June 14.—From this decision the directors appealed. The same counsel appeared

as upon the original hearing. In addition to the cases cited at the Rolls, the following were referred to:—

Moxley v. Alston, 1 Phill. 790; s. c.

16 Law J. Rep. (N.S.) Chanc. 217.

The York and North Midland Railway

Company v. Hudson, 18 Beav. 485;

s. c. 23 Law J. Rep. (N.S.) Chanc. 695.

Counsel for the respondents were not called upon. The substance of the appellants' argument is stated in the judgment.

LORD JUSTICE KNIGHT BRUCE said that this was a bill by principals against their agents, seeking to be relieved against a fraud, which, as the former contended, was sufficiently alleged in the bill, to have been committed by the agents. Of course, if this description was accurate, a demurrer was out of the question. It was suggested that the alleged frauds were remediable in such a manner under the provisions of the deed of settlement as to exclude or destroy the remedy of the shareholders. It might be that the deed of settlement contained such provisions, but as the deed of settlement appeared upon the bill, it appeared clearly that it contained no such clause. The Master of the Rolls thought the demurrer excluded by the 19th and 52nd sections, to which his Lordship would add the 21st, 28th, 37th, 51st and 54th. It was conceded at the bar, and rightly conceded, that if the bill was sustainable against any of the defendants, it was sustainable against all; but it was very properly suggested by Mr. Cooper, that if the bill was sustainable on the merits there were other persons who ought to be defendants here, and that those persons who had paid the call of 5s. per share ought to be represented. He (the Lord Justice) was not satisfied that if these parties were before the Court, it would affect the question, independently of the thirty-seventh paragraph; and the thirty-seventh paragraph alleged ignorance on the plaintiffs' part of the names of the parties, and stated that they were known to the directors. If the ignorance alleged by the plaintiffs was of a fact which they were bound to know, they could not allege that as an excuse; but here it was ignorance of a fact which they were not bound to know.

LORD JUSTICE TURNER added that it was quite unnecessary to go beyond the fifty-second paragraph of the bill, which was as follows:—"The purchase by the defendants, the directors, on behalf of the company, and payment therefor out of the funds of the company of the 560 shares in the said company of the defendant Edward Johnstone, was a fraud upon the plaintiffs and the other shareholders of the company, and was not authorized by the constitution thereof, or by the provisions of the said deed of settlement; and the plaintiffs insist that the defendants, the directors, have by their acts, and from and under the circumstances aforesaid, rendered themselves and are jointly and severally liable to make good to or for the benefit of the said company and the shareholders therein, all sums of money paid or applied by the said defendants in or towards the payment for the said shares." As to the argument that the directors derived authority under the general act, his Lordship was not aware of any enactment which sanctioned directors to enter into transactions of this description when they did not derive that authority under their own act or their deed of settlement.

After some further discussion it was arranged and ordered that the defendants should have six months' time to answer the bill.

M.R. }
May 7, 11. } HUNT v. ELMES.

Production of Deeds—Mortgagee—Purchaser without Notice.

A defendant by his answer stating that he was a purchaser for value without notice, is not bound to produce the title-deeds of an estate to a mortgagee whose security preceded the purchase, though the bill charged that the deeds were fraudulently retained by the mortgagor.

If the defendant, in his answer, sets out partially the conveyance made to his vendor, he must produce the deed to verify the statement.

A summons was taken out in chambers to compel the defendant to produce divers

deeds and papers, admitted by his answer to be in his possession. It was adjourned into court.

The bill was filed, by a mortgagee of certain freehold premises, praying for a declaration, that the defendant's right (if any) to the premises might be subject to the plaintiff's charge, and that he might be decreed to pay to the plaintiff what was due to him.

The plaintiff's mortgage was made by David Hughes, the then owner of the estate, and he subsequently sold the premises in question to the defendant.

The bill stated that the mortgagor was the solicitor of the plaintiff when he executed the mortgage, and that the plaintiff employed no other solicitor in the transaction; that the mortgage included other estates, and that the mortgagor, after the execution of the mortgage-deed, sent a bundle of deeds to the plaintiff, on which was indorsed "Deeds and mortgage of premises, situate at," &c., and naming both the estates; that the plaintiff at the time omitted to examine the deeds; but that subsequently he discovered that the defendant claimed one of the estates, and also that the deeds relating to that estate had been kept back by the mortgagor.

By his answer, the defendant denied that he had any knowledge of the plaintiff's mortgage at the time he purchased the estate in question; and he claimed to be a purchaser of the estate for valuable consideration, without notice of the plaintiff's claim.

The deeds were delivered up to him at the time of the completion of the purchase, and he insisted on his right to priority, both as to the deeds and the estate. In answer to an interrogatory with reference to the purchase of the estate by the mortgagor, he said, "that by an indenture, dated the 30th of May 1854, a piece of freehold land at Maryland Point, near Stratford, in the parish of West Ham, in the county of Essex, with five unfinished houses then in course of erection thereon (the premises in question), were, in consideration of 700*l.* therein expressed to be paid by the said David Hughes, conveyed to the said David Hughes for an estate in fee simple, and that the said land and houses were more particularly described in the said last-mentioned indenture, and I

have no reason to doubt the truth thereof; but I do not otherwise know it to be the fact, that the said David Hughes purchased the said last-mentioned premises by public auction, at the Auction Mart, in the city of London, on the 7th of October 1852, for the sum of 700*l*."

The answer to the interrogatory, requiring documents in the defendant's possession to be set out, was:—"And I say that the documents mentioned in the second part of the said schedule are the title-deeds and muniments of title relating to the fee simple and inheritance of the said land and houses at Maryland Point aforesaid; and I am advised and I verily believe that the plaintiff has not any right or title to the production of, or any interest in, the documents, papers and writings in the said second part of the said schedule mentioned, or any of them; and I object to produce the same, or any of them."

Mr. Swenson, for the plaintiff.—The conveyance to Hughes has been partially stated in the answer. The defendant is therefore bound to produce it; and as to the other deeds, the refusal to produce them is unsupported by any sufficient claim.

Mr. Godfrey, for the defendant.

The following cases were cited:—

Smith v. the Duke of Beaufort, 1 Phill. 209; s. c. 18 Law J. Rep. (n.s.) Chanc. 33: affirming 1 Hare, 507.

Clay v. Edmondson, 22 Beav. 126.

Combe v. the Corporation of London, 15 Law J. Rep. (n.s.) Chanc. 80.

Swinborne v. Nelson, 16 Beav. 416; s. c. 22 Law J. Rep. (n.s.) Chanc. 331.

Bolton v. the Corporation of Liverpool, 1 Myl. & K. 88; s. c. 1 Law J. Rep. (n.s.) Chanc. 166.

M^r Intosh v. the Great Western Railway Company, 1 Mac. & Gor. 78; s. c. 1 Hall. & Tw. 41; 18 Law J. Rep. (n.s.) Chanc. 169: affirmed, 19 Law J. Rep. (n.s.) Chanc. 374.

Head v. Egerion, 3 P. Wms. 280.

Wiseman v. Westland, 1 You. & J. 117.

The MASTER OF THE ROLLS—after reading the answer:—I think the defendant has sufficiently claimed protection from the

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production of all the documents required to be produced, except one. The defence is, that he is a purchaser for value without notice, and he sets up this defence by his answer; and then having stated that he has set out in the second part of the schedule certain documents, he says that they are the muniments of his title, and that he is advised that the plaintiff has no right to the production of, or any interest in, the documents, and he objects to produce them. Certainly the facts are not very strongly put in the answer, and they must be taken most strongly against the pleader; but I think that there is good ground for giving effect to the privilege from production, and that a case is sufficiently stated. With regard to the conveyance of the 30th of May 1854, to David Hughes, the mortgagor, which the defendant has admitted and referred to by his answer, on the principle of *Latimer v. Neale* (1), by which I am bound (though it has been doubted), I think that the defendant must produce it to satisfy the defendant of the correctness of the statement.

KINDERSLEY, V.C. } LAWRENCE v.
Feb. 28. } MAULE.

Practice—Evidence—Affidavits filed in former Proceedings—Services on the Attorney General.

One of the partners in a firm died intestate, and in a suit for winding up the partnership affairs, a sum of money was paid into court. The intestate was also possessed of two other sums of stock, which were transferred to the Commissioners for the Reduction of the National Debt, since no next-of-kin of the intestate could be found. A claimant came forward as next-of-kin, and presented a petition in the partnership suit, claiming the money standing to the separate account of the intestate. In that suit nine affidavits were filed. The same claimant presented a petition praying for a transfer of the sums paid to the Commissioners, when nineteen affidavits were filed. On this petition the Attorney General appeared, as representing the Crown and the Commissioners. Letters

(1) 11 Bligh, 112.

of administration were then granted to the solicitor for the Treasury, as nominee of the Crown, and a suit was instituted against him by the representatives of the first claimant, to prove his relationship to the intestate. Another claimant also came forward in this suit, by whom one affidavit was filed. The persons who made the affidavits were all dead:—Held, that evidence produced on a former occasion could only be made use of in subsequent proceedings, between the same parties and upon the same issue. Upon this principle, the nine affidavits in the partnership suit and the one affidavit in the present suit by a different claimant, were rejected, but the nineteen affidavits on the petition were admitted.

The Attorney General having been served, under the 56 Geo. 3. c. 60, must be presumed to have represented the Crown and the National Debt Commissioners and the beneficial interests of the Crown.

This was an adjourned summons upon a question as to whether certain affidavits filed upon former occasions were to be admitted as evidence upon this hearing, the deponents in such affidavits being all dead.

The facts were as follows:—John Lawrence, a native of England, died in America in the year 1814, intestate. At the time of his death he was a partner in the firm of Sparling, Boulden & Lawrence, and his share of the partnership assets amounted to about 20,000*l.* He also died possessed of two sums of stock amounting to 17,749*l.* and 3,000*l.* A suit entitled *Wilding v. Boulden* was then instituted for the purpose of winding up the partnership, and the next-of-kin of John Lawrence not being known, advertisements were issued for such next-of-kin, and in consequence of these advertisements several persons sent in claims, and three of them, named Diana Kemp and Matthew and Elizabeth Wilkinson, took out administration to the estate of John Lawrence in May 1828, upon their claiming to be cousins of the intestate. It appeared that the sum found to be due to the intestate, upon the partnership account in the cause of *Wilding v. Boulden*, was transferred to his separate account, and the two sums of stock, namely, the 17,749*l.* and the 3,000*l.*, were transferred, under the statute 56 Geo. 3.

c. 60, to the Commissioners for the Reduction of the National Debt. A petition was then presented, by Diana Kemp and M. and E. Wilkinson, for payment out of court of the sum of money standing to the separate account of J. Lawrence; and on that petition, in the suit of *Wilding v. Boulden*, nine affidavits were filed.

Another petition was presented, by Diana Kemp and the Wilkinsons, entitled *In re Lawrence*, for the re-transfer to them of the two sums of stock so transferred to the Commissioners for the Reduction of the National Debt, and an order was made referring it to the Master to inquire who were the parties beneficially entitled to these sums. Upon this petition the Attorney General appeared both for the Commissioners for Reduction of the National Debt and for the Crown. When the matter was before the Master, the petitioners, Diana Kemp and the two Wilkinsons, carried in a claim to be beneficially entitled to the fund, and in support of their case nineteen affidavits were filed. No report was made upon this inquiry. Proceedings were then taken in the Prerogative Court for the purpose of revoking the letters of administration so granted to D. Kemp and the Wilkinsons, and the same were revoked, and letters of administration were granted to Mr. Maule, as nominee of the Crown.

This suit was then instituted in 1835, by William Lawrence and others, claiming to be next-of-kin of the intestate, against Mr. Maule, and an order of reference was made in January 1838, to inquire who were the next-of-kin. Various claims were carried in before the Master, and in one of them, which failed, an affidavit of Sarah Hemingsley, filed on the 31st of October 1843, was used.

John Bryan and Susannah his wife, as legal representatives of Matthew Wilkinson, subsequently carried in a claim, and in support of their claim they tendered as evidence before the Master the nine affidavits made in the cause of *Wilding v. Boulden*, the nineteen affidavits filed in *Re Lawrence* and the affidavit of Sarah Hemingsley filed in this suit of *Lawrence v. Maule*. The Master refused to receive all these various affidavits, and the claim was disallowed. To that report the claimants excepted, and the case having been

continued in chambers, the question as to the reception of the affidavits now came on for argument, upon adjournment from chambers.

Mr. Anderson and *Mr. Toulmin* appeared in support of the exceptions, and submitted that the whole of the affidavits ought to be received in evidence. The parties now before the Court were virtually representing the same interest as when the affidavits were filed, and the issue was, in fact, the same as that which had before been raised. They cited—

In re Biggs, 4 Law J. Rep. (N.S.)

Exch. 41; s. c. 1 You. & C. 245.

Ex parte Ram, 3 Myl. & Cr. 25.

Kane v. Reynolds, 4 De Gex, M. & G.

565; s. c. 24 Law J. Rep. (N.S.)

Chanc. 321; affirming 23 Law J.

Rep. (N.S.) Chanc. 638; 2 Sm. &

G. 331.

Edgar v. Reynolds, 4 Drew. 269; s. c.

27 Law J. Rep. (N.S.) Chanc. 562.

Trevelyan v. Fraser, cited in 1 *Taylor on Evidence*, 410.

Mr. Wickens, on behalf of the Attorney General, appeared for the Crown and for the Commissioners for the Reduction of the National Debt.

[The VICE CHANCELLOR intimated that he should not require any argument as to the admission of the nine affidavits.]

As to the remaining affidavits they were none of them used between the same parties. The present claimants had an adverse interest, and were not represented on the former occasion, and the beneficial interest in the Crown was not represented. The affidavit made by Sarah Hemingsley was made upon a claim which failed, and upon the rejection of a claim all evidence relating to it was thrown out of the office. Moreover, the evidence was taken under the old practice, when there was not power of cross-examination, and as the witnesses were now dead, they could not be cross-examined under the rules at present in force.

Mr. Anderson was heard in reply.

KINDERSLEY, V.C. — There are three classes of affidavits to be considered in this

case. With regard to the nineteen which were filed in *Re Lawrence*, I think I ought to admit them as evidence, but I must reject the nine made in the suit of *Wilding v. Boulden*, and the one affidavit made by Mrs. Hemingsley in the present suit. The general rule as to the admission of evidence is, that where an issue is raised between parties in a court of competent jurisdiction, and evidence has been given upon that issue by either of the parties against the other, and if in subsequent proceedings there is the same issue between the same parties, and the witnesses who gave the evidence in the former proceeding have died, the Court will admit the evidence given by the deceased witnesses in the former, as evidence in the subsequent proceeding. But the evidence is not admissible unless the issue is the same, and the parties are the same, in both proceedings. The issue in this case is whether Matthew Wilkinson was next-of-kin or one of the next-of-kin of John Lawrence, the intestate, at the time of his death. It is an issue in the strict sense of the term, because it admits of an affirmation on the one side and of a denial on the other. Then what was the issue which was raised in *Re Lawrence* in the year 1828, in which the nineteen affidavits were filed? That was a proceeding under the statute 56 Geo. 3. c. 60, for the purpose of getting back from the National Debt Commissioners a sum of consols which had stood in the name of the intestate at the time of his death, and which had under the provisions of that act been transferred to them. That act of parliament authorizes applications to be made by the persons claiming to be entitled. Two persons named Wilkinson, of whom the said Matthew Wilkinson was one, and a person named Diana Kemp, who had obtained letters of administration to the intestate's estate, presented a petition under the act, asking that the sums of money which had belonged to the intestate, and which had been transferred into the names of the Commissioners, might be re-transferred to them, they claiming to be entitled thereto as his next-of-kin. Upon that petition an order was made for an inquiry as to what stock was standing in the name of the intestate, and as to the persons who were beneficially entitled to the same, and in the

course of the proceedings upon that order the nineteen affidavits were made. So far as regards Matthew Wilkinson being one of the next-of-kin, there was the same issue on that inquiry as there is in the present proceeding; for in both we have an affirmation on the one side that Matthew Wilkinson was one of the next-of-kin, which is denied on the other.

The next question is, are the parties to that issue the same as the parties to the present issue? The parties now before the Court are the representatives of Matthew Wilkinson, who assert that he was the intestate's next-of-kin and the intestate's legal personal representative. That legal personal representative is Mr. Maule, who is the nominee and trustee of the Crown, to whom administration was granted upon the footing that, as it did not appear that there were any next-of-kin, the Crown was beneficially entitled to the estate; and it was upon that footing only that Mr. Maule was constituted the legal personal representative. I adhere to what I held in the case of *Edgar v. Reynolds*, that where the grant of administration is made to the nominee of the Crown, that nominee is as regards third persons liable like any other legal personal representative to the claims of all parties. In that case I made the legal personal representative liable for interest on balances. But as between the administrator and the Crown the matter is different, for there the administrator cannot be heard to say that he is not a trustee for the Crown. It was, indeed, unnecessary to have had upon the record any person representing the Crown; but in chambers, as in the Master's office formerly, the Crown would have been required to be present, because where the Crown is beneficial owner it is always represented. The issue in the present case is between the claimant and the Crown, the claimant insisting that he is next-of-kin and the Crown insisting that he is not, and the parties were in fact the same in *Re Lawrence*. Upon the position of the Attorney General there is also a fair question. By the act 56 Geo. 3. c. 60. it is required, that where a petition is presented under that act, there shall be service on the Commissioners and on the Attorney General, but the act does not state in what

capacity the Attorney General is to be served. *Prima facie* it would appear that service on the Commissioners is sufficient protection to the public, as their interest is to make the fund as large as possible. When the Attorney General is required to be served, it is, I presume, to represent the Crown. It may be that the Crown has no pecuniary interest, and then the Attorney General represents the public, but only through the Crown, which protects public interests. The Attorney General, however, when he is served, must represent the Crown in every interest, and he would fail in his duty if he did not. If there should be a case in which the public and private interests of the Crown should conflict, then the separate interests would be represented by different counsel. In this case the same solicitor and counsel appear for the Crown and for the Commissioners of the National Debt, but that is because the two have the same interest. It appears to me that the Crown was before the Court in *Re Lawrence* in the same capacity in which it is before me now in this case, and, therefore, that not only the issue is the same, but the parties also are the same in both proceedings.

When the affidavits in question were brought in, the practice in the Master's office was, at one of the preliminary meetings to determine in what way the evidence should be taken, whether by interrogatories or affidavit or *vidé voce*; and if neither of the parties objected, the Master directed the evidence to be taken by affidavit, and all those affidavits were good evidence with regard to the parties to that proceeding. Now a change has taken place, for although all the proceedings in the Judge's chambers are by affidavit, there is now a power to cross-examine witnesses. If the evidence was good at the time it was given, it appears to me that the subsequent change in the practice does not make the evidence bad. I must, therefore, admit the nineteen affidavits filed in *Re Lawrence*. With regard to the affidavits filed in the suit of *Wilding v. Boulden*, there was in that case neither the same issue nor the same parties as in the present, and I must therefore reject them.

With regard to the one affidavit filed in the present cause, *prima facie* the evi-

dence in a cause must be received as against all parties, but in this case there has been an inquiry as to who are the next-of-kin of the intestate, and several persons have come forward. When one person comes in there is an issue between him and the Crown, and when another comes forward there is an issue between that other and the Crown, but the two issues are different as they are between different parties, and they may have totally different cases. As between one party and the Crown there might be an affidavit filed which the Crown may not think it necessary to answer, as he may have beaten himself upon his own shewing. Surely then a second claimant cannot be allowed to use that affidavit upon a different issue between different parties. I think, therefore, that I must reject the one affidavit, upon the same principle that I reject the nine affidavits and admit the nineteen.

WOOD, V.C. }
 April 18; } CLIVE V. CAREW.
 May 5. }

Baron and Feme—Separate Estate—Breach of Trust.

Property settled to the separate use of a married woman, without power of anticipation, cannot be applied to make good a breach of trust committed by her; and the circumstance that she herself was the settlor makes no difference.

The bill in this case was filed for the purpose of obtaining the directions of the Court with a view to recovering or replacing a pearl necklace, which had been settled to the separate use of one of the defendants, a married woman, for life, with remainder over, and had been first pledged and then sold by her. The question was, whether other property which had been settled to her separate use, without power of anticipation, could be made available for the purpose of replacing the value. The circumstances of the case are fully stated in the judgment.

Mr. Wickes appeared for the plaintiff; and
Mr. Southgate, for the defendants.

The cases cited were—

Jackson v. Hobhouse, 2 Mer. 483.
Robinson v. Wheelerwright, 6 De Gex,
 M. & G. 535; s. c. 25 Law J. Rep.
 (N.S.) Chanc. 385.
Barrow v. Barrow, 4 Kay & J. 409;
 s. c. 27 Law J. Rep. (N.S.) Chanc.
 678.

WOOD, V.C.—The point that arises in this case is a very singular one, although it depends upon a short state of facts. A settlement was made by three several indentures of even dates, on the marriage of Mr. and Mrs. Carew, the defendants, and amongst other articles settled there were a number of trinkets and jewels, one of which was a pearl necklace, stated by the deed to be of the estimated value of 1,000*l*. This was settled for the benefit of Mrs. Carew, for life, with remainder to her first or only son. The rest of the articles in the settlement were settled simply to her separate use. Besides that, however, she had, by one of the other indentures of even date, an interest given to her in certain freehold and leasehold estates of considerable value, the rents of which were to be paid to her for her separate use, without power of anticipation. The pearl necklace being a chattel of considerable value, and being thus limited to her for life, with remainder to her children, of course she was entitled to the use of it for her life; it was placed, therefore, in her custody. In this state of things she first pawned and then sold the necklace, in consequence of difficulties in which her husband was placed by his bankruptcy. The question, therefore, arises whether or not her property settled to her separate use, and the other property settled without power of anticipation, can be applied, under the direction of the Court, to make good the breach of trust on her part. I have not any doubt whatever about the property settled to her own separate use. As to that she is a *feme sole*, and the breach of trust must be answered out of that property, just as much as a breach of trust committed by a male or by a single woman. The real difficulty has been as to the property settled to her separate use, without power of anticipation, and I confess the case is novel, and I feel con-

siderable difficulty in it. On the one hand, the observations made by Lord Eldon, in *Jackson v. Hobhouse*, are very cogent, namely, that if you say that a fraud committed by a married woman is to entitle those who are affected by it, to insist upon having any loss occasioned thereby made good out of property settled to her separate use, without power of anticipation, the husband has only by the marital control to secure the committal of the fraud by the wife, in order to obtain the benefit of the property settled without power of anticipation, and thus disappoint the intention of the settlor. On the other hand, the intention of the settlor, in a case like this, is, of course, just as strong, that the property settled in a particular mode shall go in that direction in which she has settled it, as that she shall have this power of receiving the income of the estate, without power of anticipation. The question becomes extremely nicely balanced as to what is the proper course to take with regard to a case so circumstanced. The circumstance here, that she herself was the settlor, I do not think is material, or that it makes a material distinction between this case and *Jackson v. Hobhouse*. The Court protects a married woman in respect of her coverture against the marital control in the most effective manner, and that protection has been extended to giving effect to clauses in restraint of anticipation; so that during the coverture she shall be in a state in which it would be impossible for her to deal with the property so settled. The length to which the Court has carried that protection is shewn in a late case before the Lords Justices (*Robinson v. Wheelwright*), where it was held, that although there was a very great benefit given by a will to a lady, on condition of giving up property thus settled of far less value, yet the Court could not, on her behalf, assist her in dealing with it, although for a much more valuable consideration. I think, upon the whole, that the better course is to adhere to the rule laid down by Lord Eldon, in *Jackson v. Hobhouse*, that is to say, that the Court, having once authorized this species of protection to a married woman, it is impossible for her, in any way whatever, to deal with the fund. The Court must hold her right

and interest in the fund protected, even against her own acts, regard being had to the degree of influence and control which, during the coverture, must be supposed to be exercised over these acts by her husband. Accordingly, therefore, I have come to the conclusion, that I can only affect the property held simply to her separate use. As to the rest, liberty must be given to apply on the coverture determining, because, should she survive her husband, there may be a possibility of reaching this fund, as the restraint upon anticipation will then be removed. "Declare, that the several jewels and other chattels mentioned in the schedule to the first of the three several indentures of settlement, bearing date respectively the 6th of July 1855, in the bill mentioned, other than the pearl necklace therein mentioned, or such of them as now remain in the possession or subject to the control of the defendant Mary Fanny Carew, or her husband, are chargeable with, and liable to make good the costs hereafter directed to be taxed and paid, and the value of the pearl necklace, improperly sold by the defendant Mary Fanny Carew, but that her interest under the said indenture of settlement in the trust property limited to her separate use for life, with restraint on her anticipation, is not so liable during the present coverture."

STUART, V.C. }
June 6, 7. } LINLEY v. TAYLOR.

Statute of Mortmain—Shares in Railway on Lease—Costs in Equity—Administration Suit.

A bequest for charitable purposes of shares in a railway company, which, at the testator's death, had granted a lease of its railway property and undertaking for 999 years to another railway company at a fixed rent, and with an option of purchasing on notice,—Held, not to be void under the Statute of Mortmain.

Charge by testator of his funeral and testamentary expenses upon a particular portion of his property specified in his will:—Held, not sufficient to justify the Court in throwing upon that specified portion the costs

of a suit for the general administration of the testator's estate.

Matthew Turner, the testator in the cause, by his will, dated in October 1853, gave all his real estate, and all such parts of his personal estate as he was not by law allowed to bequeath for charitable purposes, upon trust to sell the same, and to stand possessed of the nett monies to arise therefrom, upon trust, in the first place, to keep the said monies, and which monies were thereafter denominated his "general fund," separate and apart from the principal monies thereafter mentioned, and called his "charity fund"; and, in the next place, to pay and apply his general fund in liquidation of his just debts, and of all the legacies thereafter bequeathed. The testator then, after bequeathing certain annuities and legacies, directed that, if his general fund should be insufficient, after payment of his debts, funeral and testamentary expenses, to pay all the annuities and pecuniary legacies chargeable thereon in full, all such annuities and pecuniary legacies should abate proportionally, according to the amount thereof, but that no part whatever of his charity fund should be appropriated towards the payment of them; and he directed that if his general fund should be more than sufficient for payment of such annuities and pecuniary legacies, the surplus of his general fund should be divided amongst the legatees, payable out of such general fund proportionally, according to the amount of their respective legacies or annuities.

The testator then gave and bequeathed all his printed books, household furniture, and all such his monies and securities for money, and other parts of his personal estate and effects whatsoever and where-soever not thereinbefore bequeathed, as might lawfully be bequeathed by him for charitable purposes, unto the said trustees, together with another person therein named, whom he called his charity trustees, upon trust to keep the same separate and distinct from the proceeds of the sale of his real estate, and such parts of his personal estate as could not be lawfully applied to charitable purposes, and, as soon as conveniently might be after his decease, to sell the same and dispose of the monies

and proceeds to arise from such sale, according to the trusts thereafter declared.

The testator, after giving certain other directions, declared that his charity fund should be held by his charity trustees, upon trust that the same should be distributed by his said trustees and the mayor of Beverley, and the vicar of St. Mary's, Beverley, for the time being, for the benefit of honest and deserving domestic female servants living within eight miles of the Guildhall of Beverley, in the manner and subject to the regulations in the will expressly declared and provided.

The testator died in July 1856, and the present suit was instituted by some of the parties interested under the will to have the trusts of such will carried into execution under the decree of the Court.

Amongst the property of which the estate of the testator consisted were included forty-seven shares of 50*l.* each, in the Hull and Selby Railway Company, and a sum of money arising from dividends in respect of such shares. The chief clerk had found, by his certificate, that these shares and the amount of dividends thereon did not form part of the "charity fund" mentioned in the testator's will, inasmuch as, being property of the nature of impure personal estate, they could not be bequeathed for charitable purposes.

The case now came on before his Honour for further consideration of the Court, upon the question (amongst others), whether these shares and dividends formed part of the testator's "charity fund," as being property unaffected by the Statute of Mortmain, and, consequently, applicable to charitable purposes.

It appeared that the Hull and Selby Railway Company was incorporated in 1836, by an act of the 6 Will. 4. c. lxxx., the 114th section of which enacted, that "all the shares in the said undertaking, or the joint stock or fund of the said company shall, to all intents and purposes, be deemed personal estate, and transmissible as such, and shall not be deemed to be of the nature of real property." By the statute 9 & 10 Vict. cap. ccxli., passed in 1846, the Hull and Selby Railway Company were empowered to lease for any term of years, and also to absolutely sell their undertaking, and the premises con-

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therewith to the York and North and Railway Company, and the Manchester and Leeds Railway Company, or of them, as the case might be. The 15th sections of this act enacted, that the purchase-money of the Hull and Selby Company should be paid to the directors of that company, to be held by them upon trust, after paying or providing for the payment of debts, &c., to divide the said purchase and other monies rateably between the several persons who, at the time of the payment of the said purchase-money, should be proprietors of shares in the capital of the company, in proportion to the number and amount of their shares. By the 5th section of the same act, it was provided that, upon the payment of the purchase-money to the Hull and Selby directors as aforesaid, the acts relating to the said Hull and Selby Railway Company should be, and the same were thereby repealed.

Under the powers contained in the said act of 1846, the Hull and Selby Railway Company by an indenture, dated in May 1862, demised their line and property to the North-Eastern Railway Company (which the York and North Midland Railway Company had become united), for the term of 999 years at an annual rent of 70,000l.; and under the same powers, by a deed of arrangement of the said date, it was covenanted that the said North-Eastern Railway Company should at any time during the subsistence of the said lease, be at liberty, on giving six months' notice as therein mentioned, to purchase the whole of the said Hull and Selby Railway works, property and effects. It appeared that the North-Eastern Railway Company had intimated an intention of exercising their right of purchase under this contract, but that they had as yet given no formal notice to that effect.

Mr. Greene and Mr. Smythe, for one of the executors, who supported the certificate, contended that, inasmuch as the Hull and Selby Railway Company had ceased to carry on business, having now in relation for 999 years, they were now in receipt, not of a share of the profits derived from working the land, but of an annual sum of 70,000l. paid as rent for the use of

their property, which could now no longer be considered as vested in their trading company, but as landlords of land let to another company. To such a state of circumstances the principle of the decisions in *Myers v. Perigal* (1) and *Edwards v. Hall* (2) did not apply: but the case was governed by—

Ware v. Cumberlege, 20. Beav. 603; s. c. 24 Law J. Rep. (n.s.) Chanc. 630.
Toplin v. Lomas, 16 Com. B. Rep. 159; s. c. 24 Law J. Rep. (n.s.) C.P. 144.
Watson v. Spratley, 10 Exch. Rep. 222; s. c. 24 Law J. Rep. (n.s.) Exch. 53.
Hayter v. Tucker, 4 Kay & J. 243.

Mr. Malins and Mr. Bury, for the charity trustees, submitted that the fact that the land held by one trading company was let out for the purposes of trade to another trading company, could make no difference in the quality of the shares in the letting company. The annual sum they received as lessors was still a profit derived from the use of the land for the purposes of trade and the case remained equally within the principle of the decisions in *Myers v. Perigal* and *Bacon, Mr. Curvey and Mr. G. Edwards* appeared for parties interested under the will.

Mr. Greene, in reply.

STUART, V.C. said, that it had now come settled law that shares in a trading company holding real estate for the purpose of carrying on its business, are an interest in land within the meaning of the Mortmain Act. That was the result of the decisions in *Myers v. Perigal* and *Edwards v. Hall*, which were considered binding upon this Court, whatever authority there might be in adopting the principle upon which they were founded then settled that shares in a trading company carrying on its own business

(1) 2 De Gex, M. & G. 599; n.s. Chanc. 481; overruling (n.s.) Chanc. 165; 16 Sim. 527.
 (2) 11 Hare, 1; s. c. 22 J. Chanc. 1078; on appeal, 6 D. 26 Law J. Rep. (n.s.) Chanc.

sonal estate, he could not see how the circumstance that the trading company, instead of carrying on the trade itself, had demised its trading property to another trading company, could make any difference. All the arguments in favour of the legatees were equally applicable, whether the profits derived by the company arose from the use by them of the land in carrying on their business, or from the lease of the land to another trading company. The Hull and Selby Company still remained the owners of the land for the purposes for which they had acquired it, viz. to make a profit from the use of it in trade, and to divide such profit amongst the shareholders. The land was still used for the purpose of trading, and the only return from it was in the shape of trading profits, out of which the rent was paid.

The certificate of the chief clerk must, therefore, be varied, and a declaration made that these shares were not an interest in land within the meaning of the Mortmain Act.

Mr. Malins, for the trustees of the charity, submitted, that the charity fund ought not to bear any of the costs of the suit, which was for the administration of the testator's estate, and the cost of it was a testamentary expence thrown expressly by the testator upon the fund called the "general fund" in his will. He cited *Wilson v. Heaton* (3).

Mr. Greene and *Mr. T. Smythe*, submitted that the costs of the suit ought to be apportioned between the funds called the "charity fund" and "general fund" in the testator's will—citing *Tempest v. Tempest* (4).

STUART, V.C. said, the charge by the testator of the funeral and testamentary expenses upon that portion of his estate called in his will the "general fund" was not sufficient to justify the Court in throwing the whole costs of a general administration suit upon that fund. The costs of the suit, therefore, would have to be paid out of the whole of the testator's estate.

(3) 11 Beav. 492.

(4) 7 De Gex, M. & G. 470; s.c. 26 Law J. Rep. (N.S.) Chanc. 501.

WOOD, V.C. }
Feb. 21 ; } WOOLDRIDGE v. WOOLDRIDGE.
July 1. }

Power of Appointment—Execution of Election — Feme Covert — Reversionary Interest in Personalty.

A testatrix having, under her marriage settlement, a power of appointment over a trust fund in favour of her children, by her will appointed the trust fund, and also bequeathed her residuary personal estate, upon trust, after the marriage of her daughter C, to assign and transfer the same equally between her two sons and C. ; and by a codicil, after reciting the marriage of C, she directed that the income of any sums, &c. to which C. might become entitled under her will should be enjoyed by her, for her separate use, during her life, and at her death the principal should become the property of her children :—Held, that C. was entitled to her share of the trust fund, for her separate use, during the life of her husband, with remainder to herself absolutely, and that no case of election arose; and a declaration having been made to this effect, the Court declined to alter it, on the ground that the absolute interest, being in remainder, was inalienable during coverture.

By the settlement made upon the marriage of James Wooldridge and Caroline Treweeke, and dated the 26th of June 1809, certain stock was vested in trustees, upon trust for the benefit of the husband and wife during their lives; and after the death of the survivor, upon trust for the children of the marriage, as the husband should appoint; and in default of such appointment, in trust for all and every the children of the marriage, at such time and times, and in such manner and proportions, &c. as the wife (Caroline) should by deed or will appoint or bequeath the same; and in default of appointment, upon trust for all and every the child or children of the marriage, to be divided equally between or amongst them, if more than one, share and share alike, and to his and their executors, administrators and assigns, the interests to become vested at twenty-one or marriage.

There were three children of the mar-

riage: the plaintiff, Samuel Otway Wooldridge, and the defendants, Caroline Biscoe and James Wooldridge, who was of unsound mind.

James Wooldridge, the husband, died on the 31st of August 1814, intestate, and without having exercised his power of appointment.

Caroline Wooldridge (his widow), by her will, dated the 16th of May 1825, in execution of the power of appointment reserved to her by the settlement, appointed the settled stock, and also bequeathed all other monies and real and personal estate which should belong to her at her death, upon trust, out of the annual proceeds, to pay her daughter Caroline such yearly sum as, with her other income, would make up 180*l.* per annum, to commence from the death of the testatrix; and as to the residue of the interest and annual proceeds, upon trust for the testatrix's two sons, in equal shares as tenants in common; and after the marriage of her daughter, then upon trust to assign and transfer all the trust premises unto and between her sons and daughters, in equal shares as tenants in common; the daughter's portion to be, at the discretion of the trustees, either paid to her husband, upon his making a competent settlement, or to be settled on her and her issue, in such manner as the trustees should think proper; the shares of the sons to be vested interests at twenty-one; the share of either dying before that time to go to the survivor. It was also provided, that if her son James Wooldridge should, through ill-health, be incapacitated from following any profession, the trustees were to pay him out of the trust-monies an annuity of 80*l.*, in lieu of his share of the principal of the trust-monies, which were in that case to be divided equally between Caroline and her other brother, S. O. Wooldridge.

By a codicil to her will, bearing date the 28th of August 1850, Mrs. Wooldridge, after reciting the marriage of her daughter, Mrs. Biscoe, directed that the income of any sums, &c. to which she might become entitled under the testatrix's will should be enjoyed by her, for her own sole use and benefit, during her life; and after her death the principal to become the

property of any child or children she might leave at her death, to be equally divided amongst them. With respect to her son S. O. Wooldridge, the testatrix directed the income of his proportion of the trust funds to be enjoyed by him during his life, and after his death the principal to be equally divided between any child or children he might have, lawfully begotten; in case of his dying without children and unmarried, the testatrix consented to the disposal of his share of the property to his sister, Mrs. Biscoe, or amongst her children.

The testatrix died on the 21st of January 1852.

The plaintiff, S. Otway Wooldridge, was a bachelor. James Wooldridge was incapacitated by ill-health from gaining his livelihood in any profession, and was a lunatic.

The questions proposed by this special case for the opinion of the Court were as to what interests in the trust funds the plaintiff and Mrs. Biscoe and her family were entitled to.

Mr. Sandys, Mr. Wickens, Mr. Law and Mr. Melville appeared for the several parties.—For Samuel Otway Wooldridge and Mrs. Biscoe, it was contended that each was entitled absolutely to one moiety of the settled funds, subject, as to each, to a moiety of the annuity of the 80*l.* created by the testatrix in favour of James. In the events which had happened there was an absolute appointment, not cut down by any of the directions in the will or codicil in favour of the testatrix's grandchildren, and no case of election arose. On behalf of James Wooldridge, it was contended that the interests of the plaintiff and Mrs. Biscoe were cut down by the codicil to life interests, so that the reversion remained unappointed; and that at any rate a case for election was raised.

The following cases were cited:—

- Carver v. Bowles*, 2 Russ. & M. 301;
s. c. 9 Law J. Rep. Chanc. 19.
Kampf v. Jones, 2 Keen, 756; s. c. 7
Law J. Rep. (n.s.) Chanc. 63.
Lassence v. Tierney, 1 Mac. & Gor.
551; s. c. 2 Hall & Tw. 115.

Blacket v. Lamb, 14 Beav. 482; s. c. 21 Law J. Rep. (N.S.) Chanc. 46.
Stephens v. Gadsden, 20 Beav. 463.
Whistler v. Webster, 2 Ves. jun. 367.
Harvey v. Stracey, 1 Drew. 73; s. c. 22 Law J. Rep. (N.S.) Chanc. 23.

WOOD, V.C.—With regard to the quantity of interest which the parties take, the case falls clearly within the authority of *Carver v. Bowles*. There is here, as there, first, a valid appointment, and then an invalid attempt to cut down the interests of the plaintiff and the defendant, Caroline Biscoe, to estates for life, with remainder to their children, the children not being objects of the power; and the consequence is, that the appointees take absolutely. Then, it was contended that a case of election was raised, and that no claim could be made under the residuary gift without giving full effect to the rest of the will. The same question also arose in *Carver v. Bowles*, and was decided by Sir John Leach, who held that, the testator having made an absolute appointment in the first instance, no case of election was raised; the meaning of which is, as I take it, that an absolute appointment having been made in favour of proper objects of the power, the Court treats any subsequent attempts to modify that appointment, in a way which the law will not allow, as if they had no existence for any purpose whatever. In conformity with this view, there will be a declaration that, according to the true construction of the will and codicil of Caroline Wooldridge, the plaintiff, S. O. Wooldridge, is entitled absolutely to one moiety of the funds comprised in the settlement of the 26th of June 1809, subject only to the charge of 80*l.* a year on the said settled funds and the other residuary estate of the testatrix, created by the will in favour of J. Wooldridge during his life, and a declaration that Caroline Biscoe is entitled absolutely to the other moiety of the said funds comprised in the settlement, subject only to the said charge of 80*l.* a year, but during the life of her husband, William Biscoe, for her separate use.

On a subsequent day,
Mr. Law moved, on behalf of Mrs. Biscoe, that so much of the decree, made

on the 21st of February, as declared that Mrs. Biscoe was, during the life of her husband, entitled for her separate use to one moiety of the funds comprised in the settlement, subject to the charge of 80*l.*, might be varied or amended; and that it might be declared that Mrs. Biscoe was entitled absolutely, for her separate use, to one moiety of the funds comprised in the settlement, subject only to the charge of 80*l.* a year; or that the defendant was entitled absolutely to one moiety of the funds comprised in the settlement, subject only to the charge of 80*l.* a year.

The object of this application was to obtain for Mrs. Biscoe a power of alienation; since, if she took, during her husband's life, an estate for her separate use, with remainder to herself absolutely, the latter would be a reversionary interest, which could not be disposed of during the coverture.

JULY 1.—WOOD, V.C.—This was a case in which a testatrix, having a power of appointment over a fund in favour of her children, made, by her will, an appointment of part of that fund in favour of a married woman, an object of the power, absolutely, and afterwards by codicil attempted to cut down this gift to an estate for life, to her separate use, with remainder over to her children, who were not objects of the power. I held that the gift of the life estate to her separate use would prevail, but that the gift over, being beyond the power, would not; and that Mrs. Biscoe, therefore, was absolutely entitled in remainder expectant on the determination of the coverture. What I am now asked to do is, to alter my declaration, because it has been held that a married woman cannot deal with an interest in remainder in personalty; but I cannot alter the words of the will in order to accommodate the views of the parties. The case is so clear that I do not think I ought to allow the costs of this application to come out of the estate.

Motion refused, with costs.

LORDS JUSTICES. }

Feb. 16, 17; }

March 1. }

LINDSAY v. GIBBS.

*Ship and Shipping — Freight — Wages
— Insurance — Charges on Freight — Part-
Owners — Notice.*

As between the owners of a vessel and the assignees of the freight, the wages of the captain and seamen and the expenses are proper deductions to be made from the gross freight.

Where part-owners of a vessel authorize co-owners to insure the whole vessel, and afterwards assign their interest in the freight, and the assignees do not give express notice of the assignment, the co-owners are entitled to insure the vessel and deduct the costs of insurance from the freight.

This was an appeal from a decision of the Master of the Rolls refusing to vary his chief clerk's certificate, and by arrangement (during the argument) the hearing was taken as a re-hearing of the decree made in the cause. The facts are few and are as follows:—

By a charter-party dated the 27th of April 1854, Mr. W. P. Hammond, the owner of a vessel called the *Genghis Khan*, chartered her to the defendants Messrs. Gibbs & Sons, for a voyage to Moreton Bay, Australia, and from thence to Peru, to load and bring to England a cargo of guano, at a certain rate of freight, and in the charter-party Mr. Hammond was described as being "the owner" of the vessel. In or previously to the month of November 1854, Mr. Hammond executed bills of sale of three-eighths of the ship to the defendant Mr. Briggs and three other defendants, and these transfers were registered in that month. Mr. Hammond also executed bills of sale of the remaining five-eighths of the ship to eleven of the other defendants, but these transfers were not registered until the month of January following. In the meanwhile the plaintiffs, Messrs. Lindsay & Co., who had made advances for Mr. Hammond, required security, and he offered them the freight which would become payable by Messrs. Gibbs & Sons under the charter-party of the *Genghis Khan*. The

plaintiffs accepted this security, and Mr. Hammond thereupon wrote and delivered to the defendants Messrs. Gibbs & Sons a letter as follows:—

"Dec. 29, 1854.

"Gentlemen, — We hereby assign to Messrs. W. S. Lindsay & Co. the freight which will become due from you to us on the delivery of the cargo shipped by your house abroad, in the ship *Genghis Khan*, in the month of November last, to the extent of 4,300*l.* sterling; and we therefore request you to hold this amount at their disposal, whose receipt for the same shall be binding on us.

"W. P. Hammond & Co."

On the same day the plaintiffs communicated this letter, and produced the original, to Messrs. Gibbs & Sons; but it did not appear that they made any search of the register, nor did it appear that they had any notice of the transfer of the three-eighths of the ship to the defendants Messrs. Briggs and others. But it was stated that Messrs. Briggs had no notice of the plaintiffs' claims until after the termination of the ship's homeward voyage. The cargo was delivered to Messrs. Gibbs & Sons, and a sum exceeding 8,000*l.* was, at the time of the filing of the bill, still due from them on the charter-party in respect of the freight, which Messrs. Gibbs & Sons declined to pay over, on the ground of the conflicting claims upon it, but they paid the freight into court. The plaintiffs claimed a lien on the freight for the amount due to them. At the hearing of the cause in July 1855 the Master of the Rolls decided that transfer of a share in a ship passed the corresponding share in the freight under an existing charter-party without the express assignment of the freight, and he referred several matters to chambers, directing "an account of all charges and expenses properly incurred by and on behalf of the said ship, and of her voyage in earning the freight under the said charter-party."

The chief clerk, in taking the accounts, allowed against the freight the premiums of insurance effected by Messrs. Thompson & Co., who, in the month of January 1855, had been appointed by the then owners of

the ship (Messrs. Briggs and others) to act as the ship's brokers; and neither the owners nor Messrs. Thompson had then received any notice of the charge of the plaintiffs upon the freight. Upon the arrival of the vessel in England, Messrs. Thompson & Co. also paid the wages due to the captain and the seamen, and this charge was also by the chief clerk allowed against the freight. Upon a motion by the plaintiffs to vary the chief clerk's certificate, upon the question whether the wages of the captain and crew, and the insurance upon the ship which had been effected by the other parties interested shortly after the assignment of the freight, were expenses which could properly be deducted from the earnings before the division of the nett freight, his Honour was of opinion that they were, and made an order confirming the chief clerk's allowance, from which decision the plaintiffs now appealed (1).

For the appellants, it was contended that

(1) The judgment of the Master of the Rolls, delivered on the 2nd of July 1858, was, in substance, as follows:—After some hesitation upon the question of insurance, I have come to the conclusion that the chief clerk's certificate is correct. The question of wages I disposed of yesterday. It appeared to me that the persons who were entitled to the freight had nothing to do with the insurance, but upon further considering the question, I am of opinion that the insurance of the ship must be treated as part of the expenses of the voyage itself, as much as the insurance upon the freight, and that the persons who are entitled to the profits of the voyage are only entitled to the profits after paying the insurance, as being part of the expenses. My attention was called to that class of cases in which it is laid down that one person cannot insure the share of another person; but I think it was established both upon the hearing and before the chief clerk, that the owners of the ship had authority to make the insurance which they thought proper and necessary, and that it is to be implied from the course of dealing between the parties; and, consequently, that if there had been an assignment of the freight, Mr. Hammond, the assignor himself, could not have resisted the payments for the insurance of the ship, or the insurance of the freight, and that it was not open to him afterwards to say that his partners and the co-owners of the ship had not any authority to insure the freight or to insure the ship. If that be so, I am of opinion that the assignee of the forty sixty-fourths of the freight must stand exactly in the same situation, unless he gives direct and personal notice to the co-owners that such an assignment has been made. The principle of implied or constructive notice does not apply. I am of opinion that all persons who claim under Mr. Hammond are bound by his acts, unless they gave distinct and specific notice to the

Mr. Hammond having transferred his interest in the freight, could create no valid charges on it; that the plaintiffs never having authorized an insurance, no such expenses as the chief clerk and the Master of the Rolls had allowed, ought to be deducted; that it was plain from the reported cases, that a part-owner of a ship could not recover against the other owners sums paid by him for insurance; that as the plaintiffs were alone made aware of the interest of Messrs. Gibbs & Sons, it was sufficient for them to do as they had done, namely, give notice to those gentlemen.

Reference was made, among other authorities, to

Abbott on Shipping (latest edition), p. 73, and the cases there collected.

Bell v. Humphries, 2 Stark. 345.

French v. Backhouse, 5 Burr. 2727.

For the defendants Briggs and others, owners of three-eighths of the vessel, it

co-proprietors of the ship that they had an interest distinct from Mr. Hammond, in which case it would probably have been necessary to have obtained their consent to any steps that were taken for the purpose of binding the parties. I find that this was the view which I took of the case at the hearing of the cause, although the point, I am bound to say, did not come before me in the same specific form in which it comes before me now. My decree was, that the freight was to be divided after deducting the expenses of the voyage; and if I am of opinion that the cost of insurance is properly one of the expenses of the voyage, then it necessarily follows from my decree that the nett freight must be divided after deducting the insurance, as one of the expenses of the voyage. Another question was raised upon the terms of the charter-party, upon a point which was not before me, as far as I can make out, at the hearing of the cause. I think nothing turns upon the construction of the charter-party. It is to be observed that it is a contract between the owners and the charterers of the vessel, and I think that the passage in the charter-party which was referred to really relates solely to the contract between the owners and the charterers, and was not intended to bind or to affect the rights of the co-owners between themselves. The passage in question specifies that the master shall be "supplied with a sum not exceeding 500*l.*, free of interest and commission, but the cost of insurance is to be borne by the owners, and the amount so to be advanced, and the cost of the insurance thereof, shall be in part payment of the freight at a certain exchange; and also that, if the charterers and their agents shall think fit to advance the master, beyond the sum of 500*l.*, any sum for repairs, stores or other disbursements whatsoever, such sum, with interest and insurance, shall be in payment of freight at the exchange aforesaid." In my opinion this

was argued that the registered owner of a ship was to be treated as the owner of it, and that, upon principle, there was no distinction between the freight and the ship; that the assignment, therefore, of a part of the ship was in itself an assignment of so much of the freight. On their behalf the following cases were cited:—

Green v. Briggs, 6 Hare, 395; s. c. 17

Law J. Rep. (N.S.) Chanc. 323.

Cato v. Irving, 5 De Gex & Sm. 210; s. c. 21 Law J. Rep. (N.S.) Chanc. 675.

Alexander v. Simms, 18 Beav. 80: s. c. on appeal, 5 De Gex, M. & G. 57; 23 Law J. Rep. (N.S.) Chanc. 721.

Robinson v. Gleadow, 2 Bing. N.C. 156; s. c. 2 Sc. 250.

Holderness v. Shackels, 8 B. & C. 612; s. c. 7 Law J. Rep. K.B. 80; 3 M. & R. 25.

Mr. Selwyn and Mr. Hetherington, for the appellants.

Mr. Roundell Palmer and Mr. Cole, for Briggs and others.

Mr. Druce, for the owners of five-eighths of the vessel.

Mr. Selwyn, in reply.

March 1. — LORD JUSTICE KNIGHT BRUCE.—This case is reported, as to the original hearing when the decree was made, in the 22nd volume of *Mr. Beavan's Reports*; and as to the motion for varying the certificate, with the hearing on further considerations, in the *Jurist* of the 28th of August 1858. The order made upon that motion and the hearing on further consideration is the subject of the present appeal. It was originally the only subject of appeal; but while the matter was in argument before us, the counsel on each

merely means that, when the charterers pay the freight to the co-owners, they are to be at liberty, instead of paying the gross freight, to deduct from the amount whatever they may have paid in respect of the articles specified in the charter-party; but, as soon as the freight is paid to the co-owners and proprietors, then it becomes subject to all those charges with which the co-owners have to do, and in which they are concerned; and I am of opinion that, as between the co-owners, those are properly to be allowed, and bind all persons who claim under any one of the co-partners. The chief clerk's certificate will be confirmed.

side agreed that, in addition, the original decree, so far as the terms in which it describes the accounts directed by it, and the declaration or direction contained in it concerning the application of a clear balance of both those accounts, are concerned, should also be considered as under rehearing, and we so dealt with the matter. The only dispute remaining in the cause besides the question of costs is, whether the wages of the captain and crew of the vessel for the voyage under discussion—their wages, I mean, in respect of that voyage out and home—and the payment made for insuring the ship and freight in respect of the same voyage ought to be allowed as charges upon the freight, and so be payable out of it, and, therefore, accordingly the plaintiffs' proportion out of their share of it.

The plaintiffs assert the negative of this proposition; but I think that they are not well grounded in this assertion, and that they fail upon it. That they are wrong as to the wages I take to be very clear, and, indeed, beyond rational controversy. This point was, in truth, all but conceded; and with regard to the charges for insurance, it is established by the evidence that if the plaintiffs had been out of the case and the other parties interested in the circumstances in contention had been the only persons so interested, those charges must have been allowed against the freight and paid out of it. But the plaintiffs' title was originally, and has remained, equitable merely; and it does not appear that previously to the determination of the homeward voyage any one of the owners of the vessel—I exclude, of course, both Mr. Hammond and the assignees under his bankruptcy—had any notice of the assignment under which the plaintiffs claim—had any notice of their title—had any notice that any person besides Mr. Hammond and the defendants were interested in the freight. The counsel in the cause having come to the agreement that I have stated, I am of opinion that substantially the controversy must remain settled as it was at the Rolls by the order made there (the only original subject of the appeal), and that the decision then made must in effect stand. It may be as well to add distinctly, that reasons sufficient for a con-

clusion against the plaintiffs, as to the payment for insurance, are, in my judgment, to be found in this: that the insurances in question, both upon the ship and on the freight, were effected not only without notice of the plaintiffs' title, but were also effected, *bonâ fide*, under the authority of the owner with reference to the voyage which we are now considering and in connexion with it, and were, consistently with what is an ordinary course of business, and from the beginning, intended to fall in point of expense upon the freight. So, at least, I view the facts, Mr. Anderson's evidence appearing to me decisive.

The notices served by the plaintiffs on Messrs. Gibbs & Co., the freighters, seem to me not for any present purpose material. My opinion is also against disturbing what has been done by the Master of the Rolls as to the costs, except that of the motion before his Honour to vary the certificate, there should, I think, be no costs on either side—an alteration which is, in my judgment, not to affect the costs of the appeal. I conceive that the whole costs of the appeal should be paid by the plaintiffs.

LORD JUSTICE TURNER. — This is an appeal from an order of the Master of the Rolls, made upon the hearing of the cause on further consideration, and upon motion to vary the chief clerk's certificate, who in taking the accounts directed by the decree, allowed against the freight the premiums of insurance effected by Messrs. Thompson & Co., and the wages paid by them. The plaintiffs sought by their motion to vary the certificate by disallowing these payments; but the Master of the Rolls, by the order under appeal, refused the motion with costs, and ordered an apportionment between the parties, in the proportion of twenty-four sixty-fourths, or three-eighths, to Briggs and others, and the remainder to the plaintiffs. Upon the hearing of the appeal, some doubts were suggested, whether the terms in which the account was directed by the original decree might not, as to some of the items, preclude us from deciding the question in dispute according to the real merits of the case; but in order to save the necessity of a petition to rehear the original decree, it was very properly agreed that that decree

should in this respect be considered open. I am of opinion that the order of the Master of the Rolls in this case is, in substance, right. Mr. W. P. Hammond, before he assigned the freight to the plaintiffs, had transferred twenty-four sixty-fourths of the ship to the defendants Briggs and others; and, of course, twenty-four sixty-fourths of the freight had passed with these transfers. An interest in the nature of a partnership was thus created between W. P. Hammond and the defendants Briggs and others; and when the plaintiffs became the assignees of the freight, they became in truth the assignees only of W. P. Hammond's share in this partnership interest—namely, the five-eighths which had not been transferred by him. Taking thus the partnership interest, the plaintiffs must, of course, take it subject to the burdens of the partnership; and the first of those burdens is the payment of the expenses which produce the income of the partnership—the wages of the captain and seamen. I feel no doubt, therefore, that the plaintiffs are bound to pay their proportion of the wages. Then, as to the insurances. The plaintiffs gave no notice to the defendants Briggs and others of the interest which they had acquired in the freight. They allowed Mr. W. P. Hammond to deal with those defendants as if he had continued to be the sole owner, not only of his shares in the ship, but of his shares in the freight; and these insurances were effected upon his authority concurrently with the authority of those defendants. Are they then entitled to throw upon those defendants the whole burden of the insurances? I think that they are not, and that upon every principle of equity they must bear their proportions of these payments also. There being a partnership interest, the case is no more than this: a partner assigns his interest in the partnership, gives no notice of the assignment of his interest to the copartners, but permits the partnership to go on as if no such assignment had been made; and then claims the share of the partnership profits discharged of the liabilities which have been incurred. I think that he cannot be so entitled. Parties who stand by without asserting their rights, and allow others to incur liabilities which they might not have

incurred if those rights had been asserted, cannot, I apprehend, afterwards set up those rights in this court to the prejudice of those by whom such liabilities have been incurred. It was argued for the plaintiffs that W. P. Hammond, having assigned to them his interest in the freight, could not, as against them, afterwards create any charges upon it. But this argument is beside the point; it deals with the case with reference merely to the rights of W. P. Hammond, without regard to the rights of the other parties with whom the question really arises. The plaintiffs, it was said, did not know of the interests of those other parties; they had no knowledge of the transfer of three-eighths of the ship; but their ignorance in this respect arose solely from their own negligence in not having searched the register, and they can be in no better position than they would have been in if they had made the search. The plaintiffs also relied upon the cases at law, that a managing owner cannot recover for insurance against part-owners who have not authorized the insurance; but the present case does not in any way involve that point; it depends upon wholly different considerations. It was further argued for the plaintiffs that they had given notice to Messrs. Gibbs & Sons, from whom the freight was coming due; but the interest of the defendants Briggs and others had been created before that notice was given, and the plaintiffs had the means of knowing, and ought to have known it; and it does not seem to me that the notice can do away with the effect of the parties having by the negligence of the plaintiffs been allowed to go on as if no assignment of the freight had been made. I agree, therefore, in substance with the opinion of his Honour; but looking to the terms of the decree, I think that there was ground for the motion to vary the certificate, and that that motion ought not to have been refused with costs. There should, as I think, have been no costs of the motion, and in this respect I think that the order should be altered; but this does not affect the substance of the appeal, and the costs of it must, as I conceive, be paid by the plaintiffs, notwithstanding this variation in the order.

WOOD, V.C. }
May 28, 30; } *In re CLULOW'S TRUSTS.*
June 15. }

. *Thellusson Act*, 39 & 40 Geo. 3. c. 98.—
"Portion."

A testator devised real estates in trust for his son G. during the joint lives of himself and T, and after the decease of either of them upon trust to invest and accumulate the rents, &c., until 3,000l. sterling should have been invested, and subject thereto upon trust for G. for life, with remainder to his first and other sons in tail, with successive remainders over; and he directed that the stock to be purchased and the accumulations thereof should be in trust for the children of G, and for default of such issue upon such trusts as G. should by will appoint, and in default of appointment, for his next-of-kin. G. and T. survived the testator seventeen years, when G. died without issue, having by will appointed the 3,000l. to F. D, a stranger, and the trustees invested and accumulated the rents for a period of ten years from that time, when 3,000l. had been invested:—Held, first, that the direction to accumulate was void, except for the period of twenty-one years from the death of the testator, the 3,000l. not being in the event which happened, viz., the death of G. without issue, a portion for his children, nor under the power of appointment a portion for G. himself; secondly, that F. D. was entitled to so much of the stock as was purchased with the accumulations that took place within the twenty-one years from the death of the testator, and to the interest thereon; and, thirdly, that, subject thereto, the income directed to be accumulated, with the accumulations thereon, belonged to the persons from time to time entitled to the rents and profits under the limitations in the testator's will.

William Clulow, by his will, dated the 25th of May 1821, devised real estate to trustees in fee, upon trust for his son George Clulow during the joint lives of himself and Hugh Totty, and from and after the decease of either of them, his said son George Clulow and the said Hugh Totty, which should first happen to die, then upon trust from time to time to receive and take the yearly rents and profits,

and to lay out and invest the whole of the said rents and profits, when received, in the purchase of stock, transferable at the Bank of England, not being annuities for lives or years, in the names of the trustees, and from time to time to receive the dividends, &c., and to lay out and invest the same in the purchase of other like stock, in manner aforesaid, to be added to the stock first purchased and be held therewith, and so to accumulate by way of compound interest until, by means of such investments of rents and dividends, the said trustees should have laid out and invested in the purchase of stock 3,000*l.* sterling money, of which stock so to be purchased his trustees should stand possessed upon the trusts thereafter declared concerning the same; and, subject to such trust for investment as last aforesaid, upon trust for his son George for his life, with remainder to his first and other sons successively in tail, with successive remainders to the testator's sons Joseph, Aaron and William Whitaker Clulow and their first and other sons in tail, with remainder to the testator's right heirs for ever. And the testator directed, concerning the stock so to be purchased and the accumulations thereof, that the trustees should stand possessed thereof upon certain trusts for the benefit of the child or children of his said son George, and in default of such issue upon such trusts, &c. as his said son George by will should appoint, and in default of appointment, upon trust for the next-of-kin of his said son George, according to the Statute of Distributions; and the will contained a proviso, that the trust for investing in stock 3,000*l.* sterling should, if not previously determined or satisfied by such investments, cease and determine at the end of twenty-one years from the death of the survivor of himself and his children, and the stock which should at that period have been purchased under such trust, though 3,000*l.* sterling should not have been laid out for purchasing the same, should be held upon the same trusts as if 3,000*l.* had been laid out in the purchase thereof.

The testator died on the 8th of August 1822.

Aaron Clulow died, without issue, in 1826.

George Clulow died, unmarried, on the 17th of July 1839, having by his will, dated the 8rd of May 1839, given the 3,000*l.* to Fanny Dodd absolutely, for her separate use, and having bequeathed his residuary personal estate to his sister-in-law, Eliza, the widow of Aaron.

Joseph Clulow died on the 25th of January 1848, without issue, having by his will appointed his widow, Emily Clulow, his executrix.

William Whitaker Clulow died on the 1st of September 1855, unmarried, and intestate as to real estate, but having appointed executors.

Upon the death of George Clulow, in the lifetime of Hugh Totty, the trusts for accumulation arose, and the trustees of W. Clulow's will invested the rents and accumulated the dividends until 3,000*l.* had been invested.

On the 8th of August 1843, being the expiration of twenty-one years from the death of the testator, W. Clulow, there was standing in the names of the trustees 450*l.* consols, purchased with 411*l.* 6*s.* 6*d.* sterling, partly from rents and partly from dividends, and, on the 25th of March 1859, the further sum of 2,757*l.* 14*s.* 7*d.* consols was purchased, with 2,588*l.* 13*s.* 6*d.* sterling, partly from rents and partly from dividends, making in the whole the sum of 3,000*l.* sterling invested.

Doubts having arisen as to the respective rights of the persons interested in the accumulated fund, the trustees transferred it into court, under the Trustees' Relief Act, and the present petition was presented by the surviving executor of W. Whitaker Clulow, the heir-at-law of the testator, who claimed to be entitled to the 2,757*l.* 14*s.* 7*d.*, being the result of the investments made since the expiration of twenty-one years from the death of W. Clulow, the testator, and the questions which arose were, first, whether the direction to accumulate was void, and, secondly, if so, who was entitled to the accumulations that had accrued since the 8th of August 1843?

Mr. W. M. James and *Mr. Lewin*, for the petitioner.—The direction to accumulate is clearly within the 1st section of the Thellusson Act (39 & 40 Geo. 3. c. 98), and must cease at the expiration of twenty-one

years from the testator's death, notwithstanding that it did not commence for many years after his death—*Nettleton v. Stephenson* (1)—unless it can be brought within the proviso in the 2nd section "that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settlor or deviser, or any child or children of any person taking any interest under any such conveyance, settlement or devise," &c.; and, in the event which has happened, viz., the death of George without children, the direction does not come within that provision. The consequence is, that the personal representative of the heir-at-law of the original testator is entitled. They cited also—

Sidney v. Shelley, 19 Ves. 352.

Griffiths v. Vere, 9 Ibid. 127; s. c. Tudor's Lea. Cas. 386.

Edwards v. Tuck, 3 De Gex, M. & G. 40; s. c. 23 Law J. Rep. (n.s.) Chanc. 204: affirming 22 Law J. Rep. (n.s.) Chanc. 523.

Trickey v. Trickey, 3 Myl. & K. 560.

Arnold v. Chapman, 1 Ves. 108.

Mr. Daniel and *Mr. G. L. Russell* appeared for the heir-at-law of W. W. Clulow and of the original testator.

Mr. Willcock, *Mr. F. O. Haynes*, *Mr. Martineau* and *Mr. Hansler*, for other parties.

Mr. Rolt and *Mr. C. Hall*, for Fanny Dodd.—The case is within the provision in the 2nd section of the act. Independently of the original destination of the fund being for the children of George, the power of appointment gives George himself a portion.—

Beech v. Earl St. Vincent, 3 De Gex & Sm. 678; s. c. 19 Law J. Rep. (n.s.) Chanc. 130.

Holmes v. Coghill, 7 Ves. 499.

Middleton v. Losh, 1 Sm. & Gif. 61; s. c. 22 Law J. Rep. (n.s.) Chanc. 422.

Lord Barrington v. Liddell, 2 De Gex, M. & G. 480; s. c. 22 Law J. Rep. (n.s.) Chanc. 1: overruling 10 Hare, 439.

Mr. James replied.

June 15.—WOOD, V.C.—Three questions were raised in this case:—first, whether the accumulations directed by the will of the testator, William Clulow, were within the protection afforded by the 2nd section of the Thellusson Act; secondly, if they were not within that protection, who were the parties entitled to the income which was accumulated during such time as was in excess of the period allowed by the act? and, thirdly, what was to be done with that portion of the fund which had been accumulated within the period of twenty-one years from the testator's death?—[His Honour then read the will.]—Now, the events that have happened were these. The testator died in 1822, and George died, without issue, in 1839, having made a will, by which he appointed the 3,000*l.* to Fanny Dodd. The period of accumulation commenced on the death of George, and 450*l.* was accumulated between that event and the expiration of twenty-one years from the testator's death, and the rest of the 3,000*l.* is the result of subsequent accumulations; and the first question was, whether these accumulations were protected by the 2nd section of the act. The protection itself is in these words.—[His Honour read the 2nd section of the act.]—It was first argued, on behalf of Miss Dodd, that, inasmuch as the primary trust was for the benefit of the children of George, who took an interest himself under the will, the case clearly came within the protection. It appears to me, however, that you must take the actual events that occur, where the will provides for alternative events, and the validity or invalidity of the directions must depend upon the actual state of facts. In this respect it is exactly analogous to the case of *Mony-penny v. Dering* (2), where it was held, that if a testator gives over his property

(1) 3 De Gex & Sm. 366; s. c. 18 Law J. Rep. (n.s.) Chanc. 191.

(2) 7 Hare, 568; s. c. 20 Law J. Rep. (n.s.) Chanc. 153; 2 De Gex, M. & G. 146; 22 Law J. Rep. (n.s.) Chanc. 313.

upon either of two distinct events, one of which is, and the other is not, too remote, the gift over will take effect if that event should happen which is not too remote. This is the converse of that case. If there were children of George, the accumulation was for one purpose, and if there were no children the accumulation was for another, the direction being valid in one event and invalid in the other, and that event has occurred in which the direction is invalid. It was then argued that the power of appointment given to George was a portion for him, and a great deal of argument was raised upon the meaning of the word "portion." No doubt an arguable case might arise as to a power of appointment by will being a portion; if, for instance, it were limited to a daughter on her marriage, it might be treated as a portion; but here the plain object of the will is not to give any benefit at all to George. It seems to me that this is the very case which was struck at by the legislature in passing the act. That cannot be called a portion for a child which is abstracted from that child's property in order to accumulate a fund at the time of his death. If it were so, and such a provision could be held to be a portion, there might be a series of limitations locking up the whole property during the lives of all the children and giving a power of disposition by will to the last surviving child. All possibility of enjoyment by George himself is shut out, though he might avail himself of the fund for payment of his debts after his death. The next point was, as to the income which was accumulated during this period, whether it was undisposed of and therefore belonged to the heir, or whether it should go to the persons who would have been entitled to the rents and profits if no accumulation had been directed. Clearly, this is a charge and not an exception. A sum of money is to be raised in a particular manner, and subject to that the estate is devised in strict settlement; the charge failing, the persons taking subject to the charge are entitled. I have a clear authority for that position in the case of *Shaw v. Rhodes* (3). There the testator, after directing two periods of accumulation for the benefit of his grandchildren, directed

that from and after the decease of his last surviving son or daughter the estates should stand and be charged for twenty years with the payment of two third parts of the clear produce thereof in equal shares and proportions of so much money as would in fifteen years make in the whole 30,000*l.*, which he directed to be divided amongst all his grandchildren who should attain twenty-one; and charged and chargeable as aforesaid, he devised all his freehold and copyhold estates to the eldest son of his son James in tail, with remainders over. Lord Cottenham, referring to this, says, "Nineteen years were exhausted during the first two accumulations. Then follows the provision which has been termed the third accumulation, by which, being minded to raise the sum of 30,000*l.*, but not to raise it in the ordinary way, by sale or mortgage, the testator directs that two-thirds of the income of the estates shall be accumulated; that out of two-thirds of the rents and profits so much shall be annually laid up as will produce 30,000*l.* in fifteen years; and, as he foresaw a possibility that the portion of the rents thus appropriated might not be adequate to realize the specified sum so soon, he extends the period to twenty years. The money was to be realized by means of that appropriation, and the parties interested have a right to insist that the amount shall not be raised in any but the mode and form prescribed by the testator, that is to say, by an accumulation determinable only at the end of a period of fifteen or twenty years." He then goes on to hold, that this is a trust for accumulation within the terms of the act, and therefore void. And Mr. Justice Bosanquet, in the same case, deals with the rights of the tenant in tail in remainder. He says, "Suppose all the testator's children, and all the grandchildren but two, namely, Thomas, the tenant in tail, and the eldest granddaughter, Elizabeth, to have died, and the two surviving grandchildren to have attained twenty-one in the year 1813, one year after the testator's death, the rents and profits for one year having been divided under the first two clauses, the third clause would come into operation, and might, without being affected by the statute, be acted upon for twenty years, that is, till the 10th of July 1833. Could it, in such a case, have been con-

(3) 1 Myl. & Cr. 135.

tended that Elizabeth was entitled to insist either that her share of the 30,000*l.* should be raised immediately, or that one-third, or any other portion of the rents and profits should be paid to her annually till she should have received 15,000*l.*? I think not; for Thomas, the tenant in tail, would have had a right to say, first, that fifteen years were allowed to make up the money; and, secondly, that, provided so much of two-thirds of the rents and profits were annually set apart as would, at the end of fifteen years, amount in the whole to the sum given, he would be entitled to the interest of the fund in the mean time, the estate being only chargeable with the interest and produce upon the sum given from the expiration of fifteen years." All that applies very strongly here, because we are now approaching the third question, which is, who is entitled to the income of the 450*l.* which was accumulated within the period allowed by the act. It is not like the case of *Eyre v. Marsden* (4), where the interests were subject to be divested up to the end of the period fixed for accumulation, because there is a complete trust for the appointee of George Clulow, and after George Clulow had exercised his power of appointment the appointee was entitled absolutely, and her interest was not subject to be divested by any contingency, as in *Saunders v. Vautier* (5). I think, therefore, that Fanny Dodd was immediately entitled to the 450*l.* stock, and the dividends which have accrued upon it belong to her.

Declare that the accumulation of the rents and profits directed to take place after the death of either Hugh Totty or the testator's son George Clulow, whichever might first happen, is void, except for the period of twenty-one years from the death of the testator, which period expired on the 8th of August 1843. Declare that Fanny Dodd, the appointee under the will of George Clulow, is entitled, as such appointee, to the 450*l.* consols purchased with the accumulations which took place prior to the 8th of August 1843, and to the dividends on such Bank

annuities from that time. Declare that, subject to such right of the said Fanny Dodd, the income directed to be accumulated by the will of the said testator, with the accumulations thereon, belonged to the persons from time to time entitled to the rents and profits under the limitations contained in the testator's will. Costs of all parties (except the residuary legatee of George Clulow) to be paid rateably out of the fund.

LORDS JUSTICES. }
 July 21. } THOMPSON v. WEBSTER.

Voluntary Settlement—Intention—Creditors—Statute 13 Eliz. c. 5.

C, being in embarrassed circumstances and indebted to H, applied to his mother for a loan of 190*l.*, which she consented to advance, on condition that he would settle real estate, of which he was seised, in trust for himself for life, with remainder to his children. To this he, with great hesitation, consented, and the same was so settled, the mode of doing so being by two deeds: one mortgage for 400*l.* to his mother, and the other a conveyance of the real estate upon the trusts. No reference was made in either deed to the other. C. subsequently became insolvent, and his assignee filed a bill to set aside the settlement; and one of the Vice Chancellors held, that the same was not void under the statute 13 Eliz. c. 5. (against fraudulent deeds), it being executed of full value, and no proof being given that it was executed to delay, hinder or defraud creditors, which decision was affirmed by the Lords Justices on appeal.

To render a deed void as against creditors, it is not sufficient that it is merely voluntary, but it must be proved that the party making it intended to delay, hinder or defraud his creditors.

On the question of a voluntary deed being void under the Statute of Elizabeth, all the surrounding circumstances must be looked at, and each particular case must depend upon those circumstances.

(4) 4 Myl. & Cr. 231: reversing 7 Law J. Rep. (N.S.) Chanc. 220; s. c. 2 Keen, 564.

(5) Cr. & P. 240; s. c. 10 Law J. Rep. (N.S.) Chanc. 354.

This was an appeal from a decision of Vice Chancellor Kindersley, dismissing the plaintiff's bill. The circumstances of the case are comprised in the following nar-

native:—In the year 1854 John Hewettson, a neighbour and friend of Joshua Coupe, applied to the plaintiff to sell goods to him in the way of his business, which the plaintiff consented to do on Hewettson's obtaining some person to join with him as surety for the price of the goods; and upon this J. Coupe agreed to become such surety, and gave, in the first instance, a written guarantie for 300*l.*, which was afterwards followed by a promissory note for the same amount. In the month of April 1857, the amount being still due to the plaintiff, he, being unable to obtain payment, commenced an action against J. Coupe upon his promissory note, and proceeded to judgment and execution, and finally arrested Coupe, upon which the latter took the benefit of the Insolvent Debtors Act; and the plaintiff was appointed assignee under his insolvency. Coupe was also indebted to several other persons, though not to large amounts, and he also owed to George Horsley a sum of 90*l.*, for which Horsley brought an action, in December 1855, and recovered judgment. Under the will of his father J. Coupe was entitled to a moiety of the residue of his estate; and by the death of his brother, Joshua Coupe, under a devise contained in the same will, became entitled to certain real estates at Droylsden, in the county of Lancaster, worth about 45*l.* per annum. In January 1856 J. Coupe, being embarrassed by the recent judgment obtained by Horsley, applied to his mother, a lady far advanced in years, to lend him 190*l.*, which she agreed to do, but only upon the express condition that he would execute a settlement of the property to which he had become entitled under his father's will, upon himself for life, with remainder to his children. After some hesitation and discussion as to the terms, it was finally arranged that his mother should advance to him 400*l.*; and in the month of January 1856 two deeds were prepared by Mr. Welch, who acted as solicitor for all the parties, and were executed. The one was a mortgage of J. Coupe's interest under his father's will, and of his property at Droylsden to his mother, to secure to her the repayment of 400*l.* and interest; the other was the settlement, and by it J. Coupe conveyed (subject to a mortgage) all the property at

Droylsden, devised by his father's will, to Henry Antrobus and Thomas Webster, upon trust to sell, with his consent during his life, and after his death at their discretion, and pay the dividends and interest of the proceeds of sale to him the said J. Coupe for his life, with remainder to his children, born or to be born, at twenty-one, or to the issue of such as should die under that age, in equal shares; and if there should be but one child, then the whole to that one.

J. Coupe died, leaving his mother surviving; and on her death this suit was instituted by the assignee, who, by his bill, charged that at the time of the execution of the settlement, J. Coupe was in embarrassed circumstances, and that that fact was known to or suspected by his mother and the trustees appointed, and that the settlement was made with intent to delay, hinder and defraud, and that it did, in fact, delay, hinder and defraud the plaintiff and the other creditors, and that it was fraudulent and void under the statute 13 Eliz. c. 5. The bill also charged that the settlement was not made on such a stipulation as the defendants alleged, and that there was no necessity for making it, as Mr. Coupe's children were otherwise fully provided for. It alleged that the whole sum of 400*l.*, for which the mortgage was given, had not been actually advanced, and that the amount did not exceed 150*l.*; and it charged that the mortgage should be declared to stand only for the amount really lent, the insolvent not being personally liable to pay any sums previously advanced, and further, that nothing whatever had been realized out of the insolvency. The bill prayed that the settlement might be declared fraudulent and void, and be delivered up to be cancelled; that an inquiry might be directed as to the amount really lent upon the mortgage security, and that the same might be declared to stand only for the amount actually due.

The defendants, by their answers, denied all knowledge of the plaintiff's demand at the date of the settlement, which was made at the express instance of Mrs. Coupe, the mother, against the wish of the insolvent, and was the condition upon which she advanced him the money; that the insolvent was at that time entitled to property

more than sufficient to satisfy all just demands upon him, and that the case was therefore not within the statute.

The principal parts of the evidence are alluded to in the judgment.

By the 6th section of the statute 13 Eliz. c. 5. (against fraudulent deeds) it is enacted as follows:—"This act or anything therein contained shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration, and *bond fide* lawfully conveyed or assured to any person or persons or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid, anything before mentioned to the contrary hereof notwithstanding."

At the hearing Vice Chancellor Kindersley dismissed the bill (1), and hence this appeal by the plaintiff.

(1) The substance of the Vice Chancellor's judgment was as follows:—The principle applicable to these cases was now well settled, although in former times there was a difference and fluctuation of opinion. Some of the Judges had held, that to bring the case within the statute it was sufficient that the deed was made without adequate consideration, others that the party making it must be indebted to the extent of insolvency; but it was clear that the mere fact of a settlement being voluntary, or without valuable consideration, was not sufficient ground *per se*. If two men, one worth 500*l.* and the other worth 100,000*l.*, each made a voluntary settlement, a different rule would be applicable in the two cases. On the other hand, it could not be necessary, for the purpose of bringing the case within the act, that the settlor should be insolvent, for he might hinder or delay his creditors although there was just enough to pay his debts. The language of the act being, that any instrument should be void as against creditors, if made with intent to defraud, hinder or delay them, the Court, or the jury, had to decide in each particular case, on all the circumstances, taken together, whether the conclusion could be reasonably come to that there was such intent; if there was, the case came within the statute—if there was not, it did not. No doubt it was inconvenient to be obliged to judge of each particular case by its circumstances, but, not being able to fathom a party's mind, you must judge of his mind by his acts, connected with the surrounding circumstances. In this case there were circumstances which, *per se*, led to a strong suspicion, even perhaps a conviction or conclusion, that the intent was fraudulent, but the circumstances

Mr. Anderson and *Mr. G. W. Collins* were for the appellant, and during an elaborate argument cited the following cases:—

Mathews v. Feaver, 1 Cox, 278.

Russell v. Hammond, 1 Atk. 13.

In re Magawley's Trusts, 5 De Gex & Sm. 1.

Penhall v. Elwin, 1 Sm. & G. 258.

French v. French, 6 De Gex, M. & G. 95; s. c. 25 Law J. Rep. (N.S.) Chanc. 612.

Clements v. Eccles, 11 Irish Eq. Rep. 229.

Mr. Bazalgette, *Sir Hugh Cairns* and *Mr. Charles Hall*, for the defendants, re-

must be balanced, and during the argument His Honour had found so much difficulty in applying the principle, that he considered this one of the most doubtful cases that had ever arisen. The effect of the settlement was to draw from the reach of the creditors the only property to which Coupe was absolutely entitled, and to convert it into a life interest; that would, *primâ facie*, lead to the strong impression that the intention was to hinder, delay or defraud the creditors, and such would be the conclusion if there was nothing more in the case, the settlement being the spontaneous act of Coupe; but the evidence conclusively shewed that he never thought of making such a settlement, but that his mother made it a condition of advancing the money which he required of her that he should settle his property upon his children, the debt to Horsley and not the plaintiff's being referred to. It appeared by the evidence that Mrs. Coupe was ignorant that Coupe was seised in fee of Droylsden, and that neither she, nor Mr. Welch, nor Mr. Webster, knew of the plaintiff's claim at that time. Mrs. Coupe was unfortunately dead, but her sister swore that she (Mrs. Antrobus) was ignorant of it, and believed her sister was. Mrs. Coupe was surprised and dissatisfied when she discovered that her son had an absolute interest in Droylsden, and was desirous of benefiting her grandchildren. Coupe at first rejected the idea, but eventually consented to the arrangement. It was true that there was no valuable money consideration, but, upon the construction of the act, the intent of the settlor was the question, and the onus lay on the party alleging the intent to prove it. The plaintiff certainly shewed a *primâ facie* case of suspicion, which would have been sufficient in the absence of evidence; but although Coupe, of course, knew of the plaintiff's debt, the sum advanced satisfied all other claims upon him; and applying the principle laid down by the authorities, it was impossible in this case to come to the conclusion that there was an intent to delay, hinder or defraud creditors. The other point, with respect to the mortgage, depending upon the plaintiff's success on the first, it was unnecessary to decide, but if it were, His Honour would hold that the whole money was advanced, the question being put

lied upon the case of *Holmes v. Penney* (2) and the cases there cited, and gave an undertaking to redeem the mortgage.

Mr. Anderson was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—Subject to the question as to the amount due upon the mortgage, I should have thought the present a plain case for supporting the transaction. It is impossible upon the evidence not to see that the mother was anxious to retain in her family a small landed estate, which she erroneously believed had been settled previously. Her son was a person of imprudent conduct, rather addicted to intemperance, given to debt and prone to suretyship, as was apparent—this latter a rather dangerous propensity, as everybody knows. He appeared to have obtained money, as sons very frequently do, whenever he wished it, from his mother; but at last she made a final stand. "I will advance the money," she said, "but the farm must be settled." This was communicated to the son, who appeared not to have been present at the time, the lady being bed-ridden; and the son's answer was, that if a certain additional sum were advanced, and a life estate secured to him in the property, he would consent to the settlement. On that footing the transaction was completed, although the mother was anxious for obvious reasons to deprive him of the estate if she could do so. Two contemporaneous instruments were accordingly executed—the one a mortgage and the other a settlement, neither referring to the other, so that it is necessary to resort to extraneous evidence to shew their connexion, though it would have been better if that connexion had been shewn upon one of them at least. Subject, therefore, to the question of amount due, I should have said that the

transaction was very plain; I should clearly say that it was for value. Looking then at the state of the settlor's debts at the time, the transaction was clear under the statute, and clear at the common law. But the validity of the debt of 400*l.* has been plausibly attacked, and not unfairly as it seems; although, according to my judgment, the just inference that a jury would draw from the circumstances would be, that the whole of the money was paid, including the costs of the mortgage. But the mortgage was in the whole, or in part, in respect of a former purchase-money, a charge payable out of the land, and some documents which have been produced tend to throw some doubt on the whole transaction. Still, in my opinion, there is no real fraud, and I doubt whether there is substantially a mistake; and, in addition, it would not, as I think, be a legitimate inference from the evidence to suppose that the son did not know what amount was due, the way in which part had been paid, and what was still due to the former proprietor. The family was not in affluent circumstances, and had not numerous transactions; and speaking in my character as a Judge of fact, my impression is, that it is proved that the son and every one else were aware of what was done. But whatever may be really due upon the mortgage, it could form no ground for impeaching the settlement. With regard to the contingent interests of the son, it may be proper to have some provision, as the children may die without issue. The undertaking that the trustees have given to redeem the mortgage ought to be embodied in our order, and I shall have no objection to insert a clause that this is without prejudice to any question as to what is really due. The circumstances, however, are, in some respects, so singular, the settlement and the mortgages are so near the date of the promissory note given to Mr. Thompson, the plaintiff, and there is such a remarkable silence upon the face of the instruments themselves, and the embarrassments of the son are so certain, and his means of meeting them so far from clear, that I am disposed, with the utmost deference to Vice Chancellor Kindersley, to exempt the plaintiff from payment of

upon the allegation that Coupe was not personally liable for the sums previously advanced. The bill must be dismissed, and, inasmuch as it was filed at the peril of depriving the infant defendants of this property, with costs. On so doubtful a question, if it could have been done with propriety, His Honour's disposition would have been to have dismissed the bill without costs.

(2) 3 Kay & J. 90; a. c. 26 Law J. Rep. (n.s.) Chanc. 179.

all costs of the suit up to the hearing before His Honour. As to the appeal, again I am disposed to give no costs, excepting that the deposit shall be paid over to the respondents.

LORD JUSTICE TURNER.—My opinion is that the settlement was *bond fide* made for a valuable consideration, falling within the 6th section of the statute 13 Eliz. c. 5. Upon the evidence, it is clear that not one sixpence of the 190*l.* would have been advanced to the son by his mother, except upon the terms of a settlement being made by him. The *bona fides* of the settlement is not affected even if the whole of the 400*l.* was not paid; and in all other respects I feel assured that the settlement is perfectly *bond fide*. I think, however, that the bill should have been dismissed without costs, for I consider that transactions of this description require a searching investigation; and I think so the more because I observe of late that considerations of this nature have been sometimes invented and manufactured to support such settlements against creditors; and still more strongly do I think so, because a direction which refuses to the defendant his costs of the suit would operate beneficially by inducing solicitors to put upon the faces of deeds prepared by them what is the true state of the case, whereas it appears only too common to state nothing of the circumstances upon the deeds themselves by which such arrangements are carried into effect. Upon these considerations, I am certainly not disposed to do anything which will check investigation under such circumstances as those in the present case. The plaintiff was entitled to demand investigation, and I have no objection to the insertion of a clause that the decree is to be without prejudice to any question as to the amount due upon the mortgage. The decree will be varied, as we have said; the bill be dismissed, without costs, up to the hearing before the Vice Chancellor; there will be no costs of the appeal, excepting that the plaintiff's deposit will be paid over to the respondents.

M.R. }
Feb. 23. } LEVER v. HERITAGE.

Dismissal—Practice of Bill—Insolvent Defendant.

If a bill filed in this court is not duly prosecuted, it will, though the defendant has taken the benefit of the Insolvent Act, be dismissed, with costs.

The defendant was the lessee of the Garrick Theatre, and the bill was filed against him, praying for an account of the sums received for some stage furniture and fittings alleged to have been sold by the defendant in contravention of the covenants contained in his lease. The bill also prayed for an injunction to restrain any further breaches of covenant. In March 1858 the defendant put in his answer to the bill, and no further step was taken in the suit, as the defendant had since given up possession of the theatre to the plaintiff, and taken the benefit of the Insolvent Act.

Mr. Haddan, in support of the motion to dismiss the bill with costs, cited—

Blanshard v. Drew, 10 Sim. 240.

Monteith v. Taylor, 9 Ves. 616.

Blackmore v. Smith, 1 Mac. & G. 80;
s.c. 1 Hall & Tw. 155; 18 Law J.

Rep. (N.S.) Chanc. 271.

Smith's Chancery Practice, 374, 6th ed.

Mr. Joyce.—The plaintiff ought not to be required to proceed with a suit against an insolvent. By getting possession of the theatre, the plaintiff had in a great measure obtained substantial relief, though perhaps not all that was asked. The bill, therefore, might be dismissed, but it must be without costs—*Knox v. Brown* (1).

THE MASTER OF THE ROLLS.—The merits of the case are now altogether out of the question. The usual order must, therefore, be made, dismissing the bill with costs, unless the plaintiff will pay the costs of this application, and give an undertaking to proceed with the suit.

LORDS JUSTICES. }
March 5, 7, 11. } LINCOLN v. WRIGHT.

*Statute of Frauds—Parol Agreement—
Evidence—Vendor's Occupation after Con-
tract—Part Performance.*

J. L. agreed by parol with J. W. for a conveyance of a life interest in real estate, part of which, a cottage, was in his own occupation; the terms were, that J. W. should be repaid the purchase-money and interest out of the rents, and should allow J. L. to continue to occupy the cottage. G, a witness, swore that this was the effect of the parol arrangement, but two witnesses swore that they had heard J. W. deny it. A short time after this agreement J. W. asked J. L. to execute an absolute conveyance of the same life interest to J. W.'s daughter, then an infant, which J. L. accordingly did; and J. W. entered into possession of the property, leaving the cottage in J. L.'s possession, rent free. J. W. wrote letters afterwards to G. and to J, saying that he had bought the property out and out, and offered J. L. an annuity for life if he would give up possession of the cottage. J. W. by will, devised his real estate to his daughter, and appointed B. his executor and her guardian. B. made J. L. an offer of the annuity on the same terms as J. W. had done, but the offer was refused. Thereupon B, as the next friend of J. W.'s daughter, brought an action of ejectment against J. L, who filed a bill to restrain it, alleging the parol agreement, and praying an injunction to stay the action, and a re-conveyance of the property on payment of what was due. One of the Vice Chancellors decided that evidence of the parol agreement was admissible, notwithstanding the provisions of the Statute of Frauds (29 Car. 2. c. 3.), and made a decree declaring the daughter of J. W. to be a trustee for J. L, who was entitled to redeem on payment of what was due. On appeal, the decision was confirmed.

This was an appeal from a decree made by Vice Chancellor Kindersley. The suit was instituted by John Lincoln, a master mariner, praying relief under the following somewhat complicated state of circumstances:—The plaintiff, by his bill, alleged that in the year 1855 he was seized

for his own life of freehold property, consisting of seven cottages, in one of which he resided, a chapel or meeting-house, and six acres of land in the parish of Congham, in the county of Norfolk; that at that time the hereditaments (with others to which the plaintiff was entitled in fee) were, with a policy effected by the plaintiff on his own life, mortgaged to the Rev. Stephen Frost Rippingall, for 700*l.*, with power of sale; that in August 1855 the plaintiff conveyed and assigned all his estate and effects to Mr. Henry Gamble, as trustee for the benefit of his creditors; that the same solicitors acted on behalf of the mortgagee and also of the trustee; that in September 1855 the mortgagee caused the property to be put up for sale, but no purchaser was then found; that early in October of that year Henry Gamble was informed by the solicitors that the mortgagee had been offered 220*l.* for the property, and that unless a higher offer could be procured, they should sell at that price; that thereupon Gamble communicated with the plaintiff, who at once went to the Rev. Joseph Wright, then rector of Congham, but since deceased, the father of Elizabeth Josephine Wright, and asked him to purchase the property for the plaintiff, upon the terms that Mr. Wright should be repaid the purchase-money and interest out of the rents of the cottages and chapel, and allowing the plaintiff to continue to occupy the house and land in which he then resided; that on the evening of the following day the plaintiff and Gamble called together on Mr. Wright, who told Gamble that the plaintiff had been asking him to buy the property for the family of the plaintiff, and he was anxious to know if the money would be safe; that Gamble, in reply, assured him that it would, and pointed out the mode in which he could repay himself with interest; that Mr. Wright then agreed to purchase the life-estate in the hereditaments, and the policy, in behalf or for the benefit of the plaintiff, on the terms that he (Wright) should pay the sum of 230*l.* as purchase-money, and should retain the rents of the cottages and chapel, and apply them towards liquidating or reimbursing to himself the 230*l.*, and in the mean time the plaintiff should pay interest, and should retain possession of or occupy the messuage

and land adjoining, and should pay the premiums accruing due upon the policy; that Gamble then added that it would be necessary to raise the rents of the other cottages at the ensuing Michaelmas, and this with the income from the chapel would enable the plaintiff to pay 50*l.* yearly in liquidation of the sum advanced; that this arrangement was communicated to the mortgagee, who acquiesced in it; and that on the 24th of October 1855 Mr. Wright became the purchaser upon the foregoing terms and conditions as regarded the plaintiff. The bill also alleged that the life interest of the plaintiff was then worth much more than 230*l.*, and that another person had offered to make the purchase for the plaintiff; that soon after the arrangement Wright requested the plaintiff to execute a conveyance of the property to his (Wright's) daughter Elizabeth Josephine Wright, which he accordingly did in October 1855; that from the time of the contract the plaintiff resided in the house, and had never paid any rent, but he discharged all taxes and other outgoings, and also regularly paid the premiums on the policy, except one in June 1858, which he would also have paid, but that he was informed that some person acting on behalf of the defendants to the suit had already done so, without any request on his part; that when the premium for the year 1856 was due the plaintiff received a note from Mr. Wright, informing him that the same must be paid without delay; that towards the end of the year 1855 Henry Gamble had occasion to call on Mr. Wright, and a conversation took place which led the former to suspect that Wright meant to depart from the arrangement and to claim the property as his own, and he thereupon wrote to Wright a letter reminding him of the original terms, and stating his suspicions, and in answer Wright wrote to Gamble as follows:—

“ Congham Rectory, Jan. 8, 1856.

“ Sir,—I do not understand the purport of your note. You and Lincoln cannot have forgotten the conditions on which I purchased the life interest, namely, that I would allow him and his family the use of the house and land, paying therefrom the policy and other outgoings, and that I would take the cottages and the meeting-

house (commonly called a chapel) into my own hands, and that he should pay for the furniture by instalments. These are the conditions I named to Mr. Groom and several neighbours even before I made the purchase. The deed which the society holds from Lincoln upon the chapel Mr. Partridge has informed me is null and void. The rent I have fixed upon it is 10*l.* a year, to be paid in advance, commencing on the day of purchase. Yours obediently,
Joseph Wright.”

That shortly after this Mr. Wright wrote to one Jackson, a member of the religious society which had previously rented the chapel, the following letter:—

“ Congham Rectory, Jan. 15, 1856.

“ Sir,—You no doubt may be aware that I have purchased the life interest of Mr. John Lincoln, of the above parish, allowing him the house in which he lives and the land rent free, for the benefit of his wife and young children, keeping in my own possession the cottages and the meeting-house, commonly called a chapel, upon the latter of which I have fixed a rent 10*l.* per year, to be paid in advance, commencing on the 24th of October 1855, the day on which the purchase was made.

“ Yours obediently,

“ Joseph Wright.”

That Mr. Wright until his death, the guardian of his daughter ever since, received the rents; that Wright died at the end of the year 1856, having by his will devised all his real estate to his daughter, the defendant Elizabeth Josephine Wright (then and still a minor), and appointed the other defendant, Thomas Beck, her guardian and sole executor of his will; that after Wright's death Beck called on the plaintiff and offered to allow him 10*l.* a year for his life if he would give up the house and land, which offer was a repetition of one which had been made in the lifetime of Mr. Wright; and that upon the plaintiff's refusing the offer, Beck said that he would have the plaintiff turned out; and that on the 16th of April 1858 the defendant Miss Wright commenced an action of ejectment against the plaintiff, and this action was prosecuted by her by the defendant Beck as her next friend. The bill then set up and insisted upon the alleged agreement and prayed an injunction to restrain fur-

ther proceedings in the action; a declaration that Joseph Wright might be declared to have purchased the property and the policy as trustee for the plaintiff; and that upon payment to Wright's representatives of what was due to them, they might be decreed to convey and assign the property and the policy to the plaintiff; and prayed an account of the rents and profits received by Wright or his daughter, and also of what might have been received by them but for their wilful default; and that the defendant Elizabeth Josephine Wright might be ordered to pay the costs of this suit.

The plaintiff and Gamble, examined as witnesses, positively swore to the truth of the bill as to the foregoing statements having been made in their presence, but Mr. Edwards, the solicitor for the defendant, and Mr. Beck, both declared that they had mentioned the subject of the arrangement as alleged by the bill, and that Mr. Wright absolutely denied that any such arrangement had been made. Gamble was not cross-examined by the defendants.

In July 1858 an injunction was awarded without prejudice to any question at the hearing, and, the defendants undertaking not to issue execution, judgment was given in the action.

In the following December the cause was heard before the Vice Chancellor, when his Honour held that the plaintiff was entitled to redeem, for that the parol evidence was in his favour, the Statute of Frauds (20 Car. 2. c. 3.), in his Honour's opinion, not applying to the agreement (1). The defen-

dant Miss Wright appealed. After the decision in the court below the executor of Mr. Wright was made a party to the suit.

Mr. Baily and *Mr. W. D. Lewis*, sustaining the Vice Chancellor's decree, cited the following cases:—

Dale v. Hamilton, 5 Hare, 369; s. c. 16 Law J. Rep. (N.S.) Chanc. 126: affirmed, *ibid.* 397; 2 Phil. 266.

Childers v. Childers, 1 De Gex & Jo. 482; s. c. 26 Law J. Rep. (N.S.) Chanc. 643, 743.

Ridgway v. Wharton, 3 De Gex, M. & G. 677; s. c. 6 H.L. Cas. 238.

Mr. Toller and *Mr. Dickinson*, for the defendant, argued, in support of the appeal, that the bill, if one for specific performance of a contract, did not allege the contract in such a manner as to satisfy the requisitions of the Statute of Frauds; and, on the other hand, if it were a redemption bill, which it was confidently submitted that it was not, it was erroneously framed; it was wrong in point of form, for there was no authorized hand to receive the money, the personal representative of Wright not being before the Court. Even if the agreement were considered to be sufficiently established, it was of the most obviously improbable kind, and such as the Court ought not to grant

longing to A. But suppose A, wishing to purchase, says to B, "I have not got money, but I wish you would lend me some to buy the property with, for my benefit, taking the conveyance to yourself, you standing as mortgagee of the property, subject to redemption by me." That would constitute a case almost identical with the present. The Statute of Frauds would not then enable B. to say that, although he bought at the request of A, on the understanding that he, B, should advance the money, yet that the agreement not being in writing he could commit a fraud under the shelter of the statute. It has been held over and over again that such a defence will not be allowed. In this case the letters of Mr. Wright shew clearly that there were some stipulations; but he and the plaintiff draw some distinction between what they were each to receive of the rents. The fact of the agreement is clearly proved by the plaintiff and Gamble, and the letters of Wright are consistent with it. The defendant's evidence only proves, at the utmost, the denial of Wright that there was such an agreement; but that is not sufficient evidence that an agreement did not exist. Gamble's evidence, therefore, is not contradicted, and he was a disinterested witness. Although the plaintiff was the debtor, and Gamble

(1) The Vice Chancellor's judgment was as follows:—I was precluded by the course the parties took in this case from getting further evidence, but upon the law of the case I entertain no doubt. From the mode in which the case has been brought on, it is competent to the defendant to take the objection of the Statute of Frauds. On the other hand, the right of the plaintiff is untouched in other respects. Supposing B. at the request of A, and with money of A, in his hands, purchases property for him, but takes a conveyance to himself, can it be said that A. can have no relief because there is no written agreement within the Statute of Frauds? Such a proposition cannot be maintained. That statute was passed to prevent fraud, and a Court of equity will not allow a party to avail himself of it to commit fraud. It is clear in such a case that the Court will give A. relief, although there is no writing to shew; for B. has, in fact, agreed to hold the property for the benefit of A; that is, on the assumption that B. had money be-

and land adjoining, and should pay the premiums accruing due upon the policy; that Gamble then added that it would be necessary to raise the rents of the other cottages at the ensuing Michaelmas, and this with the income from the chapel would enable the plaintiff to pay 50*l.* yearly in liquidation of the sum advanced; that this arrangement was communicated to the mortgagee, who acquiesced in it; and that on the 24th of October 1855 Mr. Wright became the purchaser upon the foregoing terms and conditions as regarded the plaintiff. The bill also alleged that the interest of the plaintiff was then much more than 230*l.*, and that the person had offered to make it for the plaintiff; that soon afterwards Wright requested to execute a conveyance to his (Wright's) daughter, Josephine Wright, who entered into the contract thereon in October 1855: that she entered the house, and he remained in his landlord's house, and he discharged the property in his hands, and he continued to pay the sums on the mortgage. In the present instance, however, it is true that at the time of the plaintiff and Wright entering into the verbal agreement which is proved by the

the trustee of the creditors, there was nothing improbable in the transaction. The defendant's contention is inconsistent with Wright's letters. The plaintiff was not a tenant, but a mortgagor, entitled to redeem. With regard to the costs, this is not a simple bill to redeem, for the defendant disputes the mortgage. When a defendant does that without a ground of right, the common course is to make him pay the costs of the suit up to the hearing. But here the case is peculiar. The defendant is an infant, taking, not as heir of the mortgagee simply, but by virtue of a conveyance direct to her by Wright's direction. The plaintiff has occasioned the state of things in this case by omitting to have some writing declaring precisely what the arrangement was. There must therefore be no costs up to the hearing; and then the ordinary costs, as in a redemption suit. There must also be an account of the amount due, such account to be a simple account, without rests; and with no direction as to what, without wilful default, might have been received. The motion must stand over, *pro forma*, to bring the present representative of Mr. Wright before the Court.

(2) 9 Moo. P.C. Cas. 413.

(3) Sug. Vend. and Pur., last edit. 123; Dart, Vend. and Pur. 655; Fry, Spec. Perform. 174.

house (commonly called the "old house") by its own hands, and the furniture by its own hands, and the conditions of the several new purchases holds Par v. Wright. I possession amount- of the agreement. reumstances, as I Wright was enabled t in the property. ssion, from the time tion of the convey- t, if not from the time , was merely wrongful if not by the verbal agreement with Wright, and must be referred to it. I

may add, that although I have referred to the part performance as excluding the Statute of Frauds, I am not sure that the statute is not otherwise avoided in this case. The price mentioned (the deed being silent as to the true contract) was in truth paid, not by the lady, then and still a minor, but by her father, and must be considered as advanced by him on the security of the purchased property. I am of opinion that the absence of plain dealing, if there is any, was not on the plaintiff's part. The decree of the Vice Chancellor is, in substance, right. But I think that the defendant Beck should pay the costs of the plaintiff and of Miss Wright down to the hearing, and of this appeal, and also of the action at law. The decree omits any direction as to wilful default, and this is probably right, nor perhaps does the plaintiff desire it to be varied in this respect. There is also an account directed against Miss Wright as well as against Beck; that perhaps is right, but I am not sure that it is so.

LORD JUSTICE TURNER.—Having given careful consideration to the case during the argument, and since it stood over, I am satisfied that the decree is well founded, without reference to the question of part performance. I am of opinion that the *pro forma* evidence is admissible and decisive. The Statute of Frauds was not made for the purpose of covering fraud. If there was a mortgage transaction, it was a fraud for

to hold the property absolute before parol evidence is adduced. There was an absolute conveyance had been an agreement only. The cases on this point are very strongly in favour of the plaintiff; I pardon v. Codrington.

There is, whether the alleged by the plaintiff there is.

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the number of shares sold, and for the distinctive numbers of the shares. The deeds bore stamps high enough to carry the 20l. shares, and were executed in blank by T. The deeds were delivered in this condition, together with the share certificates for the 20l. shares, which had been fraudulently obtained by the broker, to bond fide purchasers, who filled up the blanks. T. filed his bill to set aside the deeds, and one of the Vice Chancellors held that they were void, and that T. was entitled to the shares expressed to be thereby transferred and to have his name restored to the register, which decision the Lords Justices, on appeal, affirmed.

The practice of the Stock Exchange for a broker to deliver deeds of transfer in blank cannot prevail against the rule of law.

at for transaction, adopt one part. The decree is correct against the appellant. Consider the whole of this litigation from the action commenced by the defendant, which rendered it necessary for the plaintiff to come to this Court for relief, and considering that he was entitled to that relief, I am of opinion that the plaintiff must be indemnified as to the whole costs.

Mr. W. D. Lewis.—We do not ask for any variance of the decree by the insertion of a direction as to wilful default.

LOORDS JUSTICES. } TAYLER v. THE GREAT
May 30, 31; } INDIAN PENINSULA RAIL-
July 15. } WAY COMPANY.

Vendor and Purchaser—Deed executed in blank—Negligence—Fraud of Broker.

T. being the holder of certain shares in a company, upon which 20l. each had been paid up, and being also entitled to other shares in the same company, upon which 2l. each had been paid, instructed his broker to sell the 2l. shares. The broker sold the 20l. shares, and brought to T. for execution by him deeds of transfer in which blanks were left for the name of the transferee, for

This was an appeal from a decision of Vice Chancellor Wood, reported *ante*, p. 285, where the principal facts fully appear, and they are recapitulated in the judgment. They following summary will therefore suffice:—Mr. Tayler was owner of 120 paid-up 20l. shares in the above-named railway, the same having originally been 480 shares of 5l. each. He was also entitled to sixty new shares upon a deposit of 2l. each. He directed his broker, Mr. Bourdillon, to sell the latter shares, but the broker in fact sold eighty of the other shares, and produced deeds of transfer in which the name of the intended transferee, the number of shares intended to be sold, and the distinctive numbers and description of the shares were left in blank, the deeds being stamped with an amount of duty sufficient to cover a sale of 20l. shares. The broker obtained Mr. Tayler's signature to these deeds, and obtained also the share certificates, and sold the eighty shares to bond fide purchasers, but before the registration necessary on a sale had been completed, Mr. Tayler discovered the fraud of his broker, and filed the present bill to set aside the sale, and have the deeds declared void, and also to have his name restored to the register-book of shares. The Vice Chancellor made a decree in his favour, and now two of the defendants to the suit, Mr. Stephen Spurling and Mr. Bristow, purchasers from Mr. Bourdillon, and who had intended to mortgage the shares to Mr. Percival Spurling

any relief upon. They cited *Holmes v. Matthews* (2).

Mr. W. L. Forster, for the executor of Mr. Wright.

Mr. Baily was not called on to reply.

March 11. — LORD JUSTICE KNIGHT BRUCE.—The principal or only question of importance in this suit is as to the applicability of the Statute of Frauds, for if that statute is not in the plaintiff's way, his title to a decree is sufficiently plain. The operation, however, of that statute is, as I conceive, concluded by the part performance of the agreement; and I say this not without having given respectful consideration to Sir James Wigram's judgment in the case of *Dale v. Hamilton*, cited in the argument. The leading decisions are, as is well known, collected by Lord St. Leonards in his distinguished work, and also in the valuable treatises of Mr. Dart and Mr. Fry (3). I agree that when a man holding possession of an estate enters into a verbal agreement with his landlord for the purchase of the property in his possession, the mere fact that he continues in possession does not amount to part performance. In the present instance, however, although it is true that at the time of the plaintiff and Wright entering into the verbal agreement which is proved by the

the trustee of the creditors, there was nothing improbable in the transaction. The defendant's contention is inconsistent with Wright's letters. The plaintiff was not a tenant, but a mortgagor, entitled to redeem. With regard to the costs, this is not a simple bill to redeem, for the defendant disputes the mortgage. When a defendant does that without a ground of right, the common course is to make him pay the costs of the suit up to the hearing. But here the case is peculiar. The defendant is an infant, taking, not as heir of the mortgagee simply, but by virtue of a conveyance direct to her by Wright's direction. The plaintiff has occasioned the state of things in this case by omitting to have some writing declaring precisely what the arrangement was. There must therefore be no costs up to the hearing; and then the ordinary costs, as in a redemption suit. There must also be an account of the amount due, such account to be a simple account, without rests; and with no direction as to what, without wilful default, might have been received. The motion must stand over, *pro forma*, to bring the present representative of Mr. Wright before the Court.

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(3) Sug. Vend. and Pur., last edit. 123; Dart, Vend. and Pur. 655; Fry, Spec. Perform. 174.

plaintiff and Mr. Gamble, and at the time when the deed of the conveyance was signed, and continually afterwards, the plaintiff was, as I collect, in actual and corporeal possession of a substantial portion of the property in dispute, yet such possession was never other than that of owner, incumbered owner it was true, but still actual owner, and continued in such possession as such till the death of Mr. Wright. I am of opinion that this possession amounted to part performance of the agreement. It was under these circumstances, as I read the evidence, that Wright was enabled to acquire an interest in the property. The plaintiff's possession, from the time of the vendor's execution of the conveyance to Miss Wright, if not from the time of the contract, was merely wrongful if not sanctioned by the verbal agreement with Wright, and must be referred to it. I may add, that although I have referred to the part performance as excluding the Statute of Frauds, I am not sure that the statute is not otherwise avoided in this case. The price mentioned (the deed being silent as to the true contract) was in truth paid, not by the lady, then and still a minor, but by her father, and must be considered as advanced by him on the security of the purchased property. I am of opinion that the absence of plain dealing, if there is any, was not on the plaintiff's part. The decree of the Vice Chancellor is, in substance, right. But I think that the defendant Beck should pay the costs of the plaintiff and of Miss Wright down to the hearing, and of this appeal, and also of the action at law. The decree omits any direction as to wilful default, and this is probably right, nor perhaps does the plaintiff desire it to be varied in this respect. There is also an account directed against Miss Wright as well as against Beck; that perhaps is right, but I am not sure that it is so.

LORD JUSTICE TURNER.—Having given careful consideration to the case during the argument, and since it stood over, I am satisfied that the decree is well founded, without reference to the question of part performance. I am of opinion that the parol evidence is admissible and decisive. The Statute of Frauds was not made for the purpose of covering fraud. If there was a mortgage transaction, it was a fraud for

the mortgagee to hold the property absolutely, and therefore parol evidence is admissible. Here there was an absolute conveyance, where there had been an agreement for a mortgage only. The cases on this point are remarkably strong; I particularly allude to *England v. Codrington* (4). The only question here is, whether there is such an agreement as alleged by the bill, and I am satisfied that there is. The questions which were asked by Mr. Wright, as to the security of the investment, and as to the payment of interest and repayment of the principal, are more satisfactory to my mind than if the evidence had been more direct. If there was no such agreement, to what could Mr. Beck's offer of 10*l.* a year to the plaintiff be ascribed? It is a case not of mere trust, but of equitable fraud. The agreement for the mortgage was part of the transaction, and the appellant cannot adopt one part and repudiate the rest. The decree is correct, so far as it was against the appellant. But as I consider the whole of this litigation arose from the action commenced by the defendant, which rendered it necessary for the plaintiff to come to this Court for relief, and considering that he was entitled to that relief, I am of opinion that the plaintiff must be indemnified as to the whole costs.

Mr. W. D. Lewis.—We do not ask for any variance of the decree by the insertion of a direction as to wilful default.

LORDS JUSTICES. } TAYLER v. THE GREAT
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Vendor and Purchaser—Deed executed in blank—Negligence—Fraud of Broker.

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*the number of shares sold, and for the distinctive numbers of the shares. The deeds bore stamps high enough to carry the 20*l.* shares, and were executed in blank by T. The deeds were delivered in this condition, together with the share certificates for the 20*l.* shares, which had been fraudulently obtained by the broker, to bond fide purchasers, who filled up the blanks. T. filed his bill to set aside the deeds, and one of the Vice Chancellors held that they were void, and that T. was entitled to the shares expressed to be thereby transferred and to have his name restored to the register, which decision the Lords Justices, on appeal, affirmed.*

The practice of the Stock Exchange for a broker to deliver deeds of transfer in blank cannot prevail against the rule of law.

This was an appeal from a decision of Vice Chancellor Wood, reported *ante*, p. 285, where the principal facts fully appear, and they are recapitulated in the judgment. They following summary will therefore suffice:—Mr. Tayler was owner of 120 paid-up 20*l.* shares in the above-named railway, the same having originally been 480 shares of 5*l.* each. He was also entitled to sixty new shares upon a deposit of 2*l.* each. He directed his broker, Mr. Bourdillon, to sell the latter shares, but the broker in fact sold eighty of the other shares, and produced deeds of transfer in which the name of the intended transferee, the number of shares intended to be sold, and the distinctive numbers and description of the shares were left in blank, the deeds being stamped with an amount of duty sufficient to cover a sale of 20*l.* shares. The broker obtained Mr. Tayler's signature to these deeds, and obtained also the share certificates, and sold the eighty shares to bond fide purchasers, but before the registration necessary on a sale had been completed, Mr. Tayler discovered the fraud of his broker, and filed the present bill to set aside the sale, and have the deeds declared void, and also to have his name restored to the register-book of shares. The Vice Chancellor made a decree in his favour, and now two of the defendants to the suit, Mr. Stephen Spurling and Mr. Bristow, purchasers from Mr. Bourdillon, and who had intended to mortgage the shares to Mr. Percival Spurling

to secure a debt due from them to him, appealed.

Mr. Rolt, Mr. W. M. James and Mr. Walford supported the decree, insisting that the defendants, if they had any remedy for the wrong that had been done to them by the fraud of Bourdillon, ought to be left to their action at law, or if they proceeded in equity they might file a bill for specific performance against Mr. Tayler, who was entitled to stand in the same position as he was before the defendants had filled up the blanks in the deeds. They referred to the case of *Hibblewhite v. M' Morine* (1), cited in the Court below.

Mr. Roundell Palmer, Mr. G. M. Giffard, and Mr. Waley, for the appellants, argued that all the mischief had been occasioned by the plaintiff himself, in signing the deeds in blank; that by doing so, and by leaving the certificates in the hands of Bourdillon, the appellants had been deceived or defrauded; and that the plaintiff was in the eye of a Court of equity a trustee for *bonâ fide* purchasers from the broker. They cited the following cases, some of which were referred to in the court below :

Lickbarrow v. Mason, 2 Term Rep. 63, 70.

Pickering v. Bustler, 15 East, 38.

The Duke of Beaufort v. Neeld, 12 Cl. & F. 248.

Perry-Herrick v. Attwood, 2 De Gex & Jo. 21, 39; s. c. 27 Law J. Rep. (N.S.) Chanc. 121.

Rice v. Rice, 2 Drew. 73; s. c. 23 Law J. Rep. (N.S.) Chanc. 289.

Schultz v. Ashby, 2 Bing. N.C. 544, 552; s. c. 7 Car. & P. 99; 5 Law J. Rep. (N.S.) C.P. 130; 2 Sc. 815.

Young v. Grote, 4 Bing. 253; s. c. 5 Law J. Rep. C.P. 165.

Humble v. Langston, 7 Mee. & W. 517; s. c. 10 Law J. Rep. (N.S.) Exch. 442.

The Companies Clauses Consolidation Act (8 Vict. c. 16. s. 15).

Mr. J. Hinde Palmer, for the Company, submitted to act as the Court should direct.

Mr. W. M. James was heard in reply, and referred to the case of *Hatch v. Searles* (2).

July 15.—LORD JUSTICE KNIGHT BRUCE said, that in the present case all the material facts were undisputed, and there was no question as to the legal right, the controversy being confined to equitable procedure and the application of equitable principles. The bill was filed by a plaintiff, Mr. Tayler, who prayed for relief with respect to certain documents purporting to affect the legal title of the plaintiff to eighty shares of 20*l.* each in the Great Indian Peninsula Railway Company, which were vested legally in him, and to remove a cloud from his title to those shares. The important facts, which, as he had said, were in the main undisputed, were to be found in two affidavits made by the plaintiff in the month of August 1857 and in the month of April 1858 respectively, from which he would read some passages. The former affidavit, that of August 1857, was to the following effect:—"First, the above-named defendants, the Great Indian Peninsula Railway Company, are, as I verily believe, a company duly registered according to the Joint-Stock Companies Registration Act, and duly incorporated by an act of parliament made and passed in the twelfth and thirteenth years of the reign of her present Majesty, by the name of the Great Indian Peninsula Railway Company, and by which name they are by the said last-mentioned act duly authorized to sue and be sued. Secondly, some time since I became and was the owner of the 120 shares (and which are hereinafter referred to as 20*l.* shares) in the said company, and which 120 shares were formerly 5*l.* shares, but afterwards became 20*l.* shares, and upon each of which the sum of 20*l.* was actually paid up by me, and which 120 shares were duly transferred into my name in the books of the said company as the registered holder thereof. Thirdly, I became entitled to have sixty other of certain new shares which were issued by the said company allotted to me, and some time since such sixty new shares in the said company were

(1) 6 Mee. & W. 200; s. c. 9 Law J. Rep. (N.S.) Exch. 217.

(2) 2 Sm. & G. 147; s. c. 24 Law J. Rep. (N.S.) Chanc. 22.

allotted to me subject to my paying a deposit of 2*l.* per share thereon. Fourthly, for the purpose of paying such deposit, and so that I might become absolutely entitled to the said sixty new shares, I gave Mr. Bourdillon, my stockbroker, a cheque for the sum of 120*l.*, being the amount of the same, with instructions to him to pay such deposit, and which I considered he had done, the cheque for the said 120*l.* having been duly returned by my bankers as paid. Fifthly, in or about the month of July 1857, I became and was desirous of selling the said sixty new shares which had been allotted to me as aforesaid, and instructed my said broker to sell the same accordingly. Sixthly, shortly afterwards my said broker brought to me two printed forms of deeds of transfer, and which I signed, believing them to be deeds of transfer of the said sixty new shares, but the name of the transferee was not then inserted in either of such deeds, and in each of such deeds a blank space was left for the name of the transferee. Seventhly, on or about the 5th of August 1857 I received from my said broker a letter of that date (now produced and shewn to me and marked with the letter A), and which is partly in the words and figures, or to the purport and effect following (that is to say)—“Before you start for Scotland, be so kind as to let me know how and when you wish the 185*l.* paid.” Eighthly, the sum of 185*l.*, referred to in the said letter, was the price for the said sixty new shares, and which I was informed by my said broker was the price to be given for the same. Ninthly, I have lately seen the said two deeds of transfer at the office of the said company, and the same purport to be transfers of eighty of the 120 20*l.* shares in the said company to which I was so entitled as aforesaid, one of such deeds of transfer being of fifty of such shares, and numbered respectively 48,831 to 48,880, and the other of such deeds of transfer being of thirty of the same shares, numbered respectively 48,801 to 48,830, and the word ‘thirty’ is written in ink in such lastly - mentioned deed of transfer apparently over the word ‘ten,’ therein written in pencil, and the name of the said defendant Percival Spurling has, since the said deeds of transfer were so signed by me as

aforesaid, been inserted therein respectively as the transferee of such shares. Tenthly, I verily believe the number of the respective shares purported to be transferred by such deeds respectively, and the consideration for the same, and which is therein respectively stated to be 1,000*l.* and 600*l.*, making together 1,600*l.*, have also been inserted in the said deeds of transfer since the same were signed by me. Eleventhly, I positively say that I never gave instructions or authority to any person whomsoever for the sale or transfer of any of the said 120 shares, nor did I ever wish to sell any of the same, nor has any portion of the money in the said two deeds of transfer, or either of them, stated as the consideration for the purchase of the said shares, ever been paid to or received by me, or by any person or persons whomsoever in any way authorized or empowered by me to receive the same. Twelfthly, the said two deeds of transfer were delivered by the said Mr. Bourdillon, as I have been informed by him, to the said Percival Spurling, and at that time the name of the transferee had not, as I verily believe, been inserted therein respectively. . . . 20. I have lately been informed by the said Mr. Bourdillon, and I verily believe that the name of the transferee in the said two deeds of transfer so signed by me as aforesaid, and also the particular numbers of the shares thereby purported to be transferred, were filled up after the same had been signed and executed by me, deponent, by the said Percival Spurling himself, or by some person by his direction and on his behalf. 21. I considered that the proper certificates for the owner of the said 120 20*l.* shares had been delivered to and were in my custody, but I have lately discovered, when I called at the company’s offices as aforesaid, that the certificates so in my said custody are merely transfer certificates, and that I was entitled also to share certificates, and that the share certificates for the said 120 20*l.* shares have during the present year been obtained by the said Mr. Bourdillon from the said company, and that he has delivered to the said defendant Percival Spurling such of the same certificates as relate to the eighty shares so, by the said deeds of transfer, purported to be transferred as aforesaid.

22. I say that the said share certificates so delivered to the said defendant Percival Spurling by the said Mr. Bourdillon as aforesaid were delivered to the said Percival Spurling entirely without my authority, sanction or knowledge. 23. I have been informed that he, the said defendant Percival Spurling, alleges that when the said share certificates so delivered to him as aforesaid were delivered to him by the said Mr. Bourdillon, he paid him, the said Mr. Bourdillon, the sum of 1,600*l.* as the purchase or consideration money for the said eighty shares; and I say that if the said defendant Percival Spurling did pay the said Mr. Bourdillon the said sum of 1,600*l.* as such purchase or consideration money as aforesaid, the same was so paid to him the said Mr. Bourdillon entirely without my sanction or knowledge. 24. I say that I never gave the said Mr. Bourdillon any authority to receive any purchase or consideration money as aforesaid, and that I never gave him any authority to sell, nor did I contemplate selling, any of my said 120 20*l.* shares in the said company, nor has the said sum of 1,600*l.*, or any part thereof, or any purchase or consideration money paid by the said defendant Percival Spurling ever been paid or in any way accounted for to or received by me." The plaintiff's affidavit of the 29th of April 1858 was to this effect:—"1. Shortly after I instructed my stockbroker, Mr. Bourdillon, to sell the sixty new shares in the Great Indian Peninsula Railway Company, as mentioned in the fifth paragraph of my former affidavit sworn in this cause on the 28th of August 1857, the said Mr. Bourdillon informed me he had sold the said sixty new shares; such information was conveyed to me by a broker's note representing the sale as a sale of sixty such shares at one-fourth premium, which note I have searched for, but cannot find, and the same has been destroyed or lost. 2. On the 30th of July 1857, when the said Mr. Bourdillon brought me the two printed forms of deeds of transfer, and which I then signed, believing them to be deeds of transfer of the said sixty new shares, as mentioned in the sixth paragraph of my said former affidavit, the said Mr. Bourdillon informed me that the blank spaces in the said two deeds of transfer for

the name of the transferee, and for the number and numbers of the said shares, could not be filled up until it was known how the shares were to be divided. From what is stated in the first paragraph of the answer of the defendants Stephen Spurling and Thomas Lynn Bristow, in this cause, I now concur with them in the belief that the words 'fifty Great Indian Peninsulas' and 'thirty Great Indian Peninsulas' were inserted in the two respective deeds of transfer in the pleadings mentioned by the said Mr. Bourdillon, but such words were not so inserted therein when such deeds respectively were executed by me; and I most positively deny that the same were so inserted therein respectively either by my direction or with my knowledge. 3. I say that the share certificates for the 120 20*l.* shares mentioned in the twenty-first paragraph of my said former affidavit were obtained by the said Mr. Bourdillon from the office of the said Great Indian Peninsula Railway Company without my authority, sanction or knowledge. The only authority which he had with respect to such shares was contained in the following letter:—

"3, Stone Buildings, Dec. 20, 1855.

"Sir,—I hereby request you will pay Mr. C. Bourdillon the dividends on my 480 shares in the Great Indian Peninsula Railway Company, and also send to him any notice relative to the said shares till further notice. I remain, Sir, your obedient servant, W. J. Tayler."

"The Secretary of the Great Indian Peninsula Railway Company."

And I believe that, under colour of that letter, and certainly without any authority from me either to him so to do or to the said company to deliver up the same, he applied for and obtained from the said company the certificates of the shares, and I had no knowledge or suspicion that such certificates had been delivered to him until I learned the same at the office of the company on the 22nd day of August 1857. 4. I say I have carefully read the affidavit of the defendants Stephen Spurling and Thomas Lynn Bristow, filed in this cause on the 10th day of September 1857, and I say that the statements and representations therein mentioned to have been made by the said Mr. Bourdillon to the said defen-

dant Thomas Lynn Bristow, and mentioned in the eleventh paragraph of his said affidavit, as to the said Mr. Bourdillon having an account with me, in which I was indebted to him in a considerable amount for differences, are totally untrue and without foundation. 5. I positively say that I have never had any dealing, transaction or account involving differences in respect of railway or any other shares, with the said Mr. Bourdillon, or with any other broker, jobber or other person, and that such railway and other shares as I have purchased from the said Mr. Bourdillon have been purchased by me *bond fide* and for money, and with a view to hold the same as an investment. 6. I further say that, in the months of July and August in last year, I did not owe the said Mr. Bourdillon any sum or sums of money whatever; but, on the contrary, he was indebted to me in 120*l.*, which I had paid to him for the purpose of paying for the deposit on the sixty new shares, and the letter of allotment of which shares he contrived, as I have since discovered, to dispose of to another person. The paper writing produced to me at the time of swearing this my affidavit, and marked with the letter L, is the original cheque for the said sum of 120*l.* The name of Mastermans, with which it is crossed, is in the handwriting of the said Mr. Bourdillon. The paper writing also produced to me at the time of swearing this my affidavit, and marked with the letter M, is the original cheque, and written by me at the time, shewing, according to the fact, the person and purpose to whom and for which the cheque was given. 7. I positively say that I have never received, either directly or indirectly, from the said Mr. Bourdillon, or from any other person or persons, the consideration-moneys of 1,000*l.* and 600*l.* mentioned in the said two deeds of transfer respectively, or either of such sums, or any part or parts thereof respectively, or any other sum or sums of money whatever, in respect of the same shares. 8. Shortly after receiving the notice of transfer, dated the 5th of August 1857, of eighty shares of 20*l.* each in the said railway company mentioned in the thirteenth paragraph of my said former affidavit, I wrote to the said Charles Bourdillon, requesting an

explanation with reference to the transfer of such 20*l.* shares, and in reply to my application I received from the said Charles Bourdillon two letters, dated respectively the 17th of August and the 20th of August 1857, and the following are true copies of the said letters respectively:—

“ 17th Aug. 1857.

“ ‘Dear Tayler,—I cannot express to you my utter amazement at your letter of this morning, and I need not tell you that I lost no time in posting off to the office, and there found, true enough, that the wrong stock had been transferred. The mistake was owing, first, to the description of the deed not having specified the 2*l.* shares in particular; secondly, the jobber, believing that I had sold him eighty, had inserted fifty in one deed and thirty in the other, and there being no such number of 2*l.* shares as eighty in your name, this circumstance had aided the mistake. I am very glad you wrote to me at once, and I am only sorry that you should have had any trouble in the matter. The fault, as far as the stock is concerned, is mine, as I ought to have inserted the right shares myself. The matter will at once be set right. I shall have to transfer twenty more 2*l.* shares myself, as the jobber insists that I sold him eighty and not sixty. However, this is no very great hardship. The money will be paid to me in the course of a day or so, and I will then place it to your account with the London Joint-Stock Bank, Western Branch. Just let me know whether you so wish it. If you had not written to me, the mistake would have been discovered by the jobber, no doubt, in a few days; however, it is as well to have the matter settled at once, and I am bound to say that the fault was principally mine. I only hope you will excuse me. Send me the notice in your next. I will forward the Bombays as soon as they come in. Indian shares are a little firmer. Yours, ever,

“ ‘C. Bourdillon.

“ ‘W. J. Tayler, Esq., Rothiarnay House, Huntly, N.B.’

“ 14, Throgmorton Street, 20th Aug. 1857.

“ ‘My dear Tayler,—I find there is greater difficulty in arranging this transfer matter than I had anticipated. It is clear that eighty 20*l.* shares have passed by the

transfer; and, in point of fact, the jobber, to complete his part of the contract, has paid me accordingly. The only way now to rectify this is, by your allowing the transfer to pass at once, and I will, at your option, either remit you the amount, or else re-purchase and send you a transfer of a similar number of 20*l.* shares. As I am bound to admit that this has arisen through my carelessness, I should be glad if you would at once withdraw the letter you sent to the railway company, prohibiting the transfer to Mr. Spurling. The irregularities may subject me to very strong animadversion from the committee of the Stock Exchange, unless the matter is thus arranged forthwith. I regret exceedingly that the circumstance should have arisen; you may put it down to the hurry of business. You shall not be in any way damaged. Please let me have your answer per return, as no time is to be lost. Yours, truly,

“ ‘ C. Bourdillon.

‘ W. J. Tayler, Esq.’

9. I say that each of the said letters is in the handwriting of the said C. Bourdillon, with which I am well acquainted.” His Lordship, after reading the affidavits, added that, before the plaintiff’s alleged execution of the two deeds of transfer, the plaintiff was, undoubtedly, beneficial as well as legal owner of the shares in question, and his legal ownership still continued, notwithstanding these documents, and could not be affected by them. Each of them, if it was at any moment the deed of the plaintiff, ceased to be so when the addition of the words and figures, which were inserted after the plaintiff had executed it, was made. The plaintiff’s object was, that, as he never intended to sell the eighty 20*l.* shares, and as he had received no price for them, but had been grossly defrauded by Bourdillon, his broker, in which fraud the appellants, although innocently, were participators, he might be declared entitled to relief against them, and against the company itself, and be restored to his former position. To this the company entertained no objection, and Mr. P. Spurling, the transferee, one of the defendants, was indifferent; but the other defendants, S. Spurling and T. L. Bristow, who were

the parties who had paid Bourdillon the 1,600*l.* purchase-money, contended that the conduct of the plaintiff had been so grossly imprudent as to prevent him from having any superior equity to themselves, and that his bill therefore ought to be dismissed. Upon this ground, then, they appealed from his Honour’s decree; but, in his Lordship’s judgment there were two impediments to the success of that appeal. The first was, that, as this suit was constituted, the defendants could not resist the title of the plaintiff without instituting a cross-suit, and this they had not done; and the other, that the appellants must have known, and must be taken to have had notice, when they accepted the shares, that additions had been made to the deeds of transfer after they were executed by the plaintiff, and that they could not acquire a title to the shares under those instruments without a subsequent act of confirmation on the plaintiff’s part. It could not be alleged that any such act had been done. He, therefore, agreed with the decree, which must be confirmed; but, under the circumstances, thought that there ought to be no costs of the appeal, except those of the company, which the appellants must be ordered to pay.

LORD JUSTICE TURNER added, that this was a bill filed by the plaintiff, to prevent the consequences of a fraud which had been practised upon him. In the Great Indian Peninsula Railway Company there existed two classes of shares—the one class, shares on which 20*l.* had been paid up, and a new issue of shares, on which 2*l.* only had been paid up. The plaintiff was the owner of 120 shares, on which the full amount of 20*l.* had been paid up, and he supposed himself to be the owner also of sixty new shares, which would in reality have belonged to him, had it not been for the previous frauds practised upon him by Mr. Bourdillon, whom he had employed as his broker. The plaintiff was desirous of selling the sixty new shares, and for that purpose he executed two printed forms of deeds of transfer, in which the number of shares to be sold, the distinguishing numbers of those shares, and the names of the transferees, were left in blank, but the stamps which the transfers bore were sufficient in value to cover a transfer of

eighty of the shares on which 20*l.* had been paid up; but this was a fact which the plaintiff failed to observe. Bourdillon, the broker, then, in fraud of the plaintiff, sold eighty of the plaintiff's fully paid-up shares to Messrs. Spurling and Bristow, receiving from them as the consideration somewhere about 1,600*l.*, for which he did not account to the plaintiff. It appeared to be usual—perhaps, indeed, it was the universal practice, upon the Stock Exchange—for the broker selling shares to deliver deeds of transfer in blank, leaving the name of the buyer to be filled in when the dealer should have found a purchaser; and according to this practice, the deeds of transfer were delivered by Bourdillon to Messrs. Spurling and Bristow, filled up as to the number of shares, fifty being inserted in the one, and thirty in the other, but in blank so far as the value, distinctive numbers and the names of the transferees were concerned. The actual certificates of the plaintiff's 120 shares of 20*l.* each had remained in the possession of the company, but the broker Bourdillon, without the authority of the plaintiff, obtained them from the company and delivered them to Messrs. Spurling and Bristow, and they then transferred the shares to the defendant Mr. P. Spurling, who forthwith applied to have the transfer of the shares into his name registered in the books of the company. However, before this registration was completed, the plaintiff discovered the fraud, and filed the bill in this suit, praying thereby that the two deeds of transfer might be delivered up to him, and for an injunction to restrain the Great Indian Peninsula Railway Company from taking any steps to perfect the title of the defendant P. Spurling to the shares in question. Vice Chancellor Wood made a decree, which was, in effect, according to the terms of the prayer, and the defendants Messrs. S. Spurling and Bristow appealed against it. The case was one of those unfortunate ones in which the fraud of some third person must inflict a loss upon one of two other innocent parties, and the question was, upon which of them the loss should fall. It could not be doubted that these deeds of transfer were not the deeds of the plaintiff; on this point there could be no question: it was clear that these

shares were not transferred by them, for the law was settled upon this subject, and the safety of property depended upon it. This case was indeed a remarkable instance of the value of the existing rule of law upon the subject. To permit the practice of stock-brokers and stock-jobbers to prevail against such a rule was entirely out of the question; brokers must, like all other persons, be bound by the law, and must observe its rules. The Court had to consider what was the consequence of this rule as affecting the case before them. The plaintiff's legal title to these shares remained wholly undisturbed, and that being so, and he being the legal owner, he was entitled to the relief he sought, unless indeed he not merely wanted equity—for the mere want of equity in him ought to have been the subject of a fresh suit, or of a cross-suit—but unless he had in some manner disentitled himself to sue in this court for relief. It was said by the appellants that the plaintiff had so disentitled himself by his imprudence in executing the deeds of transfer in blank, that a principal could limit at his pleasure the authority of his agent, and that the plaintiff by his conduct had enabled a fraud to be committed on a third party. Cases were cited to shew that the authority given to an agent could not be limited by private instructions, and that he whose negligence had occasioned the loss must be the party to bear it. These were, no doubt, good, sound principles; and he desired to say nothing which should weaken them; but the question in this case was, not as to the principles themselves, but as to their application. Such principles were established to protect persons who might otherwise be defrauded, and not to facilitate the commission of frauds. They might, perhaps, have applied in the present case if Bourdillon had filled up the numbers of the shares in the books of the company, and the names of the transferees; but to apply them in favour of the defendants here would be to apply them in favour of those who could not be defrauded—persons who accepted deeds knowing that they had no legal validity. It would be stretching the rules beyond the reasons on which they were founded. The defendants having knowingly taken the shares without a

legal title, could not be allowed thus to protect themselves, and they must bear the consequences; but he agreed with his learned Brother in thinking that there had been so much negligence on the part of the plaintiff, that there ought to be no costs to him. The deposit alone would be paid over to the respondent, the plaintiff; and the other defendants must pay the costs of the company.

LORDS JUSTICES. }
June 14, 15, 30. } PAYNE v. MORTIMER.

Voluntary Bond—Marriage Settlement—Debtor and Creditor.

A father having given a voluntary bond to trustees, conditioned for the payment after his death of a sum of money to them for the benefit of his two sons, afterwards, upon the marriages of his sons, assented to such bond being settled upon trust for the benefit of these sons and their respective wives and children. The marriages having taken place upon the faith of the provision thus assented to, one of the Vice Chancellors, in a suit for the administration of the father's estate, held that the trustees of the marriage settlement were entitled to rank as specialty creditors for value, and the Lords Justices, on appeal, affirmed the decision.

The cases of George v. Milbanke (1); and The East India Company v. Clavell (2) observed upon.

This was an appeal from a decision of Vice Chancellor Stuart, reported *ante*, p. 437, where the facts appear. The following is an epitome of them. The late Mr. Edward Horlock Mortimer, in the year 1842, being then believed to be quite solvent, covenanted with trustees on the marriage of his daughter to pay for her benefit an annuity of 200*l.*, and that his executors should, on his decease, pay them 5,000*l.* for the benefit of his daughter and her children. In the same year he entered into a voluntary bond in the penal sum of 57,200*l.* with three trustees, by way of provision for his six children. In

1843, two of his sons being about to marry, various communications took place between the testator and the relatives of the intended wives, when he informed them of the fact of the giving of the bond to the trustees for the benefit of his children, and that his sons could give a bond which he trusted would be satisfactory. A copy of the voluntary bond was then forwarded to the parties and marriage settlements were made in October 1843, by which the sons assigned their interest in the bond to trustees (the obligor not being a party) upon trust for the wives and their children respectively. The marriages were solemnized, and the obligor died in the year 1857 in insolvent circumstances. A suit was instituted for the administration of his estate, and the trustees of the settlements claimed to be allowed to rank against his estate, which consisted wholly of personalty, as specialty creditors for value, which Vice Chancellor Stuart, overruling his chief clerk's certificate, allowed, whereupon the plaintiffs appealed from his Honour's decision. Among the evidence was that of Mr. Payne's solicitor, who deposed that the two marriages of the sons took place on the faith of the provision made by Mr. Mortimer for them.

Mr. Malins and Mr. Schomberg supported the appeal.—They argued that the debt on the testator's estate was one merely voluntary, and that as it was so in the hands of the original obligee of the bond, no subsequent dealing by any parties with it could in any manner alter its nature or character, unless the obligor himself took part in those dealings, which in this case Mr. Mortimer, the obligor, had not done, he being no party to the settlements made on the marriage of his two sons. It was impossible to draw any well-grounded distinction between the consideration of marriage and any other valuable consideration. With regard to the reported cases bearing on this question, it was to be observed that not one of them was a pure simple debt incurred, but was either having reference to some specific matter or thing, as, for instance, to particular lands, to a share of ascertained property, to a policy of assurance, to a deposit of deeds, or some

(1) 9 Ves. 190.

(2) Prec. in Chanc. 377; a. c. Gilb. 37.

such circumstance, and bearing, therefore, no application to a case like that before the Court. Those cases were the following.—

Kirk v. Clark, Prec. in Chanc. 275; s. c. 2 Eq. Abr. 165.

George v. Milbanke, 9 Ves. 190, 195.

Ashley v. Ashley, 3 Sim. 149.

Meggison v. Foster, 2 You. & C. C. C. 336; s. c. 12 Law J. Rep. (N.S.) Chanc. 415.

They said that the only case applicable in its circumstances to the present was that of the *East India Company v. Clavell*.

[LORD JUSTICE KNIGHT BRUCE.—There are *Baily v. Lloyd* (3) and *Daubeny v. Cockburn* (4).]

The learned counsel cited also *Maunsell v. White* (5) and the statute of 27 *Elis. c. 4*. (against fraudulent conveyances).

Mr. Fooks, for other parties, supported the appeal.

Mr. Bacon and *Mr. Freeling*, for the respondents, relied upon the case on which the Vice Chancellor grounded his judgment, namely, *George v. Milbanke*, and contended that the charge was a binding one as a specialty debt against the testator's assets. They insisted that as where real estate, or any other specific thing, was the subject, an assignee for value would prevail, a bond on covenant could not be otherwise treated; and that it appeared from the authorities that a promissory note or bill of exchange, duly negotiated, would confer a similar right. They cited:—

Prodgers v. Langham, Sid. 133.

Crofton v. Ormsby, 2 Sch. & Lef. 583.

Fairebeard v. Bowers, 2 Vern. 202.

Hart v. Middlehurst, 3 Atk. 371.

Tanner v. Byne, 1 Sim. 160; s. c.

5 Law J. Rep. Chanc. 125.

Martyn v. Macnamara, 4 Dru. & W. 411, 419.

Skeels v. Shearly, 3 Myl. & Cr. 112; s. c. 6 Law J. Rep. (N.S.)

Chanc. 21; 8 Sim. 153; but see now 1 & 2 Vict. c. 110. s. 11.

Knatchbull v. Fearnhead, Ibid. 122.

Bayley v. Boulcott, 4 Russ. 345.

Mr. Schomberg was heard in reply.

June 30.—LORD JUSTICE KNIGHT BRUCE.
—In the year 1842, the late Mr. Mortimer, of whose assets in this case we have to dispose, entered into a covenant for the payment of 5,000*l.* after his death for certain purposes. This was contained in his daughter's settlement, which was in consideration and in contemplation of her marriage, which afterwards took place, I believe in the same year. Mr. Mortimer died in 1857, and in that or the next year the trustees of the covenant became immediate creditors on the assets for this sum of 5,000*l.*—specialty creditors, of course, for value. It appears, also, that in 1842, the year of his daughter's settlement and marriage, but after the marriage, Mr. Mortimer executed a voluntary bond for securing a large sum of money, to be paid upon, or soon after, his death, for the benefit of some of his children. There was, I repeat, no valuable consideration, but the transaction is not proved to have been an unfair one. The obligor certainly was bound by the bond; and it does not appear that when he executed it he was insolvent, or contemplated insolvency, or expected or believed that he should die insolvent, though in fact he did, more than fourteen years afterwards, die insolvent. It is conceded that, in this jurisdiction, some portion of the bond debt must, on the ground of absence of valuable consideration, be postponed to the covenant debt; but it appears that two of the sons beneficially interested under the bond did, in the testator's lifetime, assign their portions or parts of their portions of the bond debt, on the occasion, and in contemplation, of the respective marriages of these two sons; and therefore for value. This happened in the year 1843, and for the interests in the voluntary bond debt, thus assigned for valuable consideration, a claim is made to equal rank in equity against the assets with the covenant debt. Such is the dispute before us. Now, clearly at law, the covenant debt, and the whole of the bond debt, being both specialty debts, stand on an equal footing. For no purpose of an action, for no purpose merely legal, is the bond, wholly or partially, less entitled to payment, or, if I may so express myself,

(3) 7 Law J. Rep. Chanc. 98.

(4) 1 Mer. 626.

(5) 4 H.L. Cas. 1039.

of lower rank than the covenant, of which the original consideration was valuable. The controversy for priority is one arising and to be decided upon rules of equitable as distinguished from those of legal administration, and certainly the rules of equitable administration do sometimes make an important distinction between debts for value and debts incurred voluntarily, which in all other respects stand on the same footing. But the point for decision here is, whether a specialty debt created voluntarily, but during the life of the debtor assigned for value by the creditor to a third person, the owner of it accordingly in equity at the time of the debtor's death, is obnoxious to the equitable rule of administration, which prefers, or generally prefers, debts for value to debts of the same or of a higher class not for value? I think that it is not; my opinion being, that the difference between the present case and such a case as that of *George v. Milbanke*, on which Sir William Grant has observed particularly in *Daubeny v. Cockburn*, is a difference of accident merely, and not essential. The principle—I think the rational and correct principle—on which *George v. Milbanke* was decided, applies, in my judgment, to the present dispute, and determines it. The fact that neither of the debts in the present instance was payable in the debtor's lifetime is, I think, immaterial; nor do I consider the well-known principle or rule on which *Cator v. Burke* (6), and other decisions of that class, proceeded, to have any application here in favour of the covenant debt. The dispute is only between general creditors of a deceased debtor—one saying that he ought to be paid out of the assets in preference to the other, which the other denies. But the debtor's estate is not concerned in the matter, since to its extent it is liable to pay the whole of each debt. *Prima facie* all specialty creditors of a deceased person stand equally as claimants against his assets. If one among them asserts a right in equity superior to the rest—a right incapable of assertion at law—a right which the law does not acknowledge—it is for him to establish it. This the covenant creditors have done, I conceive, with

regard to the unassigned parts of the bond debt, but not with regard to the parts of it assigned for value. The circumstance that in one instance the valuable consideration was by immediate contract with the debtor, and in the other not so, but by a contract in his lifetime with the equitable owner of parts of the debt, originally voluntary—a contract made after the debt had been incurred, though it was not to be paid in the debtor's lifetime—is, in my judgment, for every present purpose immaterial; I concur, therefore, in the Vice Chancellor's conclusion. It may be superfluous to add, that I lay no stress on any communication made by or to the obligor after the execution of the bond.

LORD JUSTICE TURNER.—This is a question whether a voluntary bond assigned for value ought, in the administration of assets, to stand upon the same footing as a bond originally given for value? The Vice Chancellor Sir John Stuart has been of opinion that it ought, and I agree in that opinion. It was not denied on the part of the general creditors on whose behalf the case was argued, that in the absence of fraud, a voluntary assignment of personal estate is made good against creditors by a subsequent assignment of it for valuable consideration. But it was said that this was only by operation of the statute of Elizabeth, preventing the author of the voluntary instrument from disputing the right of the assignee for value, and that the assignment for value could not change the nature of the original debt, and convert an obligation which was voluntary in its inception into an obligation for valuable consideration. Lord Eldon, however, in *George v. Milbanke*, did not put the case upon the statute of Elizabeth. He had regard, no doubt, and, indeed, the report shews, although but obscurely, that he had regard to the proviso in the statute which protects assignees for value only in the case of absence of notice, and he puts the case upon the ground of the assignee for value having a better equity than the general creditors of the settlor. It may be worth observing that the proviso in the statute of 13 Eliz. c. 5. is in these terms: "Provided also, and be it enacted by the authority aforesaid, that this act, or anything therein contained, shall not extend to

(6) 1 Bro. C.C. 134.

any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration, and *bona fide* lawfully conveyed or assured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as aforesaid." And upon referring to Lord Eldon's judgment in *George v. Milbanke*, it is to be observed that he, when the cause first came on, desired it to stand over to look into the case of *The East India Company v. Clavell*, and in that part of his judgment, I find him saying this, "I doubt whether it will not be found in the circumstances of that case that the child was not a pure volunteer. If it can be supported, as here stated, it goes a great way to decide this case; for, though this is the case of a stranger, there is no difference between a voluntary settlement made good by a subsequent marriage, and one made good by a subsequent advance of money. There is a good deal of difficulty in supporting it upon anything but the subsequent transaction. The circumstances of notice are not immaterial. What Mark Milbanke"—that should be, What Sir Ralph Milbanke—"gave by that deed was a direction to the trustees to raise a sum of money. The person taking under that direction has clear notice what he is to take; and that, if the party from whom he takes was himself claiming that interest, it would be subject to the debts. Then, it is said, they had not notice of the situation of Sir Ralph Milbanke, and that the state of his affairs was such as to make it probable this might be resorted to as part of his assets. That is only notice that it might be so or not, for it depends upon the state of his affairs, not at the time of that transaction, but at his death." So that Lord Eldon there refers to the point of notice, and I have no doubt that what was passing through his mind on the subject had reference to the proviso in the statute of the 13 Eliz. c. 5, of the effect of notice binding an alienee for value, and taking the case out of the protection given by that proviso.

I think, therefore, the principle on which Lord Eldon decided the case of *George v. Milbanke* reaches the present case. The bond constitutes a good specialty debt at law against the obligor; and the question is, whether this Court is to cut it down against the alienee for value in favour of the general creditors? The case of *The East India Company v. Clavell* is to be found in the registrar's minute-book under the title of *The East India Company v. Sheppard*, and I think it extremely probable that Lord Eldon did not see the decree in *The East India Company v. Clavell*, as it is not entered in the registrar's book, but is to be found in the registrar's minute-book. That case was much relied on on behalf of the creditors, as shewing that Mr. Clavell—who in that case had become entitled by marriage to 5,000*l.*, secured by a voluntary attilement—was postponed to the East India Company, who were bond-creditors of the settlor. But the case, even as reported, has no application to the present, for the settlement, whether voluntary or not, was not held to be void against the creditors of the settlor, and could not be so held, the East India Company not being creditors at the date of it. And, upon reference to the registrar's minute of the case, with a copy of which I have been favoured, it appears that the facts are not fully stated in the Reports. There was there a term of 1,000 years for raising this 5,000*l.* for the benefit of one of the daughters of Sir Edward Littleton, who married Mr. Clavell; and the case was, that the settlement by which this 5,000*l.* had been voluntarily settled for the benefit of the daughter was produced to Mr. Clavell on the marriage, and it was said he married on the faith of that settlement. It appears that one of the trusts of that term of 1,000 years in that case was to raise 2,000*l.* for payment of such debts as Sir Edward Littleton should appoint. Now, Sir Edward Littleton had entered into articles with the company, by which he had bound himself to account, of course, for what he should receive in the course of the duties of the office to which he was appointed; and he had not only entered into that covenant, but had given a bond in the penalty of 2,000*l.* for performance of articles, in which Sheppard, the defen-

dant, I think, had joined as surety. Now, it appears by the registrar's minute-book that that bond was conditioned only for the due management of Sir Edward Littleton during five years only, and the decree was for an account of the losses sustained by the East India Company during the five years, and of what satisfaction the company had received. What they had received during the five years or afterwards was to go towards satisfying their losses, and what should be remaining due was to be satisfied out of Sir Edward's personal estate; and if the personal estate should be deficient, the deficiency, not exceeding 2,000*l.*, was to be made good out of the monies to be raised by the sale of the term—taking that very sum of 2,000*l.*, not as the penalty of the bond, as it would appear in the reports in *Gilbert* and in *Precedents in Chancery*, but as the sum of 2,000*l.*, which was secured by the trusts of the term. A sale was directed of the fee in the estate, and the Master was to estimate the difference between the value of the term and the value of the fee. That difference, together with the 2,000*l.*, was ordered to be set apart to abide the result of the account; that is, put out on security according to the then practice of the Court—not paid into court, but secured in order to abide the result of what might be found due from Sir Edward Littleton to the East India Company; and the surplus of the monies arising from the sale was ordered to be applied according to the decree in Mr. Clavell's suit, that is, in payment of the 5,000*l.* for which he had got the decree. Then, if the company should appear to have received more than would satisfy their losses during the five years, the surplus was to be applied to the general account between them and Sir Edward Littleton, and any deficiency of the surplus to answer what might be due on the general account was to be made good out of the residue of the personal estate not applied to the losses during the five years; and the question was reserved whether, if this residue of the personal estate should not be sufficient to answer what was due on the general account, the 1,000 years' term ought not to be made liable, not to the satisfaction of all the debts, but "to the satisfaction thereof" (that is, of the deficiency) so far

as any part of the personal estate had been applied in respect of the 1,000 years' term towards satisfaction of the losses during the five years, in the case of marshalling. The value of the inheritance was also to be subject to the company's satisfaction, so far as it should appear that they had any subsisting demand against Sir Edward Littleton which could affect his inheritance. It is clear, therefore, in that case that Mr. Clavell was not postponed to the company except to the extent of 2,000*l.*, secured by the term for the payment of debts, and that the case does not, either as reported, or upon the more accurate statement to be found in the registrar's minute-book, furnish any authority whatever in favour of the general creditors. This appeal must consequently be dismissed, and, I think, dismissed with costs.

M.R. }
Jan. 31. } GEORGE v. WHITMORE.

Practice—Trial by Jury.

In cases requiring a jury under the 21 & 22 Vict. c. 27, the practice of the Court in granting issues will be followed; and therefore before the hearing the Court will not summon a jury without the consent of the defendant.

This was a motion for the appointment of a jury to try a question of fact. The affidavit made in support of the motion stated that there was a conflict of testimony between the parties, and that the truth could only be ascertained by the examination of witnesses before a jury.

Mr. W. Morris, in support of the motion.—If the application is refused, the parties will have to proceed to a hearing, and the evidence must be taken either by affidavits or before the examiner, but without any beneficial result; and the expense will be incurred without benefit.

Mr. De Gez, for the defendant, stated that he was instructed to oppose the application.

THE MASTER OF THE ROLLS.—It is impossible to grant this motion without consent at this stage of the proceedings. It

would be necessary to hear the case upon the evidence to determine whether it would be necessary to require the assistance of a jury. There must be a ground for the application; it cannot be made *ex parte*. The 21 & 22 Vict. c. 27. has enabled the Court to do by a jury what it formerly did by issue. The practice, therefore, of the Court in granting issues must be followed. Then, after answer, if counsel on both sides state that the facts are so complicated, or that the testimony is so conflicting, that it would be impossible satisfactorily to decide the question without an issue, the Court will immediately make the order. And in the present case, if counsel on both sides will assure me that the case is such as to make it desirable that it should be tried by a jury, I will make the order before the hearing; but that cannot be done in the absence of consent. As the question is new, the costs must be costs in the cause.

LORES JUSTICES. { *Ex parte* WOLLASTON, in
June 29. { *re* THE HOME COUNTIES
AND GENERAL LIFE
ASSURANCE SOCIETY.

*Company—Winding up—Contributory—
Misrepresentation—Forfeiture.*

W. was induced, on the representation of the secretary of a joint-stock company that there were to be two medical referees, and that he might be appointed one, to take 200 shares, whereupon he was appointed to the office. Soon afterwards W. discovered that there were four instead of two medical referees, on which he resigned his office and demanded back the money he had paid for the shares. By the deed of settlement it was provided that if any shareholder did not pay his calls the secretary might send notice requiring payment within twenty-one days, and if the calls were not paid the directors might declare the shares forfeited. W. (under the foregoing circumstances) refused to pay his calls, and the secretary sent him the required notice, and added that if the calls were not paid within twenty-one days his shares would be forfeited. W. made default, and took no further notice of the matter, and the directors

within the twenty-one days declared a forfeiture, but allowed W.'s name to remain on the share register for more than two years, when the company was wound up. One of the Vice Chancellors decided that there had been no such misrepresentation by the company as absolved W. from liability as a shareholder, and that upon the construction of the deed of settlement the forfeiture of the shares had not been completed, and that W.'s name must be placed on the list of contributories. On appeal, it was held, (affirming His Honour's decision) that there was no such misrepresentation or breach of faith as would exonerate W; but (reversing the same decision) that there had been an absolute forfeiture submitted to by W, whose name must therefore be removed from the list.

Their Lordships also held, that whether the directors declared the forfeiture before or after the twenty-one days was a matter of form and not of substance.

This was an appeal from a decision of Vice Chancellor Kindersley, on an adjourned summons from chambers, refusing to remove the name of Dr. Wollaston from the list of contributories, upon which he had been placed by the chief clerk of his Honour.

The Home Counties and General Life Assurance Company was established in 1853.

The deed of settlement was dated the 30th of July in that year, and the company was registered on the 10th of August following. The shares were 1*l.* each, payable in two instalments.

The two important clauses of the deed were the 101st and 103rd, which were respectively as follows:—

101st. "That in case any shareholder shall refuse or neglect to pay such further sum of 10*s.* per share, or any part thereof, as and when called for, in pursuance of the last preceding clause hereof, with interest, if any, payable thereon, and shall continue in such default for the space of two calendar months after the day appointed for the payment thereof, the secretary shall send to such shareholder a notice in writing, specifying the amount due and requiring payment thereof within twenty-one days from the date of such

COURTS OF CHANCERY:

...e, on pain of forfeiture; and if such sum be not paid within the time so specified, it shall be lawful for the directors to declare the share or shares in respect of which the sum and interest, if any, or any part thereof, shall remain unpaid, to be forfeited, and the same shall be forfeited accordingly to the use of the company."

By the 103rd clause it was provided that the company should be at liberty, if the directors should think fit, to sue for and compel payment of the sums for non-payment whereof any shares should have been forfeited, notwithstanding such forfeiture, and without prejudice thereto.

The particular circumstances of Dr. Wollaston's case may be stated in the following narrative:—

In the early part of the month of January 1854, Mr. Rathbone, one of the directors, called upon Dr. Wollaston and requested him to become the medical referee of the company. He represented that there were to be two, one of whom was Mr. Squire, and that the medical business of the company would be equally divided between such two referees, and estimated that the Doctor's share would be, for the first year, about 400*l.* or 500*l.* On the 28th of the same month Mr. Durnford, the secretary, told Dr. Wollaston that he was appointed one of the two medical referees, and assured him that no more than two would be appointed, the whole of the medical business being divided between them. Dr. Wollaston thereupon consented to act, and Mr. Durnford produced the deed of settlement, and asked him to sign for 200 shares. Dr. Wollaston said that Mr. Rathbone had said nothing of the taking of shares, and thereupon he declined to sign; but upon Mr. Durnford saying that all the office-bearers were required to take shares, which all had hitherto done, and that the Doctor had better take, at any rate, a few, Dr. Wollaston signed for ten shares.

On the 30th of the same month, the directors passed a resolution that Dr. Wollaston, having been proposed by Mr. Rathbone as medical examiner of the company, and appointed, such appointment be confirmed; and that he should be the medical officer of the company upon and from the day of his execution of the

deed for an amount of not less than 200 shares, and that he should be paid one guinea for every case reported by him to the company. Mr. Durnford, on the 31st, called on Dr. Wollaston and told him that unless he took 100 shares in the company he could not expect to be appointed one of the two medical referees, and thus Dr. Wollaston consented to sign the deed for another ninety shares. On the 9th of February 1854, Mr. Durnford again called on Dr. Wollaston, and told him that the directors said they could not consent to his appointment unless he took 200 shares; that all the office-bearers of the company were required to take, and had taken, that amount of shares; and that upon Dr. Wollaston's taking that number of shares he would be appointed one of the two medical referees; and that the medical business of the company would be divided equally between him and the other referee. Dr. Wollaston then, in consideration of his appointment as such medical officer, signed the deed for another 100 shares; and paid the company 100*l.* as a first call of 10*s.* on the 200 shares.

Dr. Wollaston saw some patients, and made a journey, by Mr. Durnford's direction, to see a patient sixteen miles distant, and reported on the case to the company. He attended three board days, and was then informed that he need not attend on those days of meeting, but that the directors would send for him when they required him. He observed on the last day of his attendance at the board, that the printed prospectus of the company stated that there were four medical referees—viz. Drs. Hutchinson, Scanlan, Squire and himself. Finding that the directors never sent for him, he, on the 8th of August 1854, tendered his resignation as medical referee, and demanded back his 100*l.* The company did not return that sum; but the directors repeatedly pressed him for payment of the rest of the calls. He put the affair in the hands of his solicitor, considering himself, on account of the fraud practised by him, no longer a shareholder in the company. Dr. Wollaston's solicitor accordingly wrote to the company, plainly repudiating the shares; and the company, on the 14th of October 1854, replied that the 100*l.* call-money was not paid on

before Wednesday then next ensuing, they must commence legal proceedings for the recovery of it. Those proceedings, however, were never commenced; but on the 9th of May 1855 a resolution was passed, to the effect that those shareholders who had not fully paid and satisfied the respective calls upon their subscribed shares should receive notice to do so forthwith, and that unless the said shares were fully paid and satisfied within twenty-one days from the date of the notice, then and in such case the said unpaid shares should be immediately forfeited to the sole and exclusive use of the company, under and by virtue of the 101st clause of the deed of settlement. On the 5th of June 1855 they sent a notice of that resolution to Dr. Wollaston's solicitor, and demanding the payment of the 100*l.* within twenty-one days from the date of the notice.

At the same time the secretary wrote to Dr. Wollaston the following letter:—

"29, New Bridge Street, Blackfriars,
June 5, 1855.

"Sir,—In accordance with a resolution of the board of directors, passed on the 9th of May 1855, I now beg to give you notice that unless the call of 100*l.* on 200 shares subscribed for and held by you in this company be fully paid within twenty-one days from this date, then and in that case the said 200 shares will be immediately forfeited to the sole and exclusive use of the company, and that your interest in the same will finally cease. Annexed is a copy of the resolution.

"I am, sir, yours, &c.

"(Signed) John Mills, Secretary."

Before the expiration of the twenty-one days, they declared the shares of Dr. Wollaston forfeited. The 100*l.* was never paid, and no communication of any kind passed between the parties. The company made no further declaration of forfeiture, and took no steps to enforce payment of the call due. They continued carrying on business as usual, until a petition was presented in December 1857 to have the company wound up, and on the 15th of January 1858 an order absolute to that effect was made by Vice Chancellor Kindersley. Upon searching the register-book of shareholders, it was found that Dr. Wollaston's name had never been

removed, but that he was still entered as the holder of 200 shares. It also appeared that in none of the returns made in each half-year by the company of all persons who had ceased to be shareholders, in pursuance of the 11th section, 7 & 8 Vict. c. 110, did Dr. Wollaston's name appear. The section is this:—"That in the months of January and July in every year the directors of every joint-stock company completely registered under this Act shall make the following returns to the Registrar of Joint-Stock Companies, namely, a return, &c. . . . of every transfer of any share in such company which shall have been made since the preceding half-yearly return, &c. . . . and which shall have come to the knowledge of the directors; and also a return, &c. . . . of the names and places of abode of all persons who shall either have ceased to be shareholders of such company, or have become shareholders of such company otherwise than by a transfer as aforesaid, since the preceding half-yearly return, &c. . . . and if within any such period any such return be not made, then, on conviction thereof, every director of such company shall be liable to pay a sum not exceeding 20*l.*"

The chief clerk placed the name of Dr. Wollaston on the list of contributories, which was affirmed by the Vice Chancellor (1), and from that decision Dr. Wollaston

(1) As the Lords Justices differed from the Vice Chancellor on the question of forfeiture of the shares, it seems proper to insert his Honour's judgment, which was as follows:—Everything that could be said on behalf of Dr. Wollaston in this case has been said; but still, notwithstanding all that, I am of opinion that his name must be retained upon the list of contributories to this company. I do not think that he is entitled, notwithstanding the circumstances under which he became a shareholder in it, to say that he is not now liable as a contributory. The case was contested upon two grounds: one, that there was misrepresentation on the part of the company; the other, that his shares were forfeited. With regard to the first ground, on the plainest principles, no man can enforce against another a contract into which he has fraudulently led that other person; and on the same plain principle, a body of men, a company, cannot, *quæ* company, enforce against any man a contract into which he may have been so led by them. The question then is, what constitutes a fraudulent representation by the company? You cannot, of course, have the representation of each individual shareholder in the company; and, therefore, the difficulty always is to say

appealed. It appeared from the evidence that of the office bearers of the company, thirteen in number (exclusive of the bankers), when Dr. Wollaston took his shares, only five held 200 shares, seven held only 100 shares, and one only 50 shares.

what ought to be treated as a representation of the company or body of men composing it? In *Brockwell's case* (1) I thought it justice that where directors, whose duty it is to make reports to the company, make fraudulent statements in their reports, and the company adopts those reports, they cannot be entitled to insist upon the performance of a contract into which, upon the faith of those fraudulent reports being correct, another person may have entered with them. In *Nicol's case* (2) the learned Judges were not all of the same opinion. The Lord Chancellor thought the representation was not that of the company. I think Lord Justice Knight Bruce was also of that opinion, or inclined towards it. But Lord Justice Turner seemed to be of a different opinion. The case was, however, decided on another point. What I have to determine here is, whether there was a representation by the company, on the faith of which Dr. Wollaston became a shareholder; and whether that representation, if any, was false. Now, in the first place, there does not appear to have been—nor do I understand that it was contended that there was—any misrepresentation by Mr. Rathbone. He only told Dr. Wollaston that he could get him appointed as one of two medical referees, and that the probable income of his appointment would be for the first year about 400*l.* or 500*l.* At all events it does not appear that there was any wilful misrepresentation by Rathbone. Well, then, how stood the case when Durnford called upon Dr. Wollaston? Why, as it seems to me, thus. His appointment was not then, in reality, in any way dependent on his taking shares. He signed the deed for ten shares on the 28th of January 1854. On the 30th the directors signed the resolution appointing him the medical examiner of the company at a salary of a guinea for every case reported upon, and from the day of his executing the deed for an amount of not less than 200 shares. That resolution was on the 30th of January 1854. At that time Dr. Wollaston had not been led to take, and had not taken, the 200 shares. He took those subsequently. The conduct of Mr. Durnford appears to me to have been very much like that of a person "tickling a trout," and if it had or could have had no other effect, it certainly should have put Dr. Wollaston on his guard. It did not, however, produce that result, and Dr. Wollaston signed the deed for the 200 shares. Well, but then, admitting that he did so on the faith of a representation made to him by Durnford, and that that representation was false, was it such a false representation of the company as to justify the Court in holding Dr. Wollaston not to be a contributory? *Brockwell's case* was plain. There the

Mr. Glasse and *Mr. Brooksbank*, for the appellant, argued that Dr. Wollaston had signed the deed of settlement for shares under an entire misconception, and also under very serious misrepresentations made to him by the secretary, for whose misrepresentations the company were answerable,

concern was manifestly insolvent at the time the representation was made; and yet the report was of a most flourishing and successful character. Now that report, made as it was in that case, was clearly a false and fraudulent misrepresentation. I think that in this case, even assuming the directors to have authorized Durnford to make the statements he did—though, in truth, that is not quite consistent with the resolution of the 30th of January 1854—still, assuming that, I think they amount only to this: that Durnford told Dr. Wollaston, if he would become a shareholder, he would be made one of the two medical officers of the company. What does Dr. Wollaston then do? He does not, notwithstanding the peculiarity of Durnford's conduct, go to the office for information, but he signs the deed, and becomes a shareholder. He then finds there are more than two medical officers appointed. How far that might have been a breach of the agreement with him is a different question; whether it would have entitled him to recover in respect of it is one thing—but to say that, having signed the deed and taken the 200 shares, he is not a shareholder because there were really four, instead of, as he was informed there were to be, only two medical officers, is quite another thing. On this first ground I think there is no proof of false representation by the company, and Dr. Wollaston's name must still be retained on the list of contributories. Then, as to the second ground, that of forfeiture. I must confess the tendency of my mind has been very strong, not to allow a mere deviation in some small technicality, some small and unimportant form, to relieve persons from a responsibility to which they would clearly be liable if that technicality or that form had been strictly pursued. But what is the case here? Were the directors justified in acting as they did? The clause of forfeiture, as I understand it, says, the directors are to wait two months after the day appointed, by resolution and notice, for the payment thereof, and then to declare a forfeiture of the shares if the money be not paid. Here the resolution was on the 9th of May 1855, and the notice of forfeiture on the 5th of June 1855. This declaration of forfeiture was then made within the twenty-one days from the date of the notice. That declaration, therefore, was one they had no power by their deed to make as they have made it. It is therefore bad, and they have not complied with the requisitions of the deed. The shares, in fact, never were forfeited. Now this conduct of theirs was not, in truth, a mere formal non-observance of the deed; it was a neglect of its substantial provisions. On this ground, then, as I think there was no forfeiture of the shares, Dr. Wollaston cannot be exonerated; and I may add that his sending in his resignation as medical referee could not in any

(1) *Ubi infra.*

(2) *Ubi infra.*

his acts as authorized agent being binding upon them. It was a breach of faith, too, in the directors not to perform the promises which had been made on their behalf by the secretary. Dr. Wollaston had taken the shares on the faith and on the condition that he should be appointed one of two medical referees, and yet as soon as he had bound himself by the execution of the deed, no less than four of such officers appeared to have been appointed. Such a condition being violated operated as a release of Dr. Wollaston of his liability, which principle had been adopted by their Lordships in the unreported case of *Ex parte Wood*, in *re the Sunken Vessels Recovery Company* (2). It was decided by Vice Chancellor Kindersley in *Brockwell's case* (3), that the falsehood of a report issued by directors, on the faith of which a party became a holder of shares, relieved him from liability, and in the present case the same principle ought to be applied, for here the misrepresentations, instead of being contained in a report, prospectus, or such like document, were actually made to the shareholder. From a series of authorities, it was plain that misrepresentation made by the secretary will bind the directors, and the acts of the directors legitimately performed will bind the company, as *Ex parte Nicol* (4), *Holt's case* (5), *Bell's case* (6), *Ayre's case* (7), and in the observations of Lord St. Leonards in delivering judgment in *The National Exchange Company of Glasgow v. Drew* (8). This was a purchase made, not as in a market, but directly from the directors—*The Liverpool Borough Bank, ex parte Duranty* (9), and there being a taint of misrepresentation, Dr. Wollaston ought to be relieved from all consequences. If, however, the appellant was not for these reasons relieved,

way exonerate him from his liability as a shareholder. His name must, on both grounds, be retained on the list of contributories, and the official manager must have his costs out of the estate.

(2) See *post*.

(3) 4 Drew. 205; s. c. 26 Law J. Rep. (N.S.) Chanc. 855.

(4) *Ante*, 257.

(5) 22 Beav. 48.

(6) *Ibid.* 35; s. c. 26 Law J. Rep. (N.S.) Chanc. 137.

(7) 27 Law J. Rep. (N.S.) Chanc. 579.

(8) 2 Macq. 103.

(9) *Ante*, 37.

he certainly ought to be by reason of the forfeiture made by the directors. If in strictness these gentlemen ought to have proceeded at the end of twenty-one days to declare formally the forfeiture of the shares, what they did was in substance the same thing, and the appellant had no power to compel them to perform that act. Dr. Wollaston for a space of more than two years had repudiated the shares and refused to recognize any liability upon them, and in that conduct the directors, without complaint, acquiesced, and the declaration, which according to the strict grammatical construction of the 101st clause of the deed of settlement, ought to have followed the expiration of the twenty-one days and the default, was only made in advance and before the default had taken place. If the declaration of forfeiture was within the powers of the directors, which in this case it plainly was, the present came strictly within the reported cases of *Richmond's Executors* (10), *Beresford's case* (11) and *White's case* (12). In the present instance there was no collusion, nor was the forfeiture intended for the appellant's benefit, as in *Richmond's case* (13), and the forfeiture had been entirely acquiesced in—*Barton's case* (14).

[LORD JUSTICE KNIGHT BRUCE said that as both members of the Court were of opinion that the alleged misrepresentations amounted to nothing, the respondent's counsel might confine his argument to the question of forfeiture.]

[LORD JUSTICE TURNER.—Dr. Wollaston acted as medical referee, and whatever breach of contract there was, it does not affect his liability as a shareholder.]

Mr. W. D. Lewis and *Mr. J. N. Higgins* argued that the declaration of forfeiture by the constitution of the deed of settlement should have been, and to be effectual must be, by a subsequent act, and therefore the act in that respect done by the

(10) 3 De Gex & Sm. 96.

(11) *Ibid.* 175; s. c. 19 Law J. Rep. (N.S.) Chanc. 332: on appeal, 2 Mac. & G. 197.

(12) *Ibid.* 157; s. c. 19 Law J. Rep. (N.S.) Chanc. 497.

(13) 4 Kay & J. 305.

(14) *Ex parte Barton, in re the National Patent Steam Fuel Company, ante*, 637.

directors was of no avail. The question was one, not of form merely, but essentially of substance, for the deed gave power to the directors to threaten forfeiture, and they had done so here, and they still retained the power at their discretion to say whether they would absolutely forfeit shares of defaulting shareholders. What, it might reasonably be asked, was the meaning of the directors allowing Dr. Wollaston's name to remain on the share-list after he had refused to pay, but that the directors knew they had not performed the solemn act of forfeiting his shares? and it would make this fact the more conspicuous when it was recollected that the Doctor's name was uniformly omitted, as a party who had ceased to hold shares, in the return made to the Government under the 11th section of the statute 7 & 8 Vict. c. 110. By the 13th section of the same act it was provided that, until the return of the transfer of any share should have been made, the person whose share should have been thereby transferred should, so far as respected his liability to the debts and engagements of the company, be deemed to continue a shareholder of such company. The resolution of the 9th of May 1855 was addressed to numerous shareholders; could it have been intended to declare forfeiture against persons whose names could not possibly until twenty-one days after notice be ascertained? There must be mutuality between the parties; and as the shareholder had twenty-one days in which to decide whether he should incur the risk of forfeiture or not, so the company was entitled to the same delay before they absolutely confiscated the shares. The position of the company might be materially changed within that time, and it might be, therefore, more beneficial to maintain the liability of the shareholder than to release him by forfeiture. For these reasons, it was contended that the declaration of forfeiture was invalid, and Dr. Wollaston was still liable.

Mr. Glasse, in reply, observed, that counsel for the directors could hardly be permitted to claim any advantage from their (the directors,) own laches in not making a correct return. The shareholders, moreover, had no power conferred upon them of compelling the directors to rectify

any mistakes in the Share Register; that power not having been conferred until the passing of the statute 19 & 20 Vict. c. 47, which did not take place until 1856.

LORD JUSTICE KNIGHT BRUCE.—I think that the directors had power to create and declare a forfeiture of the shares in question in the events that have occurred. I think they intended to exercise and execute that power, and I think, in their manner of exercising it, in their mode of executing it, there has been no substantial excess and no material deviation from their proper functions. The forfeiture seems, as I have already said, to have been intended. It seems to have been submitted to, and on that ground (respectfully differing from the learned Judge before whom this has been, although agreeing with him altogether on the other point) I am of opinion that Dr. Wollaston's name ought to be removed from the list of contributories; but he has added so much useless matter to the case, that I do not think he ought to have any costs.

LORD JUSTICE TURNER.—I think also the appellant's name must be removed from the list of contributories. By the deed, in case any shareholder refuses or neglects to pay for the period of two months after the call is made, the secretary is to send the shareholder notice in writing, specifying the amount, and requiring payment within twenty-one days from the date of the notice on pain of forfeiture. The argument on that was, not that he must pay within twenty-one days on pain of forfeiture, but that he must have an absolute and unqualified notice, that if he did not pay within the twenty-one days the shares would be absolutely and irremediably forfeited to the sole and exclusive use of the company. The directors by that, therefore, made a clear and direct declaration of forfeiture, by the notice they had given him, and they left that declaration in force for a period of above two years. But it is said that they have no power to do this, because by the latter part of the same clause it is provided, "if the amount be not paid within the time specified, it shall be lawful for the directors to declare the share or shares in respect of which such sum and interest shall then remain unpaid, to be

forfeited, and the same shall be forfeited accordingly to the use of the company." It is said that the declaration of forfeiture could not be made by the requisition made to the shareholder to pay on pain of forfeiture, but that it must be made after the twenty-one days had expired. It may be so in strictness, but it is a question of form and not of substance, unless it can be shewn that as to the declaration it was material to all the parties interested in this company that the directors should make the declaration at the end of the twenty-one days, and should not make it before the expiration of the twenty-one days. I cannot see that it would make any material difference in the exercise of the discretion of the directors, whether they declared the forfeiture before the expiration of the twenty-one days, or whether they declared the forfeiture from the end of the twenty-one days. Looking upon it, therefore, as a question of form, not of substance, I am of opinion that there has been, what it was clearly intended there should be, a forfeiture of the shares within the provisions of the deed. I think, therefore, that this gentleman's name must be struck out of the list of contributories. I fully agree that there should be no costs in the case, and I confess I view with some regret the case itself.

M.R. { CASE v. THE MIDLAND
Jan. 14, 17; { COUNTIES RAILWAY COM-
July 11, 13. { PANY.

Canal—Traction by Steam—Public Rights.

The right of traverse by the public on a canal cannot be confined within the state of science as it existed when the undertaking was projected.

The public may adapt the inventions and discoveries of practical science to secure a more complete and efficient enjoyment of rights conferred, but such inventions and discoveries must not interfere with or endanger the existence of the property in or over which such rights exist.

A carrier claimed a right to navigate a canal with boats propelled by steam, both for carrying loads as well as for drawing barges. Upon a bill to establish the right,

—Held, after experiments made by an engineer at the instance of the Court, that the plaintiff had a right to adapt modern improvements to the enjoyment of his rights, provided such improvements did not injure the canal or tend to destroy its existence.

This cause came on upon a motion for a decree.

The Ashby-de-la-Zouch Canal, with its branches, was made under the 34 Geo. 3. c. xciii. It runs into the Coventry Canal and forms, with the Oxford Grand Junction and the Regent's Canal, a communication between the counties of Derby and Leicester and London, for the conveyance of coal, iron, and other heavy merchandise.

By section 113. it was enacted that all and every person and persons shall have free liberty to use with horses, cattle and carriages the private ways and roads belonging to the company of proprietors, except the towing-paths, for conveying goods and other things to and from the said canal, cuts or branches, and the wharfs, quays or landing-places belonging thereto, and also with boats and other vessels to navigate, pass up and use the said canal, cuts or branches and roads respectively, for the purpose of conveying any iron, stone, lime, goods and other merchandise, and also to use the said wharfs, quays and landing-places for the loading and unloading of any goods or other things, and the said towing-paths for the leading and drawing of such boats and vessels, upon payment of such rates, tolls and duties as shall be demanded by the said company for the same, not exceeding the several rates, tolls and duties herein mentioned, and subject always to the rules, orders, bye-laws and regulations which shall from time to time be made by the said company by virtue of the powers of the act; and power was thereby granted to the said company from time to time to demand and take for the tonnage of materials, merchandise, &c. carried or conveyed upon the canal, cuts or branches, the rates and duties therein mentioned respectively, and also to make such rules, orders and regulations for the passing of any locks with any boats or vessels as they should think proper, which, upon being published as therein mentioned, should be binding upon

and be conformed to by the owners, masters or persons having the care or conduct of such boats or other vessels.

By the 7 & 8 Vict. c. xviii. the defendants were united and incorporated into one company, under the name of the Midland Railway Company, and several railways and other works therein mentioned were vested in them.

The 9 & 10 Vict. c. cciii. enabled the Midland Railway to make a railway from Burton-upon-Trent to Nuneaton, with branches, and to purchase the Ashby-de-la-Zouch Canal. It recited that the railway would be detrimental to the canal company, and that it would, in some respects, render it useless. It then empowered and required the railway company, on demand of the canal company, to purchase the Ashby-de-la-Zouch Canal, with all the rights and privileges, for a price therein named; and it declared that, on execution of the conveyance, the canal, and all lands, buildings, railways, tramways and other works belonging thereto, and all powers, rights and privileges of the canal company in relation thereto, should belong to and be absolutely vested in the defendants, and that from thenceforth the defendants, their directors, officers and servants and agents, might exercise all the said powers and rights in the same manner as if the name of the defendants had been inserted in the 34 Geo. 3. c. xciii. in lieu of the name of the company of proprietors; and the defendants were required, for ever thereafter, at their own costs, to keep, repair, support and maintain the Ashby-de-la-Zouch Canal and the several railways, reservoirs, tunnels, towing-paths, land, buildings and works belonging thereto well and sufficiently repaired, dredged, cleansed and scoured, and in good order and condition for the purposes thereof, and to preserve the supplies of water to the canal as amply as they were then and had theretofore been usually maintained, so that the navigation should at all times be kept open and navigable for all persons desirous to use and navigate the same.

The Midland Railway Company, under their act, accordingly purchased, and they are now the owners of the Ashby-de-la-Zouch Canal.

Messrs. Case, the plaintiffs, were coal-

merchants and owners of the Moira Colliery, and they carried coals from the Moira Colliery, and from various other coal-fields in the counties of Derby and Leicester, to London, by means of such canal navigation. The defendants also carried large quantities of coal and other merchandise, both for themselves and as carriers, along their lines of railway, from various places in the Midland Counties to London and other places, and it was their interest to divert the traffic from the canals to their railway.

The method of drawing boats on the canals by horses having been found too expensive to enable traders carrying coals and other merchandise by the canals to compete on equal terms with persons trading in the same goods and conveying them by railways, the attention of engineers and others was directed to the application of steam-power to the traction of boats and other vessels navigating canals, and the result was an invention by John Inshaw of a species of canal-boat of the ordinary size and dimensions, propelled by a pair of small screws fixed in hollows on each quarter of the boat, near its stern, which were driven by steam-power, and moved in a contrary direction, the effect of which was to prevent that injurious action of the water upon the banks of the canal which generally arises when a boat is propelled by steam in the usual manner. These boats could be used, not only to carry cargo, but also, at the same time, to draw a train of other boats; and boats constructed upon the principle of this invention had been successfully used on the Regent's Canal, and upon other canals.

The plaintiffs were the owners of a boat constructed on this principle, called *The Pioneer*; its length from stem to stern was 71 feet; its breadth at the broadest part 7 feet 1 inch; and its depth from the gunwale to the bottom of the lowest part of the keel, 3 feet 11 inches; and its burthen 30 tons. The plaintiffs had used this boat on the canals communicating with the Ashby-de-la-Zouch Canal; but the defendants had refused to permit it to enter or pass along the Ashby-de-la-Zouch Canal, alleging that it would damage the banks by the wash it caused

against them; but the plaintiffs denied this, as the ordinary speed of travelling of such boats was only from two to three miles an hour, and the greatest speed at which they were capable of travelling was at the rate of from five to six miles an hour.

By the 34 Geo. 3. c. xciii. it was enacted that the owner of any boat navigating the canal should be answerable for any damage, spoil or mischief which might be done by such vessel to the canal or the works.

The plaintiffs instituted this suit to establish their right to navigate the canal by means of steam-power, and the bill prayed that they might be declared entitled to navigate and use the canal with the *Pioneer*, or any other boat of similar construction, with coals or other merchandise, upon paying the tolls, and conforming to the bye-laws and regulations lawfully made for the management of the canal. It also prayed for an injunction to restrain the defendants from obstructing the plaintiffs in navigating the canal.

Mr. R. Palmer and Mr. W. Pearson, for the plaintiffs.—The Canal Act must be construed most beneficially for the public. The company could not restrict the public in the use of the canal. The plaintiffs had been prevented from navigating the canal, but it was upon the principle of *sic volo, sic jubeo, stet pro ratione voluntas*. The defendants had made a bye-law that no boat should travel faster than a walk; they had no power to make such a law. It was said that the boat caused the water to surge and destroy the banks; but, assuming it to be so, the act does not say that a boat shall not be used when parties had a right to use the canal. If any injury was done by parties navigating the canal the company could obtain compensation; but the mere wear of the canal by the ordinary traffic was compensated by the tolls. The plaintiffs' boat was a practical improvement upon canal traction; it could be used without damage to the canal, and the act of parliament must be altered before the plaintiffs' right to use the boat could be interfered with. This was an attempt to exclude the plaintiffs and practical science from the canal—

NEW SERIES, XXVIII.—CHANC.

The Stourbridge Canal Company v. Wheeley, 2 B. & Ad. 792.

The Kingston-upon-Hull Dock Company v. La Marche, 8 B. & C. 42.

Dand v. Kingscote, 6 Mee. & W. 174; s. c. 9 Law J. Rep. (N.S.) Exch. 279.

Bishop v. North, 11 Mee. & W. 418; s. c. 12 Law J. Rep. (N.S.) Exch. 362.

The Durham and Sunderland Railway Company v. Walker, 2 Q.B. Rep. 940, 960; s. c. 11 Law J. Rep. (N.S.) Exch. 440.

The Solicitor General and Mr. Speed, for the defendants.—The plaintiffs had no right to exercise a right of traffic in a way injurious to the canal; the question ought to be determined by a Court of law, and the bill ought to be retained for a year, with liberty for the plaintiffs to bring an action to try their right.

THE MASTER OF THE ROLLS.—The case should, I think, stand over to make experiments, to ascertain the amount of damage done by the boat: if the boat does such damage that it imperils the existence of the canal, the plaintiffs cannot be entitled to use it; but if there is no further damage than what horses produce, and they always produce some, then the plaintiffs are entitled to use the canal. The defendants' proposition, that the cause should stand over to try the legal right, would be quite correct if this was a case in which the right to the highway was disputed; but that, I apprehend, cannot be so: not only the right to use this as a highway, under the 34 Geo. 3. c. xciii. is not disputed, but as it appears in the cause it cannot be disputed.

The Solicitor General.—If the boat is suitable for a canal, the defendants do not dispute the right.

THE MASTER OF THE ROLLS.—The best course is to let the cause stand over, and let the plaintiffs make use of the boat on the canal in such manner as they may think fit, they undertaking to make good, as the Court shall direct, any damage it may cause. Means must then be taken accurately to ascertain the extent of the damage done

by the use of the boat. The plaintiffs may be able to use it at such a reduced speed as to cause no damage, and they would take the greatest care to effect that end. If the Court makes a decree simply that they have a right to use the boat, they might double the speed and produce great damage, which the Court would have no means of controlling. Of course, the Court might direct that the plaintiffs were at liberty to use the boat at not exceeding a certain amount of speed, but their statement is, that they cannot use it beyond five or six miles an hour.

Mr. Palmer.—Empty boats.

The Solicitor General.—Three miles with a load of 140 tons.

The MASTER OF THE ROLLS.—I do not know at what rate horses walk by the side of a canal.

Mr. Palmer.—From two-and-a-half to three miles an hour, according to the plaintiffs' testimony.

The Solicitor General.—The defendants say from two to two-and-a-half.

The MASTER OF THE ROLLS.—The extra half mile an hour might produce a considerable surge. I should also like to know what the effect would be of going at a greater speed than three miles an hour.

The Solicitor General.—In *Dickinson v. the Grand Junction Canal* (1) experiments were directed to be made by persons named by the Court, who were to have both the control and direction of the experiments. It was to ascertain the effect of a pump. They ordered it to be worked sometimes faster and sometimes slower, that they might take every view of the case.

The MASTER OF THE ROLLS.—It would be most satisfactory to appoint an engineer of eminence wholly unconnected with the parties to superintend the experiments made, letting the plaintiffs work the boat as they pleased, he making any suggestions he might think fit to ascertain what the result would be, and that he should report to me.

An order was then made, that the de-

(1) 15 Beav. 260; a.c. 21 Law J. Rep. (n.s.) Exch. 241; 7 Exch. Rep. 282.

fendants, by their counsel, undertaking to permit the plaintiffs to pass upon, navigate and use the canal as the plaintiffs shall see fit, with any boat or vessel propelled according to the same principle and method as the *Pioneer*, and the plaintiffs undertaking to abide by any order of the Court with respect to the damage (if any) which shall be occasioned by such use, and to make any experiments with any boat or other vessel which may be directed by the engineer to be named, and the plaintiffs and defendants undertaking to abide by any order the Court may make as to the payment of the fees and expenses of such engineer; refer the following question to Wm. Pole, C.E.: What effect the use of the canal by such boats or vessels, with and without other vessels in tow, and at the different rates of speed of which they are capable, will have upon the banks and other works of the canal and the navigation of the defendants? and with a view to ascertaining such effect, he is to be at liberty to direct and conduct such experiments with the boats, &c. as he shall think proper at such times and upon such parts of the canal as he may deem necessary or expedient; and both parties are to have notice of and to be at liberty to attend such experiments; and Mr. Pole is to certify to the Court the particulars of such experiments, and the result thereof. In the mean time the cause was to stand over, with liberty to apply.

After several experiments made with the *Pioneer*, Mr. Pole certified that the greatest speed arrived at when running alone was four miles an hour, and the greatest speed when towing three miles an hour, and on one part of the canal, where the width and depth of the canal increased the speed reached five miles an hour. That the method of propulsion caused no surge injurious to the banks; that the only wave likely to be detrimental was that arising from the passage of the boat through the water. The results deduced were: that up to a speed of three miles an hour no wave of an injurious character appeared; that between three and three-and-a-half miles an hour a breaking wave appeared on occasional curves and shallows; that above three-and-a-half miles an hour the bre-

wave became more continuous and took a more marked character; that at four miles an hour the injurious character of the wave became very decided; that at five miles an hour, even in the increased section of the canal near Moira, the wave was still more increased, breaking sometimes over the towing-path and being followed by other waves in succession; that the use of such boats did not affect the ordinary traffic.

July 11.—The cause was again brought on upon this certificate.

Mr. R. Palmer and Mr. W. Pearson, for the plaintiffs.

Sir H. Cairns and Mr. Speed, for the defendants.

July 13.—The MASTER OF THE ROLLS.—The whole question in this case has been caused by the course pursued by the company. It is evident both from the answer and the correspondence, that the company positively insisted that no vessel propelled by steam should be allowed to enter the canal upon any terms or conditions whatever. If before that they had said to the plaintiffs, we believe it impossible, but if you navigate the canal with a boat propelled by steam, it must be on the terms that it will produce no greater ripple than that produced by a boat drawn by horses, the case would have been altogether different. The case against the company is quite clear; without, therefore, going into details, I must declare, That the plaintiffs are entitled to navigate the canal with the boat called the *Pioneer*, and with any other boat or boats constructed on the like principle and of the like dimensions, with or without barges in tow, provided they do not exceed with such boats or boat the speed of three miles an hour; and the plaintiffs undertaking not to exceed that rate of speed, a perpetual injunction must be granted to restrain the defendants from obstructing them; there must also be liberty to apply, and the defendants must pay the costs of the suit and the costs of Mr. Pole; and any costs connected therewith must be dealt with as costs in the cause.

LORDS JUSTICES. { BURT v. THE BRITISH NA-
May 5, 7, 9. { TION LIFE ASSURANCE
ASSOCIATION.

Joint-Stock Company — Promotership Deed—Shares taken for the Purpose of Registration—Annuities to certain Directors—Knowledge—Acquiescence.

E. B. and J. B. in 1854, by deed, assigned leasehold premises, and the copyright of a book on life assurance, to trustees, in consideration of a sum of 1,000*l.* and annuities to each, with a view to form a company. E. B. subscribed for 25,000 shares, and J. B. for 30,000; each paid such a sum for deposits as would leave 1,000*l.* due from each. In 1855 the directors accepted and confirmed the deed of 1854, and obtained the sanction of a general meeting to a loan to the company from another company. In 1856 H. M. B. a lawyer, became a shareholder and director. In December in the same year the directors passed a resolution, that E. B. and J. B. should be relieved from all liability in respect of 20,000 each of their shares, and that the same should be assigned to trustees for the company. These shares were originally taken to facilitate complete registration. H. M. B. early in 1858, filed a bill, on behalf of himself and all other shareholders, except the defendants, against the directors and two shareholders, to set aside this transaction. Afterwards, in April 1858, a general meeting of the shareholders was held, at which the directors were authorised to purchase these shares of E. B. and J. B. on their giving up the benefit of the deed of 1854. One of the Vice Chancellors decided that the transaction of April 1858 was unimpeachable, either under the statute 7 & 8 Vict. c. 110. (the Joint-Stock Companies Act), or as contrary to the deed of settlement, and dismissed the bill, with costs. On appeal by the plaintiff, it was held, affirming the decision, first, that the plaintiff must be taken to have been all along cognizant of and to have acquiesced in the proceedings complained of; secondly, that as the whole of the transactions of the company were entered in their books, he must be held to have had notice of them; and, thirdly, that whatever rights any of the shareholders, who were not precluded by knowledge and acquiescence from suing, might have, the plaintiff's bill could not be sustained, on account of his own

incapacity, by reason of his knowledge and his subsequent conduct; his suit being similar to one instituted by a plaintiff who had released the defendants.

COURTS OF CHANCERY:

This was an appeal, by the plaintiff, Mr. Henry Mattock Burt (a solicitor or a certificated conveyancer), against a decision of Vice Chancellor Stuart, dismissing his bill with costs. The bill was filed, by the plaintiff, on behalf of himself and all other shareholders or proprietors of shares in the British Nation Life Assurance Association, except such as were defendants, against the company and the following shareholders, Edward Baylis, George Birmingham, James Furnell, George Charles Richardson, and Colin Thompson (who were directors), and Robert Norton and Henry Lake. The company was originally promoted by the defendants Baylis and Birmingham, and was provisionally registered in 1854; and by an indenture dated the 1st of November in that year the defendants Baylis and Birmingham, and another, transferred to trustees on behalf of the company their interest in certain leasehold premises, No. 35, Cranbourne Street, and also the copyright of a book, entitled *An Essay on Life Assurance*, which they alleged had been prepared by them with great labour and expense in inventing, classifying and arranging the principles of life assurance, upon condition that the association should, on complete registration, pay to each of them the sum of 1,000*l.*, and also a commission of 2*l.* per cent. on all premiums effected with the association, and that Baylis should receive a certain salary, and Birmingham an annuity of 250*l.* The defendant Birmingham subscribed for 25,000 shares, and on the 20th of November 1854 paid 250*l.* on account of the first instalment of 1*s.* a share, leaving the sum of 1,000*l.* due to the association in respect of such shares. The defendant Baylis subscribed for 30,000 shares, and on the same day paid 500*l.* on account of the first instalment, the remaining 1,000*l.* being, as he alleged, satisfied by the agreement on the part of the association to pay him that sum. The deed of settlement was dated the 28th of February 1855, by which it was agreed that a subscription capital of 300,000*l.*

should be raised, to be divided into 800,000 shares of 1*l.* each, with power to increase the capital, and that on complete registration of the association the sum of 1*s.* should be paid on each share. The above-named gentlemen were appointed directors, and the defendant Baylis was appointed the first consulting actuary, and the defendant Birmingham first consulting surgeon, and these two executed the deed on the day it bore date. On the 12th of March 1855 the association was completely registered, and on the 25th of August following the sum of 5,500*l.* was borrowed by the association from another joint-stock company, called the Unity General Assurance Association. Baylis and Birmingham, by their answers, alleged that at a meeting of the directors, held on the 12th of September 1855, a resolution was passed adopting the deed of the 1st of November 1854, and directing that two sums of 1,000*l.* each should be paid to them; and that on the 14th of September 1855, at an extraordinary general meeting two resolutions were passed, 1st, that the board should be authorized to borrow money; and, 2nd, that the 5,500*l.* (before borrowed) should be deemed as part of the sums so authorized to be borrowed.

Some time about 1856, the plaintiff, after having had interviews with Birmingham and Baylis, became the proprietor of 5,000 shares in the association, and paid the first instalment, amounting to 250*l.*, and became one of the directors, though he had since ceased to be so, but remained proprietor of the 5,000 shares, and subsequently paid the call of 6*d.* a share. On the 3rd of December 1856 a meeting of the board of directors of the association was held, at which the plaintiff and defendants Baylis, Birmingham, Furnell, G. C. Richardson, Thompson and Lake, were present, when the following entry was made in the directors' minute-book: "Messrs. Baylis and Birmingham having this day surrendered all right and claim to 20,000 shares each, respectively held by them, and originally taken in order to facilitate in the first instance the complete registration of the association, in compliance with the act of parliament; and having delivered up their respective certificates for the same: resolved, that Messrs.

Baylis and Bermingham be, and they are hereby relieved from all responsibility as to calls or otherwise on account of the said 20,000 shares each so held by them. That the said shares be transferred into the names of Henry Mattock Burt, G. C. Richardson, C. Thompson and J. Furnell, Esqrs., in trust for the association; and that the proceeds therefrom be applied in due time to the funds of the association." From the 25th of December 1854 to the 25th of March 1857 Baylis received a salary of 500*l.* and Bermingham a salary of 250*l.*, afterwards respectively reduced, and Baylis ceased to act as director and actuary in October 1857. On the 10th of March 1858 a general meeting of the shareholders was held, at which a report of the directors and statement of accounts were adopted, and resolutions were passed (as Baylis, Bermingham, Norton and Lake alleged) for relieving the defendant Baylis from 20,000 of the shares held by him, and the defendant Bermingham from the like number of shares held by him. On the 4th of December 1858 a circular was issued by order of the board, calling upon the proprietors to pay a call of 6*d.* a share, Baylis being called upon to pay the call on 10,650 shares (he having since acquired 650 more shares), and Bermingham on 5,000 shares.

The allegations of the bill were, that Baylis and Bermingham had no beneficial interest in the leaseholds in Cranbourne Street; that the book was worthless, and that the indenture of the 1st of November 1854 was void; and that the business of the association was carried on for the most part under the said defendants' control, in so reckless a manner that not only the income but the paid-up capital of the association was expended in the space of six months from its complete registration; that the sum of 2,000*l.*, part of the 5,500*l.* borrowed from the Unity General Assurance Association, was applied in discharge of the personal liabilities of the said defendants; and that the said application was fraudulent and void; that the directors of the association had no power to pass any such resolution as that of the 3rd of December 1856; that the entry was illegal, and the said resolution void; that the salaries paid to the said two defendants ought to be refunded; that the defendant

Baylis ought to have paid the call upon 30,650 shares instead of 10,650, and the defendant Bermingham upon 25,000 shares instead of 5,000; that the meeting of the 10th of March 1858 was not duly summoned and constituted; and that the resolutions and proceedings at the said pretended meeting were illegal and void, so far as regarded the attempted confirmation of the accounts, and so far as regarded any scheme or contrivance for relieving either of the said two defendants from any part of his shares.

It was then prayed, amongst other things, that a declaration should be made that the defendants Baylis and Bermingham were, to all intents and purposes, the proprietors of the shares for which they respectively executed the deed of settlement; that the entry in the minute-book, dated the 3rd of December 1856, and all other, if any, entries, resolutions and acts by which it had been attempted to relieve the said two defendants from any of the shares actually held by them, might be declared to be illegal, fraudulent and void; that the meeting of the 10th of March 1858 might be declared to be illegal and void; that the said two defendants might be decreed to pay to the association the instalment of 1*s.* a share, and the call of 6*d.* a share on the whole amount of shares held by them respectively, with interest at 5*l.* per cent.; that the said two defendants might be declared to be personally liable for the said loan of 5,500*l.*, and might be decreed to refund the amounts received by them by way of salary.

By their answers the defendants Bermingham and Baylis alleged that an extraordinary general meeting was duly summoned and held on the 14th of September 1855, when two resolutions were passed, by the first of which it was resolved, that the board should be authorized to borrow for the purposes of the association such sums as it should deem expedient; and by the second it was declared, that the said sum of 5,500*l.* and other sums already received on deposit by the board should be deemed part of the sums of money by the preceding resolution authorized to be raised; and further, that the plaintiff was present at the board meeting of the 3rd of December 1856, and concurred in passing the resolution of that date, being cognizant

of all the circumstances of the said agreement of the 1st of November 1854, and that they believed such resolution to have been legal, and submitted the question of its legality to the Court. They denied that the sum of 1,000*l.* or that anything was due from them in respect of the first instalment of their shares; and with regard to the meeting of the 10th of March and the resolutions passed thereat, they said that doubts having been raised whether the said meeting was a duly constituted ordinary meeting, the board of directors on the 15th of April 1858 called an extraordinary general meeting of the association, by a notice which they sent to each of the persons entitled to attend such meeting. The notice stated the object of the meeting to be the adoption of a report and balance-sheet for the confirmation of the plaintiff and another defendant (Dr. Norton) as directors, and for other purposes; also for the purchase by the association of 20,000 shares held by the defendant Baylis, and of 20,000 shares held by the defendant Birmingham, on their repaying to the association the sum of 1,000*l.* each. The notice was signed by Henry Lake, manager; and when sent was accompanied by a letter, stating that the object of the proposed meeting was to remove doubts as to whether the meeting of the 10th of March 1858 was regularly convened. The extraordinary general meeting was duly assembled on the 24th of April 1858, (after the filing of the bill,) and at that meeting the report and balance-sheet were adopted as they had been adopted at the meeting of the 10th of March 1858; the resolutions also confirmed the appointments, except that of the plaintiff as director; and the following also was passed, "That this meeting do authorize the purchase from Mr. Birmingham, at the price of 1,000*l.* of 20,000 shares; for which he signed the deed of settlement and for which he paid the sum of 1,000*l.* as the first instalment then due thereon, at the same time and place that he received a sum of 1,000*l.* from the funds of the association as one of its promoters, and do authorize the transfer of such shares to Henry Mattock Burt, James Furnell, George Charles Richardson, and Colin Thompson, as trustees, for the benefit of the proprietors of the association, as the

board may at any time hereafter direct; upon condition nevertheless that Mr. Birmingham at the same time repay the sum of 1,000*l.* paid to him as such promoter, and surrender all his rights, if any, under the promotership deed of the 1st of November 1854." A similar resolution related to Mr. Baylis. The plaintiff's name was subsequently omitted as a trustee. Reliance was also placed by the defendants on the validity of the resolutions of April 1858, and also upon the acquiescence of the plaintiff in such resolutions.

The clauses of the deed of settlement bearing upon the question in the suit were in substance as follows:—Clause 14. provided, that an ordinary general meeting of the association should be held on the second Wednesday in every February, or within seven days before or seven days after as the directors should appoint. By the 15th, an extraordinary general meeting could be called by the directors at any time. By the 186th it was provided, that whenever any sum of money shall be wanted for the purposes of the association, it shall be lawful for the board, if they shall think it expedient so to do, with the consent of an extraordinary general meeting, instead of raising the same by calling in any further instalment, to borrow the same at interest, either from the proprietors or by the bond of the association, or by means of any other security, real or personal, subject nevertheless to clause 9, by which the directors and proprietors are protected from personal liability. By clause 195. it was provided, that whenever the holder of any share shall be desirous of selling the same to the board, it shall be lawful for the board, with the sanction of a general meeting, with and out of the proprietors' fund, to purchase such share for the benefit of the proprietors at such time as they shall deem reasonable. By the 270th it was provided, that no holder of any share shall have power to transfer the same, unless the full amount of the instalments for the time being called for on such share shall have been paid.

There were some further important facts stated in the judgment of the Lords Justices; but the foregoing are those chiefly relied upon during the lengthy argument.

When the cause was heard, before the

Vice Chancellor, he decided that whatever questions might have arisen as to the validity of the transaction of 1856, neither the deed of 1854 nor the transaction carried into effect by the resolution of the meeting held in April 1858 could be impeached; and he dismissed the bill, with costs: from which decision the plaintiff appealed.

Mr. Greene and *Mr. Bromehead*, for the appellant, contended that as Messrs. Baylis and Birmingham were directors of the company, the payments of 1,000*l.*, and 1,000*l.* were in fact payments made to themselves; that moreover the contract between the other directors and these two gentlemen was never approved by the body of shareholders before it was executed, and was void under the 29th section of the Joint-Stock Companies Act (7 & 8 Vict. c. 110.), as was decided in the case of *Poole v. the National Provincial Life Assurance Company* (1), and even the presence of a director of a company interested in a matter when under arrangement as those parties were at the meeting of the 14th of September 1855, was quite sufficient to invalidate the whole—*In re Sea, Fire, Life Assurance Company, ex parte the Port of London Assurance Company* (2). The objection the plaintiff made to the loan of 5,500*l.* by the Unity Association was, that though it was sanctioned by an extraordinary meeting of the 14th of September 1855, it was contracted before any meeting had authorized it, and even when approved, it was at a meeting held not for the purpose of sanctioning a loan, but to put in action the powers of the directors of borrowing. Besides this, the deed of settlement did not authorize the directors to effect policies and then make them a security to the lender of money to the association. With regard to the board meeting of the 3rd of December 1856, that was held for the purpose of relieving Messrs. Baylis and Birmingham of their responsibility in respect to shares, which was an object beyond the powers of the directors, and that act being altogether illegal, it was not competent for the parties

to say, that the acquiescence or concurrence of the plaintiff rendered it valid. The plaintiff was unaware of the nature of the promotership deed, for he thought that the payment of 1,000*l.* came out of the pockets of Baylis and Birmingham. With respect to the ordinary general meeting of the 10th of March 1858, they contended that it was not summoned within the time appointed by the deed; that, if duly summoned and convened, the shareholders could not confirm the accounts in their then form, or pass resolutions relieving Messrs. Baylis and Birmingham from their shares; that the powers of an ordinary general meeting did not extend to the purchase of shares; that the purpose for which the meeting was summoned was not duly set forth in the notice; that it was an ordinary general meeting; that the accounts did not shew a proprietor fund from which the purchase could be made. With regard to the extraordinary general meeting of the 24th of April 1858, there was no proprietors' or other fund with which to purchase the shares; that the calls were not paid up on Messrs. Baylis and Birmingham's shares; that the shares themselves were of no value; that no payment had been made by Messrs. Baylis and Birmingham, the 1,000*l.* being merely in respect of the 1*s.* instalment; that the instalment was consequently unpaid, and no transfer could be made under the 54th section of the act, and the 270th clause of the deed; and, lastly, that the transaction was contrary to the policy of the 7th, 25th and 29th sections of the Joint-Stock Companies Act (7 & 8 Vict. c. 110).

The following cases were also cited for the appellant:—

Morgan's case, 1 Mac. & G. 225; s. c. 1 Hall & Tw. 320; 18 Law J. Rep. (N.S.) Chanc. 265.

Mangles v. the Grand Colliery Dock Company, 10 Sim. 519; s. c. 9 Law J. Rep. (N.S.) Chanc. 177.

Ex parte Lawes, re the Vale of Neath Brewery Company, 1 De Gex, M. & G. 421; s. c. 21 Law J. Rep. (N.S.) Chanc. 688.

Preston v. the Grand Collier Dock Company, 11 Sim. 327; s. c. 10 Law J. Rep. (N.S.) Chanc. 73.

(1) 2 Exch. Rep. N.S. 687; s. c. 27 Law J. Rep. (N.S.) Exch. 219.

(2) 5 De Gex, M. & G. 465; s. c. 24 Law J. Rep. (N.S.) Chanc. 705.

COURTS OF CHANCERY:

v. Nichols, 6 H.L. Cas. 401.
an v. Mitchell, 13 Ves. 581.
and North Midland Railway
company v. Hudson, 16 Beav. 485;
 s.c. 22 Law J. Rep. (N.S.) Chanc.
 29.

. Malins and Mr. Thring, for the
 association, cited the following autho-

Foss v. Harbottle, 2 Hare, 461.
Mozley v. Aston, 1 Phil. 790; s.c. 16
 Law J. Rep. (N.S.) Chanc. 217.
Australian Steam Clipper Company v.
Mounsey, 27 Law J. Rep. (N.S.)
 Chanc. 729.

Bryon v. the Metropolitan Saloon Om-
nibus Company, 27 Law J. Rep. (N.S.)
 Chanc. 685.

Bennett's case, 5 De Gex, M. & G.
 248; s.c. 24 Law J. Rep. (N.S.)
 Chanc. 130.
Ex parte Bagge, 13 Beav. 162; s.c.
 20 Law J. Rep. (N.S.) Chanc. 229.

Cockburn's case, 4 De Gex & Sm. 177;
 s.c. 20 Law J. Rep. (N.S.) Chanc.
 137.

Williams v. St. George's Harbour
Company, 27 Law J. Rep. (N.S.)
 Chanc. 691.

Graham v. the Birkenhead Junction
Railway Company, 2 Mac. & G. 146;
 s.c. 20 Law J. Rep. (N.S.) Chanc.
 445.

Carlisle v. the South-Eastern Railway
Company, 1 Ibid. 689; s.c. 2 Hall
 & Tw. 366; 19 Law J. Rep. (N.S.)
 Chanc. 478.

Mr. Wellington Cooper, for *Mr. Baylis*,
 referred to—

Taylor v. Hughes, 2 Jo. & Lat. 24.
Kent v. Jackson, 14 Beav. 367; s.c.
 on appeal, 2 De Gex, M. & G. 49;
 21 Law J. Rep. (N.S.) Chanc. 438.

Mr. Bacon and Mr. W. H. Bagshawe,
 for *Mr. Bermingham*, cited *Ex parte Big-*
nold (3) and remarked upon *Jackman v.*
Mitchell.

Mr. Greene, in reply, referred to the
 cases of—
Murray v. Palmer, 2 Sch. & Lef. 474.
Adams v. Clifton, 1 Russ. 297.

(3) 22 Beav. 143.

LORD JUSTICE KNIGHT BRUCE.—This is
 a bill, filed in the early part of 1858,
 by a single plaintiff, a shareholder in a
 company or an association called the
 British Nation Life Assurance Association,
 on behalf of himself and all other the
 shareholders or proprietors of shares in
 the association, except the defendants; and
 the defendants are the gentlemen who have
 been connected with the administration of
 the affairs of the association during the
 time which the plaintiff considers material
 to draw the attention of the Court to.
 Whatever may be the extent of the prayer
 of the bill, the relief asked at the bar has
 been confined to these grounds: first, the
 defendants, who have been concerned in
 the management of the association, are
 required to indemnify the association
 against the consequences of a loan alleged,
 and probably with truth alleged, to have
 been irregularly obtained by the managers
 of the association, on behalf of the associa-
 tion, from another company (I believe also
 an insurance company) which was in part
 secured by the effecting of policies with
 that company. It is said, I repeat, to
 have been a damaging loan,—a transaction
 that occasioned loss to this association, and
 not to have been warranted by the terms
 of its constitution, and therefore the
 managing persons who were parties to it
 are required to make good the conse-
 quences. The next head of relief sought
 at the bar is against two sums of 1,000l.
 each, and certain annuities conceded
 two of the defendants *Mr. Baylis* and
Bermingham, two of those who were con-
 nected with the company, by a deed pri-
 minary to the complete registration of the
 company, called the promoters' deed. It
 is said those two sums of 1,000l. were
 unfairly given, unfairly obtained, irre-
 gular, improper, unfair; and accordingly
 redress is sought in those respects against
 the persons who were parties to the trans-
 action. In the third place, *Mr. Baylis*
 and *Mr. Bermingham*, two of the defen-
 dants to whom reference has already been
 made, are relieved, or profess to be relieved,
 from a great number of shares which they
 took in the association, and from all the
 and consequences; and it is alleged that
 that transaction was also irregular.

unfair; that they must still be continued to be deemed proprietors in the association to that extent, just as if that attempted relief had not taken place. The plaintiff who makes these complaints became a shareholder in the company in the month of March 1856—some time, I believe, after its complete registration—and in the same month he was elected and became a director, that is, of course, one of the managers of the concern; and, as far as we can judge from the books, it seems admitted in effect, at the bar on both sides, that from the time of his election to be a director,—which, as I have already said, was close upon the time when he became a shareholder, in the same month,—until the end of the year 1857 and somewhat later (a period, therefore, much exceeding a year and a half) he was an active director, constantly, or almost constantly, and with substantial regularity, attending the meetings, being paid for those attendances, and appearing to perform all the duties of a director. Now this gentleman cannot be considered as an ignorant person. He is a certificated conveyancer, was so certainly as early, I believe, as the year 1854, and has been so (it is probable, and I presume) ever since. He was, therefore, a certificated conveyancer when he became a shareholder and director, and cannot have ignorance of matters of business imputed to him, at least as a matter of course. Now, from the time when he began thus to attend as a director, there were regular meetings held, and the accounts of the company and payments on behalf of the company were brought under the attention of the directors from time to time, and entered in the minutes; and, as is usual, I believe, in such cases, at the commencement of every meeting the minutes of the preceding meeting were read, and generally or universally confirmed. And on several of these occasions during the year 1856, after the plaintiff became a director, and subsequently to the year 1856, there are entries of payment on account of this loan obtained from the Unity Insurance Company. One will serve as a specimen of the numerous entries of the description I have mentioned. I am reading from page 357 of the book, from the minutes of the meeting of the 20th

of August 1856, which were confirmed at the next meeting:—"No. 63, Unity General Assurance Association. On account of loan premiums, 119*l*. 15*s*. 10*d*.; due 24th inst. 61*l*. 17*s*. 6*d*.—181*l*. 13*s*. 4*d*." As I have said, an entry of that description relating to the same transaction does not occur once only, twice only, or thrice, but on numerous occasions, so far as those periodical payments could be, according to the nature of things within so restricted a time, numerous. They were regular. Now it is impossible—even if this gentleman had said that he was ignorant of the nature of this loan and of the nature of this transaction—it would have been impossible, for any effectual purpose, to hear him say so. It was his duty, I had almost said, as a professional man—certainly it was within his competency as a professional man, and within his obvious duty as a director—to understand what the minute meant if he had any doubt about it. If he was ignorant of the nature or origin of the transaction—which, I agree, had its inception before he became a shareholder, and therefore before he became a director—it was his duty to have obtained information upon it. But, upon the whole of the evidence, it is impossible reasonably to suggest that he relieves himself from the strong, I had almost said the conclusive, presumption against him of knowledge of the nature and particulars of that transaction. With the knowledge which it is necessary thus to impute to him, he acts upon the transaction from time to time; he leads the other directors; he leads all who are associated with him in the management of the company, and who may well have felt confidence in his professional knowledge, to consider that he thought it unobjectionable. He has so treated it; he has not proved, if he could have effectually offered evidence for the purpose of proving, that he was ignorant or misled in the matter; and, upon the materials before us, he must, in my opinion, be taken, as far as his interests are concerned, completely to have adopted it and confirmed it, and to have excluded himself from all ground of complaint on that head, whatever ground of complaint other persons may have. We then come to the 1,000*l*. a-piece paid to Mr. Baylis and to Mr. Bermingham as

promoters of the association before this gentleman joined it, and the annuities granted to them on that occasion by what is called the promoters' deed, of the 1st of November 1854, upon which I agree with the plaintiff, it is hardly possible to make observations too strong. I regret very much that it should have been possible to prepare, possible to execute, such a deed; and, above all, I regret to see respectable professional names associated with it. The deed provided for the payments preliminary to the general registration, and annuities for the benefit not only of Mr. Bermingham and Mr. Baylis, but of others. Its recitals are these: It recites the title to leasehold property that was to be acquired for the benefit of the future association. It recites the existence of a book or pamphlet, said to belong to three gentlemen as authors and proprietors, upon life assurance, upon principles which were, "for the most part, of a novel nature, and different from those of any previous life assurance company, are of great worth and value, and it is believed that many and great benefits and advantages will arise and be secured to the general public from the establishment of a society carrying out such principles as aforesaid." Then it recites that the three gentlemen are the joint proprietors of the copyright; that Mr. Baylis, Mr. Bermingham and Mr. Francis Norton Erith "have undertaken upon themselves all preliminary expenses, hazards and liabilities whatsoever in creating and establishing the said association." And then it goes on to recite in effect that it had been agreed that Messrs. Baylis and Bermingham should transfer to the trustees, on behalf of the association, the leasehold property and also the copyright of the book, upon condition that the association should, on complete registration, pay to each of them the sum of 1,000*l.*, and also a commission of 2*l.* per cent. on the premiums of all policies effected with the association, and that Baylis be the consulting actuary, and should receive a salary of 500*l.* even after resignation; and Bermingham should be consulting surgeon, and should receive an annuity of 250*l.*, even after resignation; that Messrs. Trinder & Eyre should be solicitors to the association without power of removal, and

should receive a salary for general business to be transacted by them of 250*l.* a year. Then the operative part of the deed proceeds and does provide for all these, I should have thought, most extraordinary payments. As far as I can understand the operative part of the deed, they are all provided for. Now this deed is mentioned in the minute-book upon an occasion previous to the time when the plaintiff became a shareholder in the institution; and I agree it might very possibly be too strict to hold him bound by that—to hold that he was bound to look back through the book to every entry that had preceded the commencement of his directorship. There is, however, in the year 1854, this entry:—"Resolved, that the promoters' deed as prepared by the solicitors to the association, having been read, being cordially approved of, be now confirmed; and that such assignment of agreement for lease of No. 35, Cranbourne Street, Leicester Square, and of copyright in a certain book, entitled 'An Essay on Life Assurance,' illustrative of the modern application of its principles to the requirements of the living, being accepted in its integrity, shall now and hereafter be held binding upon the present or any future directors of the British Nation Life Assurance Association. Mr. Baylis, Mr. Bermingham and Mr. Norton Erith, during the consideration of the deed of assignment upon certain conditions, of their right, title, interest and estate in No. 35, Cranbourne Street, and in their copyright of an essay upon the principles of which, therein detailed, is founded the British Nation Life Assurance Association, declined to use their privileges as directors, and accordingly did not vote or take any part in the decision of the other directors present." I do not impute to the plaintiff the knowledge of the entry; but considering what the deed was, considering how it associated irremovable officers (at least officers substantially irremovable) with the association, and provided for the annuities for which it did provide, it is in the highest degree improbable that the plaintiff should not early have been aware of it. He appears, upon his own statement, some time after he became a director, to have been aware that there was some such instrument—

some such agreement. When, he does not say; but the answers obviously called his attention to that subject; and the state of the pleadings and the evidence, I think, rendered it incumbent on him, if he desired not to have a very early knowledge of the instrument imputed to him, to be precise in his statements and evidence upon that point. The unavoidable inference from the evidence, independently of the entries to which I am about to allude, is, that he became early aware, if not in every sense literally of the instrument itself, aware that there was an agreement containing such provisions or provision to that effect, which affected, or purported to affect, the association. But we find throughout the years 1856 and 1857—I do not allude to the reduction of the annuities, that is immaterial—we find reference to the annuities under the deed of a nature similar in effect, the same indeed in effect *mutatis mutandis*, as those relating to the loan obtained from the Unity Association. One will serve as a specimen of the whole. I open the book at the 24th of September 1856. These entries are there:—"The following drafts are approved of, drawn and signed, namely, No. 76, Mr. Baylis's annuity, to Michaelmas, 125*l.*;" (that, of course, was the fourth of 500*l.*) "Mr. Bermingham, ditto, 62*l.* 10*s.*," the fourth of 250*l.* Then comes what seems not hitherto to have been observed upon, though it is no discovery at all—it is patent—the solicitors' ditto (ditto meaning annuity), "62*l.* 10*s.*," it being the 250*l.* a year which they were to be paid by way of salary as irremovable solicitors, in addition to their costs. Now, these payments occur from time to time, as I have already said, in the book; they are entered in the minutes in the presence of Mr. Burt, and each set of minutes is confirmed at the next meeting in his presence. It is impossible to impute to him ignorance of business, or that he was not a man of business. He is a practising lawyer, and I have no doubt a well informed and able one—it is impossible to suppose that any man could have these documents read to him or draw cheques, or see drawn cheques for annuities for Mr. Bermingham and Mr. Baylis and the solicitors without asking what they were. No man would think of such an imputation on any man

in his senses, especially a man of business and a professional gentleman. I doubt, myself, very much whether this decisive evidence is wanted; the other evidence to which I have referred is so entirely satisfactory. But if that could be considered otherwise than satisfactory, this is completely conclusive. He must, before the end of the year 1856 have had actual notice and knowledge of the provisions of the deed, which deed, independently of the annuities, provided also for the payment, as I have said, of the two sums of 1,000*l.* each to Mr. Bermingham and Mr. Baylis. Then, that being so, all the observations applicable to such transactions with the Unity Assurance Company amount to this: A man of business, with knowledge, allows his brother directors to act and proceed upon the notion that he affirms and adopts those acts, and has no objection to them, and this course of acting goes on from quarter to quarter, from half-year to half-year, during the years 1856 and 1857. It is possible to suppose a case in which a director, even though a member of the profession of the law, might defend himself from the charge of acquiescence and confirmation upon the ground that he was deceived or misled, or that he was ignorant of something which it was not his duty to know. The evidence forbids any such assumption. There is not, in my opinion, the least proof that he was deceived, there is not the least proof that he was ignorant of anything material that it was his duty to know. Accordingly, I think these transactions stand exactly on the same footing as the transaction with regard to the Unity Assurance Company. It seems that the 2,000*l.* was accounted for in this manner—a manner for which I hardly like to trust myself with an epithet: two sums of 1,000*l.* were paid out of the funds of the company, or future company, to Mr. Baylis and Mr. Bermingham, and were applied by them in paying the first instalment, I think, on the shares which they acquired. That is of no moment on the present occasion; but what is of moment on the present occasion is the deliverance subsequently, or attempted deliverance, of Mr. Baylis and Bermingham from the shares on which they paid the 2,000*l.* thus indescribably acquired. Now, that transaction took place also in the year

1856—in the month of December. I turn to the minute of the 3rd of December 1856:—"Messrs. Baylis and Bermingham having this day surrendered all right and claim to 2,000 shares each, respectively held by them, and originally taken in order to facilitate, in the first instance, the complete registration of the association in compliance with the act of parliament, and having delivered up their respective certificates for the same, resolved, that Messrs. Baylis and Bermingham be, and they are hereby relieved from all responsibility as to calls or otherwise, on account of the said 20,000 shares each, so held by them. That the said shares be transferred into the names of H. M. Burt (that is, the plaintiff), G. C. Richardson, Colin Thompson, and James Furnell, Esq., in trust for the association, and that the proceeds therefrom be applied, in due time, to the funds of the association." In this Mr. Burt (the plaintiff) must be taken to have concurred, and the minutes of that meeting are adopted and confirmed at the next. On the 12th of December 1856 the minutes of the last board, and of the extraordinary meeting of the directors held this day, are read and confirmed, Mr. Burt being a party. Now, as I have said, this took place in December 1856. No complaint, no objection, appears to have been made, on the part of Mr. Burt or on the part of any one else, during the year 1856 or the year 1857, as I understand it. But it appears that this transaction had been formally completed by a transfer of the shares in the books without waiting for the authority of a general meeting; and accordingly, in February 1858, a resolution is come to, not at all departing from the resolution of December 1856, but cancelling what I have called the premature action upon it with the view, as I collect, to a confirmation of the transaction by a general meeting. That is done in March 1858, the month in which the bill was filed, but irregularly done. It is done with more formality, if such a transaction could be confirmed effectually, by a meeting in the month of April, the month after the filing of the bill, upon which, as I understand it, the Vice Chancellor appears, as to this part of the case, mainly to have proceeded. I am of opinion, however, looking only at what took place in December 1856, that, by the con-

duct of the plaintiff and his conduct afterwards, he has precluded himself from any right of complaint, whatever right of complaint others may have, either as against the defendants or as against the plaintiff himself. As to that, it is not necessary to give an opinion. He has sued on behalf of himself and all others; and I assume that there may be others, notwithstanding what has been contended—perhaps correctly, perhaps incorrectly—on the part of the defendants; I assume that there still exist persons who have a right to complain of these transactions; but that will not give the plaintiff a title to sue for them. As, on one hand, a plaintiff who has a right to complain of an act done to a numerous society, of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested, though no other may wish to sue, so where, though there are a hundred others who do wish a suit and are entitled to sue, still, if they sue by a plaintiff only who has personally precluded himself, that suit, in my opinion, cannot proceed; and the present case, in my opinion, stands upon the same footing as if the dissatisfied shareholders, supposing them to be dissatisfied, had sued by a plaintiff who had released the defendants—for that, in my opinion, is the position in which, effectually, Mr. Burt has placed himself. Whether, therefore, agreeing or disagreeing with the particular ground on which his Honour the Vice Chancellor has proceeded, I apprehend the grounds I have stated are amply sufficient on which to render a dismissal of the bill necessary. The bill has been dismissed, with costs. I have doubted for some time as to the costs, on account of the conduct that has been exhibited on the part of some of the parties to this record; but, on the whole, I do not think it sufficiently clear that the bill should have been dismissed, without costs, to render it fit for me to give a voice for altering what has been done in that respect. I am of opinion, however, that, in dismissing the appeal, it should be dismissed, without costs, and the deposit be returned.

LORD JUSTICE TURNER.—I entirely agree with my learned Brother, and for exactly the same reasons, which, therefore, I do not think it necessary to repeat. I desire only to add, that I think the argument on

public policy is not applicable to the case, because the transaction is one which might be confirmed by all the shareholders, and, if so confirmed, would not be against public policy.

Lord JUSTICE. { RANGER v. THE GREAT
April 27. { WESTERN RAILWAY COM-
PANY.

Practice—Production of Documents on Oath—Corporation—18th Section of the Chancery Amendment Act.

A corporation were sole defendants to a suit, no officer of the company being party for the purpose of discovery. On a motion by the plaintiff that the defendants might file an affidavit, as directed by the 18th section of the statute 15 & 16 Vict. c. 86, (the Chancery Amendment Act,) as to the documents in their possession, it was ordered that the company should, before a day named, file an affidavit, made by one or more of its officers, as to such documents, unless they should in the mean time satisfy the Court that they could not procure such officer or officers to make the affidavit.

This was an appeal motion to discharge an order of Vice Chancellor Kindersley, directing that the defendants, the Great Western Railway Company, should, on or before the 24th of April, file a full and sufficient affidavit, stating whether they have, or have had, in their possession or power any, and if any, what documents relating to the matters in question in this suit (beyond those mentioned or referred to in the schedule to the answer of the defendants), and accounting for the same. When the bill was filed three of the directors were made parties, as interested in some of the property of the company, but not for purposes of discovery, and they all died during the progress of the suit, and the company were now the only defendants on the record. Under these circumstances, the company offered to file a schedule of documents, under their corporate seal, but objected to the order of the Vice Chancellor on the ground that there was no officer of the company a party to the suit to make an affidavit.

By the 18th section of the Chancery

Amendment Act (15 & 16 Vict. c. 86.), it is enacted, "that it shall be lawful for the Court, upon the application of the plaintiff in any suit, . . . whether the defendant may or may not have been required to answer the bill, or may or may not have been interrogated as to the possession of documents, to make an order for the production by any defendant, upon oath, of such of the documents in his possession or power relating to matters in question in the suit as the Court shall think right."

Mr. Anderson and Mr. T. Stevens, for the appellants, observed that the 18th section had no application to the case of corporation defendants. It applied to defendants capable of making oath. The plaintiff, had he had the purpose of discovery in view, ought to have made the secretary or other officer of the company a party defendant. They referred to—

The Attorney General v. the East Dereham Corn Exchange Company,
5 W. R. 486.

Anonymous, 1 Vern. 117.

Fresman v. Fairlie, 3 Mer. 29, 44.

Le Fezler v. Margravine of Anspach,
15 Ves. 159.

Mr. Bailey and Mr. Beeson were not called upon in support of the Vice Chancellor's order.

LORD JUSTICE TURNER.—I think the proper order to be made would be this, "It is ordered that the defendants, the Great Western Railway Company, do, on or before the 1st day of June next, file a full and sufficient affidavit, to be made by one or more of their proper officers, stating whether they have, or have had, in their possession or power any, and if any, what documents relating to the matters in question in this suit (beyond those, &c.), and accounting for the same, unless they shall in the mean time satisfy this Court by sufficient evidence that they cannot procure such officers or officer to make such affidavit,"—which will vary so far the order of his Honour the Vice Chancellor.

LORD JUSTICE KNIGHT BRUCE.—I agree in that alteration.

LORDS JUSTICES. }
May 3. } MACLEAN & DAWSON.

Practice—Service of Bill on Defendants residing out of Jurisdiction—Order 33. of May 1845.

*An order to serve a defendant out of the jurisdiction with a copy of the bill is wholly in the discretion of the Court, but it will look into the bill to see that the case made by the plaintiff is not such as *prima facie* will not obtain relief at the hearing of the cause, notwithstanding that the 33rd Order of May 1845 does not require evidence of the merits or truth of the case.*

The plaintiffs having on the 2nd of March obtained an order, under the 33rd Order of May 1845, for leave to serve a copy of their bill on the defendants William Dawson and Thomas Dawson, now residing in Scotland, this was an appeal from the decision of his Honour the Master of the Rolls refusing to discharge it. The facts are as follows:—The suit was instituted by Henry Dundas Maclean and Eleanor his wife, who was the executrix of Sarah Lodge, who died in 1838, against Henry Dawson, and William Dawson and Thomas Dawson, both out of the jurisdiction of this court, the executors of Joseph Dawson, late manager of the Carron Company, and against the executors of Henry Stainton, the agent of the company in London, and the Carron Company, to set aside the purchase of certain shares in the Carron Company, made from the female plaintiff as such executrix by the said J. Dawson in 1839, on the ground of fraud. For this purpose the bill alleged that H. Stainton, the London agent of the Carron Company, J. Dawson, manager of the company at Carron, and the defendant W. Dawson, then assistant manager of the company (who were also large shareholders of the company), kept and published false accounts of the company's workings, and concealed the true state of the company's affairs from the shareholders from the year 1825 to the year 1851, in order as well to enrich themselves directly, as indirectly to enable them to buy up the shares of their copartners at an under-value; that by these means J. Dawson

had purchased the shares of the said Sarah Lodge from the said female plaintiff, as well as shares of various other shareholders, at less than their true value; that he died possessed of seventy shares only, but it was impossible now to discover whether the ten shares bought of the plaintiff were amongst the remaining seventy, or whether J. Dawson had parted with them in his lifetime; that these facts came to the knowledge of the plaintiffs only in the year 1858; that J. Dawson died on the 5th of January 1850, a domiciled Scotchman, having made a trust disposition, whereby he gave his residuary estate, including the seventy shares in the Carron Company, certain sums of stock, and a large debt due to him from the company, to the defendants H. Dawson, W. Dawson and T. Dawson, and appointed them his executors.

The will was not proved in England, but the three residuary legatees were properly constituted executors in Scotland. They accordingly discharged all the funeral and testamentary expenses, and provided for the execution of the trusts of his trust disposition; in pursuance whereof twenty-four shares were transferred to W. Dawson, twenty-three shares to H. Dawson, and the remaining twenty-three to T. Dawson. H. Stainton died in 1851, and his executors were also made defendants.

The defendants W. and T. Dawson having been served with copies of the bill under the above-named general order, put in a conditional appearance, and then moved before the Master of the Rolls to discharge the order, but his Honour refused the motion, and they appealed (1).

(1) The judgment of the Master of the Rolls was as follows:—I am of opinion that this motion altogether fails. I apprehend the sole question—when the order speaks of discretion—is, whether on the facts appearing on the bill, or the facts as the plaintiff ought to have stated them in the bill, and brought to the attention of the Court, it would be a proper case for the Court to direct its process to be served out of the jurisdiction. The defendant may afterwards come to the Court to discharge the order, if not made in accordance with the rules of the court, or if it has been obtained by fraud; as, for instance, if it has been obtained in direct opposition to an agreement between the plaintiff and the defendant, that they should not be served. Such a question as that might be brought before the Court. But, in any other respect—assuming that it is a proper case—I have always considered,

Mr. Roll, Mr. Follett and Mr. Cotton, for the appellants, argued, that the grant of leave was not, as the Master of the Rolls had said, *ex debito justitiæ*, but was wholly in the discretion of the Court, and in this case it was eminently inconvenient that leave should be given, for the litigation related to Scotch property of a Scotch testator, was between Scotchmen and some of their Scotch representatives, and the plaintiffs themselves resided much nearer to Edinburgh than to London; there was not even an English representative, and if the plaintiff were successful, as to which there were very grave doubts, the estate could not be proved except by putting in motion the powers of the Scotch courts. They at length contended that if leave was given to serve this bill, the Court would essentially assist the plaintiffs in multiplying litigation. This and the other points of argument are examined in the judgment, and they cited—

Whitmore v. Ryan, 4 Hare, 612, 618; s.c. 15 Law J. Rep. (N.S.) Chanc. 232.

Innes v. Mitchell, 4 Drew. 141; s.c. 26 Law J. Rep. (N.S.) Chanc. 625: on appeal, 1 De Gex & Jo. 423; 26 Law J. Rep. (N.S.) Chanc. 719.

Mr. Roundell Palmer, Mr. Selwyn and Mr. John Pearson were for the plaintiffs, in support of the order at the Rolls.

Mr. Roll was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—The arguments which have been so ably urged in this case as to the multiplication of litigation, and as to the supposed unlikelihood of the present suit proving of any substantial utility to the plaintiffs, are certainly not wholly irrelevant; on the contrary, they are entitled to attention; but even if they are well founded, that will not be decisive on such an application as this. The 33rd Order of the 8th of May 1845, under which the present order was made, requires no affidavit as to the merits of the plaintiff's case. That order is as follows:—"Where a defendant in any suit is out of the jurisdiction of the Court, the Court, upon ap-

raise that question until he has appeared as a properly constituted party to this cause. Then will be the proper time to consider whether the suit can more properly be carried on in this country, or whether the rights of the parties will be better administered in Scotland. Undoubtedly, even in the consideration of that case, the Court will only be guided by what is most for the interests of the parties, and what is most for the interests of justice, and will totally disregard any other consideration. But it is new to me that this Court is to be told, in a case which is *primæ facie* a proper case, that the Court ought not to make the order on the ground of there being proceedings in Scotland which would try the whole question if the case were left to that jurisdiction. I express no opinion on that question. In my opinion, the defendants cannot raise the question whether they ought to be served or not, or whether the Court, in its proper discretion, has done right in allowing the defendants to be served. If it were otherwise, I see no reason why a party under any circumstances should not be allowed to raise the question. If a party in this country is sued, why should he not come to set aside service of *subpœna* on the ground that a suit in a foreign court with respect to the same matter would more conveniently dispose of the rights of the parties? The reason is, he has no *locus standi*. A proper discretion is to be exercised by this Court, on the facts appearing upon the bill, always supposing there is no question of fraud, and that service on the defendants in the country is not contrary to good faith. I am of opinion the motion must be refused with costs.

from the time the act was passed, that it was a matter *ex debito justitiæ*; that the Court had no right to withhold, if there were a *primæ facie* case, the order for serving the bill and process on a party in a foreign country; always leaving it open to a defendant, as soon as he appeared, to shew that the bill was one which ought not to be proceeded with against him, or to shew that, in consequence of some arrangement between the parties, it was contrary to good faith on the part of the parties who served him. But it is quite out of the question that this Court should take into its consideration any extraneous facts. The question is, whether, when I was asked for leave to serve this bill out of the jurisdiction of the Court—whether, upon the facts appearing, as stated by the bill, or which ought to have been stated, it was right then to make the order. The fact that there have been subsequent proceedings in Scotland arising out of the same matter cannot affect the propriety of the exercise of the discretion of the Court in determining whether it was right, at the time when the motion was made, that the bill should be served. I cannot conceive a course more likely to produce great expense, great litigation, great loss of time and money to the parties, than that as soon as a defendant is served out of the jurisdiction he should be at liberty, by a series of affidavits, to shew that it would be more convenient that the case should not proceed here. I expressly disclaim any opinion whether it is more desirable that the case should proceed in this court, or that the litigation subsequently commenced should be pursued in Scotland. But I am of opinion that the defendant cannot

plication supported by such evidence as shall satisfy the Court in what place or country such defendant is, or may probably be found, may order that the *subpœna* to appear to, or to appear to and answer the bill, may be served on such defendant in such place or country, or within such limits as the Court thinks fit to direct." I entirely agree that discretion is given to the Court in respect to cases in which it should or should not act under this order; but still it is impossible not to observe that no affidavit or evidence of the truth of the plaintiff's bill is required. It is, however, in my opinion, incumbent on the Court to look into the bill, though not supported by evidence; for it is easy to conceive a case of a bill so plainly absurd, or relating to such a subject-matter, or to a controversy between persons so circumstanced, as to justify the Court in at once declining to act. This case is not of that description. I have certainly been struck during the argument by the circumstance that the bill is demurrable—not upon the merits, indeed, but inasmuch as it states a demand to the discussion of which the presence of a legal personal representative in this country is indispensable, and yet the bill does not suggest the existence of such a person here or elsewhere; but such a ground of demurrer would be one which would not only not preclude the plaintiff from amending his bill, but the course of business in this Court would give him, almost as a matter of right, the liberty of amending, allowing reasonable time for that purpose; therefore, the defective nature of the bill in this respect is not a sufficient ground of objection. Then, it has been said that it is obvious, upon the case made by the bill, that even if an English personal representative be added, the plaintiffs know there can be no effectual relief, two of the executors being resident in Scotland, and only one in England; but I am not satisfied upon that ground either. Still, whether the Court looks at the case with the aid of the evidence added since the order was made at the Rolls, or only upon such materials as were before his Honour, I consider that, although there may be a considerable chance of failure of effectual relief to the plaintiffs, there is also a chance

of success; I repeat, a *chance* of success, for the bill is not, on the face of it, absurd. Then, looking to the subject-matter, and the parties to the controversy, the subject-matter consists exclusively of movables, no part immovables; the suit is not between foreigners, not between a foreigner or foreigners on the one side, and the Queen's subjects on the other; but it is wholly between subjects of the Queen, and subjects of the Queen resident in this island. It is clear that if any circumstances whatever should happen by which the two gentlemen should be brought from Glasgow and Stirling into England, they will be liable to service in the ordinary way, they will be constituted parties, and the suit will proceed. Therefore, although the case is open to doubt, and though the plaintiffs may be proceeding under considerable risk of failing, still, looking at all the facts, the case is not so evidently a bad one as to justify the Court in not allowing that service to take place in Scotland which would be valid if made in England. I repeat, that the case is far from clear; but the motion must, in my opinion, be refused; the costs, if my learned Brother does not object, to be dealt with hereafter by the Judge who shall hear the cause as costs in the cause, as between the plaintiffs on the one side, and the two Messrs. Dawson residing in Scotland on the other.

LORD JUSTICE TURNER.—As my learned Brother agrees with the Master of the Rolls, it is not necessary for me to express any opinion, and regarding it as a mere question of discretion, it would not be right for me to do so. I desire, however, to say, that, it being, in my judgment, purely a matter of discretion, it is the duty of the Court to look into the bill before making this order, to satisfy itself whether the case is one in which, in the discretion of the Court, the order ought to be made. I agree as to the costs.

Their LORDSHIPS added, that they considered that the costs at the Rolls should be dealt with in the same way as the costs before themselves.

LORDS JUSTICES. }
 March 1, 2. } GOODMAN v. GOODMAN.

*Evidence — Presumption — Marriage —
 Legitimacy — Jewish Law.*

A, a Jew, and B, a Christian woman, cohabited as man and wife for twenty-eight years, and until B's death. They had several children, who were brought up as Christians. They cohabited partly in England and partly in foreign parts. There was no evidence of any marriage having been solemnized, but there was general reputation that the parties were married, and proof of the registry of the baptism in England of several of the children as of A. and B. his wife, and that on a judicial proceeding the parties gave evidence on oath as "A. and B. his wife." The relatives of A. never recognized the fact of a marriage, and some of them swore that they did not know even of the reputation of marriage. A, in his will, referred to such of the children as were living as "my legatees." One of the Vice Chancellors decided that the children were entitled as legitimate children of A. and B. to a fund belonging to A.'s next-of-kin; and that the onus of proof lay upon those who sought to disturb the general reputation and presumption of marriage under the foregoing circumstances: and, on appeal, the decision was affirmed.

This was an appeal, presented by Mary Denis, wife of Denis Denis, of Paris, late Mary Goodman, spinster, the plaintiff in the above-named suit, and by the trustees of their marriage settlement, from an order made by Vice Chancellor Stuart, on the 12th of July 1858, on a petition in the cause. From the allegations of the petition, supported by affidavit, it appeared that a decree was made in a cause of *Goodman v. Goodman* (1), declaring what was the true construction of the will of one Philip Goodman, and directing the personal estate (a fund of considerable amount,) to be paid into court. The petition alleged that Isaac Goodman had died in August 1856, without ever having been married, and thereupon his share of the residuary personal

estate of Philip Goodman had become divisible among his (Isaac's) next-of-kin, of whom the petitioner, Mary Denis, was one. It was prayed that the fund might be sold and paid out of court in the shares in the petition mentioned. The contest, it will be observed, was between the next-of-kin of the testator other than his children, nine in number, who were alleged to be illegitimate, and those nine children, or their representatives, as the lawful children of Isaac Goodman, or, in other words, whether Isaac Goodman and Charlotte Geering were lawful husband and wife.

The petition was heard before Vice Chancellor Stuart, and an affidavit of George John Goodman, of 16, Rue Saint-Jean, Brussels, was read, in which he swore he was a son of Isaac Goodman, deceased, and that Isaac Goodman left seven children him surviving, being issue of his marriage with his wife, deponent's mother, Charlotte Goodman. On the hearing of the petition the Vice Chancellor directed inquiries whether Isaac Goodman had any and what children; and in the same month the chief clerk certified that no evidence had been produced of the solemnization of any marriage of Isaac Goodman, but if the Court should be of opinion from the evidence produced that a marriage between Isaac Goodman and Charlotte Geering, the mother of the children thereafter mentioned, was to be presumed, Isaac Goodman had nine children.

Isaac Goodman, by his will, in which he described himself as of Woburn Place, in the county of Middlesex, gave and bequeathed the whole of his property "to William Isaac Goodman, George John Goodman, Joseph Goodman, Lyon Philip Goodman, and to Rachel Goodman and to Susannah Harvey, the wife of John Harvey, and to Clara Lurrell Brown, the wife of William Brown, all at present living at Brussels." He directed that the whole of his property should be equally divided between his seven aforesaid "legatees," share and share alike. He appointed his "sisters" Harriet Goodman and Rachel Goodman his executrices; and described other persons as his "nephews" and "niece." He nowhere referred to the legatees as his children. This will was

(1) 1 De Gex & Sm. 695; s. c. 17 Law J. Rep. (M.S.) Chanc. 695.

made in London, written in the testator's handwriting, and was duly proved by the executrixes.

The evidence before the chief clerk comprised the baptismal certificates of some of the children described as "son" or "daughter" respectively "of Isaac and Charlotte Goodman," extracted from the parish registers of the church of St. Dunstan, Stepney, from the year 1807 to 1819; and affidavits of a nephew, niece, cousin, and two brothers (being all the surviving relatives) of Mrs. Goodman, and of her intimate friends, all of whom deposed to the fact that Mrs. Goodman was always referred to in conversation, and treated and considered, both in London and at her native place Pevensy, in the county of Kent, as the lawful wife of Isaac Goodman. The niece deposed that her aunt often expressed her regret that her marriage "was not recognized by her husband's family." In 1819 Mr. and Mrs. Goodman went to live at Brussels; and evidence was produced to shew the residence together there "of Isaac Goodman and his wife, Charlotte Geering," until their deaths, and that all the children, except one who was married in London, lived with them. Certificates of entries from the registries of births and deaths in the *commune* described one of the children as born of Isaac Goodman and Charlotte Geering "domiciled with her husband"; another as born of the same persons, "lawfully united." A similar copy from the register of the death of Charlotte described her as "domiciled at Hellis, wife of Isaac"; the register of Isaac Goodman's death described him as "widower of Charlotte Geering"; and the directors of the Israelite community at Brussels, in a burial certificate, described him in the same terms. Evidence was also given, that at the hearing of a public prosecution in Brussels, in 1823, both "Isaac Goodman and Charlotte Geering, wife of the said Goodman," were required and took oath to speak the truth concerning the matter in contest; and that it was customary in Belgium to describe a married woman in all official documents by her maiden name.

This, together with the affidavits of friends of Isaac and Charlotte residing in Brussels, was the evidence in support of the fact of

marriage; and which is fully examined and commented on by the Vice Chancellor (2). That on the other hand consisted of the will to the effect before set out, and the affidavits of the two sisters of Isaac Goodman (also remarked upon by his Honour), who deposed that they had heard that their brother Isaac had, many years ago, formed a connexion with a female professing the Chris-

(2) The judgment of the Vice Chancellor was as follows:—These persons who call themselves the children of Isaac Goodman come forward in this cause with a considerable body of evidence to prove that from about the year 1804 Isaac Goodman lived with Charlotte Geering as her husband, and as the legitimate father of Charlotte Geering's children. There are proved declarations by Isaac Goodman to the effect that he was the husband of Charlotte Geering, and that she was his lawful wife. There is evidence that they were received in society as husband and wife. There is also evidence that, having left this country in 1819, they went to Brussels, and resided there together as husband and wife until the death of Charlotte; that, upon solemn occasions on the birth of children, when the law of the country where they were residing required the children to be presented, and also at a judicial act at their baptism, there were solemn declarations that they were the children of Isaac Goodman and Charlotte Goodman as husband and wife. There is in evidence a document shewing that upon a judicial proceeding between other parties, these persons were called as witnesses, and gave their solemn depositions upon oath according to the form of law which was referred to in the judicial proceeding; and upon the fair construction of the documents in evidence as to that, I am bound to hold that, upon oath and upon a solemn occasion, they represented themselves in a court of justice as husband and wife. Upon the death of Charlotte in 1832, when the law of Belgium required registration and a solemn declaration, there was a declaration that Charlotte was buried as the wife of Isaac Goodman. Subsequently to her death, and during the period intervening between her death and his own in 1856, upon repeated solemn occasions he declared himself to be a widower, and the widower of the selfsame Charlotte. Upon this body of evidence the question is, whether the Court is not bound to hold that the presumption of marriage arises. If the presumption of marriage arises, of course the evidence to rebut it must be stronger than the evidence upon which the presumption is raised, or at least as strong. It is a question, then, to be decided on the weight of evidence supporting and rebutting the presumption. Against the presumption, and in order to rebut it, strong circumstances are referred to. In the first place, the will of Isaac Goodman has been produced, in which the children are not named as children, but are named as strangers. They are objects of his bounty as to nearly the whole amount of his property; and upon an occasion when it might have been expected the father of legitimate

tian faith, and that he had several children by her; that upon one occasion he asked if he could not make his children legitimate; and that they had been informed and believed, that Mr. Jacobs, their family solicitor, advised their brother Isaac not to name his children in the will as his sons and daughters, because, being illegitimate, they would lose the benefit of any legacy he might intend for them. They verily believed that he never was married; and further, that living and dying in the Jewish

faith, he could not, and would not be married in accordance with the forms of the Christian religion; and that he could not have married a Christian in accordance with the Jewish rites; for the laws of the Jews did not permit their intermarrying with Christians, and no Jewish priest would perform the ceremony. Further, that, by the family, it was always understood and reputed that their brother lived with a young woman of the Christian faith as his mistress; that he never told them he was

children would declare their legitimacy and recognize their *status* as legitimate children, he uses language that is quite consistent with the supposition that they were illegitimate. That is the first strong piece of documentary evidence which has been adduced in order to rebut the presumption. Beyond that, an ineffectual attempt has been made to refer to a declaration made by Isaac Goodman in certain judicial proceedings in this court. It is said that in an answer put in in this cause, in which the present petition was presented, the nature of the suit and proceeding making it an important thing that the fact of his having issue should be stated—in this answer put in upon oath, or at any rate with all the solemnities that would attend it if on oath—again, as in his will, he has failed to recognize these persons as his children, or to state that he had any children. The value of that as a circumstance of evidence seems to me to be small, because the frame of the bill was such as not to raise a question which, from the facts apparently in the knowledge of all parties, ought to have been raised. It is certain that other members of the family who were parties to this suit knew of his cohabitation with this woman, and knew of the existence of these children. That is certain, and knowing it, if they knew that the children were illegitimate, and that the woman was not his wife, the occasion naturally arose on which it would have been averred by them on the pleadings that he had no legitimate children. Therefore, on the whole, though it is, no doubt, a circumstance in evidence, it is one which produces small weight on my mind, that on that occasion of putting in his answer he was silent on a subject on which he was not required to speak. The next circumstance referred to is the parol evidence on affidavit of two sisters of Isaac, and of two other persons connected with his family. As to the evidence of the two sisters, it certainly goes to this—that they did not recognize this woman as the lawful wife of their brother; that they treated her, and that the reputation, so far as they were concerned, was, that she was not the lawful wife of their brother Isaac. The evidence of the other two witnesses, which seems material, is as follows:—One of them, a printer, sixty-four years of age, says he was the son of a man who was for some years a resident tutor in the house of Henry Goodman and his family, and he stated that, upon an occasion when the declaration might have been expected to be made with an even mind, Isaac Goodman, with

reference to this woman, so conducted himself as to lead to the inference that she was not his lawful wife. The passage is remarkable, and it is this:—“I was upon very intimate terms with the said Isaac Goodman, and was daily at his house, whilst he lived in London, and I was confidentially employed by him and his brother Lyon, and I knew of his acquaintance with Charlotte Geering, who was living in Greenfield Street, Whitechapel. My father, in my presence, frequently remonstrated with him for his illicit intimacy with her, urging him to marry a female of his own faith. My father has also, in my presence, questioned the said Isaac Goodman as to whether he was married to the said Charlotte Geering, which he denied, admitting however, that he was living in concubinage with her.” The affidavit goes on to say, that, about the year 1817 or 1818, the witness’s father was active in promoting a marriage between Isaac Goodman and a woman of his own faith (a Jewess), with the concurrence of the said Isaac Goodman; which was inconsistent with his being at the time a married man; but no history is given as to the latter circumstance, and it produces no great weight on my mind. Still, it is entitled to some weight as a circumstance in evidence. As to the other paragraph, which consists of an avowal that Isaac was not married to this woman, and that he admitted he was living in concubinage with her, it is express evidence upon the subject, liable only to a little deduction from its weight by another circumstance, to which I will refer. The other witness, who gave parol evidence, says that Isaac declared to him that a female with whom he was residing in that particular street (Greenfield Street) was his mistress, and not his lawful wife. I cannot hold that there is sufficient proof of the identity of this woman as being Charlotte Geering, and therefore that evidence must be taken with very great qualification, from its want of express proof of identity. What I have stated from the affidavits of these two sisters and these two individuals constitutes the great weight of the parol evidence to rebut the presumption arising from the cohabitation and repute, as testified to by the other witnesses. But the case does not rest there; for, beyond the parol evidence, there are other circumstances legitimately relied upon by those who seek to rebut the presumption of marriage; and the strongest of these circumstances perhaps is, that this woman was in an inferior position in life—that that made it an improbable thing that he should have been married to

married, or that his children were legitimate; nor did he introduce the alleged wife and family to them, or in any way ask to have them recognized as members of the family.

In the suit of *Goodman v. Goodman* Dr. Adler, Chief Rabbi of the Congregation of British Jews, had been examined, and asked—First, whether the Jewish law prohibited the solemnization of marriage between a Jew and a female of another faith;

and, secondly, whether, when a Jewish minister is called upon to solemnize marriage between two persons, who, or either of whom, are or is unknown to him, it is his duty to make inquiries with a view to ascertain that both parties are of the Jewish religion. The answer returned by Dr. Adler to these questions was as follows:—First, the Jewish law prohibits the marriage between a Jew and a female born in and of another faith; and consequently,

her without, at least, her preserving some distinct evidence upon the subject of a marriage according to the Christian faith. The other circumstance is this (I do not recollect it to have occurred in any other case) that the strongest parol evidence in support of the presumption of marriage all proceeds from the relatives of the woman, and none from the relatives of the man; that the relatives of the man who is alleged to be the husband never recognized the marriage, and never recognized the children as legitimate children. That is a circumstance of very considerable strength; but it is to be taken with this remarkable qualification—Isaac was a Jew and Charlotte was a Christian; and it seems plain that, to Jews, a marriage with a Christian woman, so far from being a thing readily recognized as an acceptable thing, is considered an odious marriage, and one rather to be rejected. It appears, in fact, that the authorities of the Jewish law would rather refuse recognition of the validity of such a marriage. Upon the other hand, it is said that in this very cause there was the legitimate and admitted—I mean admitted by Jews as a legitimate—daughter of a brother of this Isaac by a Christian woman, with whom he had formerly lived as his mistress. That, no doubt, is a circumstance which shews that between Jews the validity of a marriage with a Christian woman is for judicial purposes recognized, and that it must be recognized; but when I speak of the recognition of a marriage, and of the effect in this case of the non-recognition of this marriage by the Jewish relatives of the alleged husband, who was a Jew, it must be taken with the qualification which arises from the unquestionable fact that, as between a Jew and a Christian woman, the marriage was to Jews, and according to the law of Jews, an odious marriage. Still that is not a conclusive circumstance, for the proceedings in the cause shew that the Jews would recognize such a marriage as legitimate, because the law of England compels them; and it is in vain, therefore, to attempt to do otherwise: still the marriage is open to observation. Then, considering the whole weight of the evidence to rebut the presumption of a marriage, it rests upon the declaration, or rather the sort of language, used in Isaac's will—upon the declaration that he is reported to have made to one person that this woman was his mistress—upon the doubtful identity of the person with whom he said he was living in concubinage—upon the allegations of the husband's sisters, to whom, as Jews, the marriage, or the recognition of the marriage, would be odious—upon their not entertaining that

general reputation or that belief of a marriage, or having ever heard, so far as their statements go, any declaration of a marriage, such as have been heard by other persons to whom the marriage had been declared. It rests, moreover, upon the evidence of the circumstance of all the relatives on the husband's side never having partaken in that general reputation, or in the receipt of those declarations which other people received; and upon that weight of evidence I find myself unable judicially to say that the affidavits of those two sisters, the contents of the will, the circumstance of the sisters never having heard the marriage declared, and never recognizing the children, are to outweigh what has been repeatedly and solemnly declared by the husband—declared by him upon oath—declared by him during the wife's lifetime, and after her death in the most solemn manner, and upon one occasion upon his oath. Then what was the reputation among those persons who gave evidence of the general character and *status* enjoyed by this man and woman as husband and wife from the year 1804 downwards? It is to put the evidence of general reputation and general character against that of particular persons, not knowing the fact—who never heard the fact—and against the silence of the husband as to the fact upon one important occasion; but these circumstances do not appear to my mind sufficient to rebut the presumption which I think arises legitimately from the evidence first propounded in favour of the legitimacy of the children. I need only add, that on a question of this kind, an issue might have been asked; or if the Court felt a judicial doubt, and if its conscience were not sufficiently informed on the evidence, then it would have been the duty of the Court to direct an issue. But the present case does not appear to me so much a question of fact for a jury, but I think it a question of law on the weight of evidence; and even if the case were to be sent to a jury, the question would come back whether the Judge had laid down the law correctly to the jury as to what they ought to presume upon the weight of the evidence, or whether he had misdirected them. For these reasons I should not think myself justified in directing an issue or creating further expense, considering, as I do, that sufficient legitimate evidence has been already adduced to the Court. I will also observe, that by the desire of counsel on both sides, I have treated the question as a question of an English marriage, to be decided according to the law of England. I have some doubt whether that is the true view of

also, the solemnisation of the same. Secondly, a Jewish minister called upon to solemnise a marriage is bound to make inquiries with a view to ascertain that both parties about to be married are of the Jewish religion.

His Honour pronounced in favour of the legitimacy of the nine children of Isaac and that they were entitled to the fund, adding that the burden of proof rested entirely on those who disputed the marriage, from which decision this was an appeal.

Mr. Malins and *Mr. Waley* supported the appeal.

Mr. Bacon and *Mr. Speed*, who appeared to support the decision of the Vice Chancellor, were not called upon.

The case so entirely depends upon the weight to be attached to the evidence of presumption, and it is so carefully examined in the judgment of the Vice Chancellor, that no statement of the argument appears necessary.

LORD JUSTICE KNIGHT BRUCE.—There are, in this case, improbabilities on both sides; but the ground for presuming a marriage to have taken place, if not

the case, but however that may be, I rejoice that I am able so far to satisfy my mind that, viewing it as a question of English law as to the legitimacy of the whole nine children, I can say that the children are legitimate children, and are not to be excluded from the participation in the property of the original testator, to which on that footing they will be entitled in this cause. No decision has been cited during the argument, but on the question of reputation of marriage the law is well settled in the case of *Doe v. Fleming* (1). The law is there laid down in the clearest terms in these words:—"The general rule is that reputation is sufficient evidence of marriage, and a party who seeks to impugn a principle so well established, ought at least to furnish cases in support of his position." That is the law on the subject, and it is said, moreover, "that the rule has never been doubted. It appeared upon the trial that the mother of the lessor was received into society as a respectable woman, and under such circumstances improper conduct ought not to be presumed." Taking the law as there laid down, I treat the burden of proof to rebut such a presumption as resting entirely on those parties who dispute the fact of a marriage. The declaration will be, that there has been a marriage, and that the children are legitimate; the costs of all parties must be paid out of the general assets of the testator in the cause.

(1) 4 Bing. 266; s. c. 5 Law J. Rep. C.P. 169.

before the birth of the elder children, at least before that of the younger children, appears to me broader and more solid than the grounds for a contrary opinion. Certainly the language in which the father mentions his children in his will, not speaking of them in that relation; and certainly the total estrangement between the families not only during the life of their mother, but afterwards; and, perhaps, also the denials of the marriage which some of the witnesses allege the father to have made, are circumstances deserving attention; and, were the evidence less strong on the other side, they, in the absence of any proof of a ceremonial marriage, might have led me to a different conclusion. On the other hand, there was the constant cohabitation of the man and woman during many years as man and wife, both here and abroad; the fact of the woman being treated as his wife, and of the children being registered both here and abroad as the children of the father by his wife, the mother—for that is the effect both of the English and Belgian registration. It is true that it is consistent with the English registration that the performance of the christening took place without the presence of the father, who was of a different faith; but this does not apply to the Belgian registration, for there the father signed the register as well as his wife. When there are united to those circumstances the difference of religion—the father being a Jew, the mother a Christian—and the difference of wealth, creating a fancy of difference of station, it seems to me that the consequences from the latter class of facts prevail over the consequences from the other. According to my judgment, precedent and analogy, principle and policy, alike agree in holding the children to be legitimate. I agree with the Vice Chancellor, and the appeal must be dismissed with costs.

LORD JUSTICE TURNER.—The most important consideration in this case is the conduct and proceedings of the parties themselves. That from 1804 to 1832 they passed as husband and wife is not in dispute. That their children were brought up as legitimate children from their birth till 1856 is also not in dispute. The Court is now asked to declare them illegitimate. No doubt there is evidence in support of

that view. But to what does it amount? It is said, in the first place, that in the former suit the children were not made parties, and, therefore, were treated as not being legitimate, and that the father, in his answer, did not assert their legitimacy, and say that the property would go to them after his death. But that only comes to this, that the bill did not raise the question, and the counsel in drawing the answer did not insert an allegation that the children were legitimate. Then, it was said, that the father in his will described them by name, and not as his children; this argument was met by the case of *Lord Braybroke v. Inskip* (3). Some declarations by the father are also spoken to by some of the witnesses; but if they are to be relied on, they only raise the presumption of an intention to conceal the marriage which had been contracted with a person of a different religion. The appeal fails, and must be dismissed with costs.

M.R. } FITZROY v. THE DUKE OF
June 14. } RICHMOND.

Power of Appointment—Gift to "Sons" as a Class.

A testator had three sons. After referring to a power in his marriage settlement, he said of the settled fund "the sum of 2,000l. was settled at her marriage upon my daughter Mary"; and then he added, "the remainder I wish to be equally divided among my sons." One of the sons died in the testator's lifetime:—Held, a good appointment; and that it was made to them as a class.

The bill in this cause was filed to determine the rights of the parties in a sum of 16,297l. 12s. 6d. consols.

Sir Charles Augustus Fitzroy, in contemplation of a marriage with Lady Mary Lennox, transferred 16,297l. 12s. 6d. consols to the Duke of Richmond and the Duke of Grafton, as trustees of an indenture dated the 9th of March 1820, upon trust to pay the income to Sir C. A. Fitzroy and his assigns for life, and after his decease to pay the income to Lady M. Lennox for

life; and after the decease of the survivor upon trust for all and every, or such one or more exclusively of the other or others, of the children or child of the marriage at such age, day or time, and if more than one in such shares and proportions, and with such annual sums of money and limitations over for the benefit of the children, or some or one of them, with such provisions and upon such conditions, &c. as Sir C. A. Fitzroy and Lady M. Lennox should during their lives jointly appoint, and in default thereof, and so far as the same should not extend, then as Sir C. A. Fitzroy, in case of his surviving, should by deed or will from time to time direct or appoint; and in default thereof, and so far as the same should not extend, and if there should be two or more children of the marriage then the trust funds should be for the portions of such two or more children, to be divided between or among them in equal shares and proportions, to be vested, the shares of sons at their respective ages of twenty-one, and the shares of daughters at twenty-one, or respective days of marriage.

On the 7th of December 1847 Lady M. Fitzroy died, leaving four children, who all attained twenty-one.

Sir C. A. Fitzroy, on the 18th of December 1847, made a will, entitled "Memorandum of my wishes after death"; and thereby stated it to be his desire that property should be sold as therein mentioned, and the proceeds equally divided between his three sons, Augustus Charles Lennox Fitzroy, George Henry Fitzroy, Arthur George Fitzroy, and his daughter Mary Caroline, now the wife of Keith Stewart, or as many of them as might be then living; and after specifying several articles, which he wished to be reserved from sale, and giving some specific and pecuniary legacies, he concluded as follows:—"The funded property confided to trustees under my marriage settlement in 1820 is, I believe, left at my disposal as the survivor as far as appropriating the shares to each of my children, but of this fund the sum of 2,000l. was settled at her marriage upon my daughter Mary; the remainder I wish to be equally divided among my sons, as also any other sum of money that I may die possessed of."

On the 8th of September 1855 A. C. L.

Fitzroy, a captain in the army, was mortally wounded in action before Sebastopol, and on the 10th he died, having never been married. He left no written will; but a question was raised whether or not he left a nuncupative will. Letters of administration, as on an intestacy, were granted to G. H. Fitzroy.

On the 11th of December 1855 Sir C. A. Fitzroy married a second time; he died on the 16th of February 1858, having in no other manner revoked his will than by his second marriage.

On the 9th of July 1858 the Court of Probate granted administration of his estate to his widow, excepting such as under his marriage settlement he had appointed and disposed of by will.

On the 3rd of May 1858 letters of administration, with the will annexed, limited to all such personal estates as Sir C. A. Fitzroy by his marriage settlement had a right to appoint, and had by his will appointed and disposed of, were granted to the plaintiff A. G. Fitzroy.

Doubts arose whether the plaintiff was not entitled to a moiety of the settled stock; and whether A. C. L. Fitzroy was not included in the testamentary appointment; and whether it had not failed as to one-third of the fund, and that one-third had not devolved as in default of appointment.

Mr. R. Palmer and *Mr. Hobhouse*, for the plaintiff A. G. Fitzroy, left the construction to the Court.

Mr. Farrer, for Mary Caroline Stewart.—The wishes expressed by the testator were the index of his intention. His personal property he gave to his sons and daughter by name if then living. The settled reversionary property was given to the sons in like manner, subject only to the payment of an appointed sum of 2,000*l.*; the death, however, of A. C. L. Fitzroy had left his one-third of the fund unappointed; it remained, therefore, subject to the provisions of the settlement.—

Ackerman v. Burrows, 3 Ves. & B. 54.

Leigh v. Leigh, 17 Beav. 605; s.c. 23 Law J. Rep. (N.S.) Chanc. 287.

Mr. Selwyn and *Mr. Fremantle*, for G. H. Fitzroy.—The will admitted of no

question in respect of the testator's personal estate. The appointment of the settled property was reversionary; it was made to the sons as a class, which was to be determined at the death of the testator. The survivors, therefore, had become entitled to the whole after providing for the 2,000*l.* sterling.

In re Ham's Trusts, 2 Sim. N.S. 106; s.c. 21 Law J. Rep. (N.S.) Chanc. 217.

Les v. Pain, 4 Hare, 201; s.c. 14 Law J. Rep. (N.S.) Chanc. 346.

Cruss v. Howell, 4 Drew. 215.

THE MASTER OF THE ROLLS.—The word "sons" is a general designation of the class. The general rule is clearly established. The cases cited do not point out any violation of it, except where there is a designation of particular persons. In *Ackerman v. Burrows* the question was the meaning of the word "you": whether "to be divided amongst you" meant the same as if he had said "his mother and sisters"; and so in *Ham's Trusts* it was a question whether there was not a designation of the particular persons. In this will it is the general residue which he gives. It is not merely the remainder of the fund in the settlement, but "also any other sums of money he may die possessed of." It is the general residue which he gives to his sons, and would clearly include all his sons. Where a person uses only words which designate a class, he leaves it to the law to determine what that class may be. No doubt sons of the second marriage would not have been entitled to take under the fund settled in favour of the issue of the first marriage exclusively, but that cannot in the slightest degree affect the meaning of the words, which are a general class. When he speaks of his children, mentioning them by name, in the former part of his will, he directs that "as many of them as shall be living" shall take. If he intended the same class to take, the only way was to say his children, because so many of them as were living would take; but he intended to exclude the daughter, and therefore he intended to give it to the sons as a class. It would be a dangerous principle in construing a will to introduce any word where it is not required. If I put in "my said sons," and made it a

designation of particular persons, I should be introducing words to turn a class, according to the ordinary meaning, into a designation of particular persons, for the purpose of creating an intestacy. And if he had a son by the second marriage, I should exclude that son from taking a share in the general residue not included in the settlement. I am of opinion, it means generally sons in the fullest acceptance of the term; and that the class is to be ascertained at his death, and only those who survived can take.

M.R. } FITZROY v. THE DUKE OF
June 14, 16. } RICHMOND.

Settlement—Daughter's Portion—Infancy—Appointment—Marriage.

*Tenants for life of a fund settled on their marriage had a power to appoint the same among the children of the marriage. Upon the marriage of a daughter, one of the children of the marriage, under age, a deed was executed by the tenants for life, by which the reversion in 2,000*l.*, part of the fund, was assigned by the tenants for life to trustees to pay the income to the intended husband for life, with remainder to the wife for life, with remainder to the children of the marriage:—Held, to be a valid appointment to the daughter, and that the settlement was a good declaration of trust by the intended husband of the fortune of his wife, though an infant.*

Mary Caroline Fitzroy, when but seventeen years of age, intermarried with Keith Stewart, and in contemplation of the marriage, by a deed, dated the 9th of August 1841, Sir Charles and Lady M. Fitzroy, after reciting that it had been agreed by virtue of the powers contained in their marriage settlement, that they should appoint 2,000*l.* sterling, part of the settled funds, assigned and set over all that sum of 2,000*l.*, part of 12,000*l.* in their marriage settlement mentioned, and which they authorized jointly to distribute or

Lady M. Fitzroy, upon trust to pay the income to Keith Stewart for life, and after his decease to pay the income to M. C. Stewart for life, and after the decease of the survivor to apply the 2,000*l.* for the children of the intended marriage, of whom there were now several.

The 12,000*l.* did not correctly describe the settled funds.

It was doubted whether the power was properly exercised, and whether there was a valid settlement of the fund, as Mary C. Stewart was an infant at the time of her marriage.

Mr. Selwyn and Mr. Fremantle contended that the appointment made was bad, as not being in accordance with the power, and that the settlement made on the marriage of the infant had entirely failed—

Tucker v. Sanger, M'Cle. 424, 439; s. c. 13 Price, 307.

Birley v. Birley, 25 Beav. 299; s. c. 27 Law J. Rep. (N.S.) Chanc. 569.

Mr. Farrer.—A valid appointment was made by Sir Charles and Lady Fitzroy upon the marriage of their daughter. The power was general, and it could be exercised at any time. Infancy did not prevent its vesting. It was for her benefit. The appointment was not varied by being made the subject of a settlement. She might not then have had any power to consent; her consent, however, was not material to the appointment. Assuming, however, that the appointment was valid, the settlement by the intended husband and wife was valid, and could not be impeached after the marriage, for though the wife was an infant, the husband *jure marit* had full power to settle the fund.—

Chance on Powers, 353.

Limbard v. Grote, 1 Myl. & K. 1; s. c. 2 Law J. Rep. (N.S.) Chanc. 10.

In re Gosset's Settlement, 19 Beav. 529.

White v. St. Barbe, 1 Ves. & B. 399.

Routledge v. Dorril, 2 Ves. jun. 357.

Langston v. Blackmore, Ambl. 289.

2 *Sugden on Powers*, 261, 7th ed.

June 16.—The MASTER OF THE ROLL.—The settlement made on the marriage of Mary C. Fitzroy may be supported, as an

ing she was an infant at the time it was made, and also when she was married. It being a reversionary fund does not affect the question. The interest was reversionary in *White v. St. Barbe*, but there it was considered that a good settlement was made. The question of infancy apparently created greater doubt, but the husband can dispose of the property of the wife in expectancy against everyone except the wife him surviving. This must apply as well to an infant as to an adult female, and the Court, if the infant had been its ward, would have approved of a settlement. It would have been binding on the infant in all future time. Accordingly, I think that this must be treated on the same principle as *Routledge v. Dorril*, where the fund was considered as appointed to the daughter and then settled by the husband for the benefit of the children of the marriage; and, being of that opinion, I shall make a declaration to that effect.

See 18 & 19 Vict. c. 43.

WOOD, V.C. }
March 9, 10. } ATKINSON v. JONES.

Will—Construction—Cross-Limitations.

A testator bequeathed his residuary estate upon trust as to one moiety for his daughter M. for life, and in default of issue of M. upon trust as to one half part thereof as M. should appoint, and in default of appointment over, and as to the other half part of such moiety, upon the same trusts as were therein after declared concerning the other moiety of his residuary estate; and he proceeded to declare precisely similar trusts of the other moiety, substituting the name of his daughter E. for that of M. Both M. and E. exercised their powers of appointment, and died without issue:—Held, that each appointment effectually disposed of one moiety of the testator's residuary estate.

Richard Battye, by his will, dated the 22nd of May 1829, after certain devises and bequests, gave all other his real and personal estate to trustees, upon trust to sell and convert the same into money, and after setting apart several sums of money amounting to 17,000*l.*, to invest the resi-

due, and to stand possessed thereof, upon trust, during the life of his daughter, Mary Jane, the wife of James Crosland Fenton, to pay and apply the dividends, interest and annual proceeds of one moiety or equal half part or share of such residue as his said daughter Mary Jane Fenton should direct or appoint, or in default of such direction or appointment, for her sole and separate use; and from and immediately after the decease of the said Mary Jane Fenton, should stand possessed of the said moiety, in trust for such of the children or child of his said daughter Mary Jane Fenton, as she should direct or appoint, and in default of such direction and appointment in trust for all and every the children or only child of the said Mary Jane Fenton, who being a son or sons should attain the age of twenty-one years, or being a daughter or daughters, should attain that age, or be married, in equal shares as tenants in common; and if there should be but one child, the whole to be in trust for that one child; and the said will contained trusts for the maintenance and education of the child or children of the said Mary Jane Fenton, and for the accumulation of the surplus income of their respective fortunes. Provided always, and the said testator declared his intention to be, that if there should be no child of the said Mary Jane Fenton (which event happened) who, being a son, should attain the age of twenty-one years, or, being a daughter, should attain that age or marry, then and in such case the said trustees should, from and after the decease of the said Mary Jane Fenton, and such default or failure of children as aforesaid, stand and be possessed of, and interested in the said moiety or equal half part or share of his said residuary estate thereinbefore given in trust for the said Mary Jane Fenton, and the dividends, interest and annual proceeds thereof, or the part or parts thereof unapplied under the trust or direction thereinbefore contained for the maintenance and education of the child or children of the said Mary Jane Fenton, and the accumulations, if any, thereof respectively, upon the trusts following, that is to say, as to one half part of such moiety, upon trust to pay, assign and transfer the same unto such person or

persons, and in such parts and proportions, and under and subject to such conditions, restrictions, charges and limitations as the said Mary Jane Fenton should at any time, notwithstanding her coverture, by deed or will appoint; and in default of such appointment, upon trust to pay and divide the same unto and amongst his children or child, or grandchildren or grandchild, equally amongst them, share and share alike; and if but one, then to such only child or grandchild; and as to the other half part of such moiety of his said residuary estate so thereinbefore given in trust for the said Mary Jane Fenton as aforesaid, upon the same trusts as were thereafter declared of the moiety or equal half part or share of his said residuary estate next thereafter disposed of, in trust for his daughter Ellen Elizabeth Battye, or such of them as should be subsisting and capable of taking effect; and as to the remaining moiety or equal half part or share of his said residuary estate, upon trust that the said trustees should, during the life of his daughter Ellen Elizabeth Battye, pay and apply the dividends, interest and annual proceeds thereof, as his said daughter Ellen Elizabeth Battye should direct or appoint, or, in default of such direction or appointment, for her sole and separate use; and from and immediately after the decease of his said daughter Ellen Elizabeth Battye, should stand possessed of the said moiety or equal half part or share, in trust for such of the children or child of his said daughter Ellen Elizabeth Battye as she should direct and appoint, and in default of such direction and appointment, in trust for all and every the children and child of the said Ellen Elizabeth Battye (if any) who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or be married, in equal shares as tenants in common; and if there should be but one child, the whole to be in trust for that one child; and the said will contained trusts for the maintenance and education of the child or children of the said Ellen Elizabeth Battye, and for the accumulation of the income of their respective fortunes. And the testator declared his will to be, that if there should be no child of the said

Ellen Elizabeth Battye who, being a son, should attain the age of twenty-one years, or, being a daughter, should attain that age or marry, then and in such case the said trustees should, after the decease of the said Ellen Elizabeth Battye and such default or failure of children of her the said Ellen Elizabeth Battye as aforesaid, stand and be possessed of, and interested in, the lastly thereinbefore-mentioned moiety or equal half part or share of his residuary estate so given in trust for the said Ellen Elizabeth Battye as aforesaid, and the dividends, interest and annual proceeds thereof, or the part or parts thereof unapplied under the trust or declaration thereinbefore contained, for the maintenance and education of the child or children of the said Ellen Elizabeth Battye, and the accumulations, if any, thereof respectively, upon the trusts following: that is to say, as to one half part of such moiety, upon trust to pay, assign and transfer the same unto such person or persons, in such parts and proportions, and under and subject to such conditions, restrictions, charges and limitations as the said Ellen Elizabeth Battye, notwithstanding her coverture, by deed or will should direct or appoint; and in default of such appointment, upon trust to pay and divide the same unto and amongst his children or child, grandchildren or grandchild, equally amongst them, share and share alike; and if but one, then to such only child or grandchild; and as to the other half part of such moiety of his said residuary estate so thereinbefore given in trust for the said Ellen Elizabeth Battye as aforesaid, upon the same trusts as were declared of the moiety or equal half part or share of his said residuary estate thereinbefore given in trust for his said daughter Mary Jane Fenton, or such of them as should be subsisting or capable of taking effect.

The will contained no further disposition of residue than as above stated. The testator died on the 29th of November 1829, leaving Mary Jane Fenton and Ellen Elizabeth Battye surviving him.

Mary Jane Fenton, by her will, dated the 30th of November 1829, in pursuance of the power given to her by the will of the testator R. Battye, appointed all and singular the trust-moneys, parts or shares,

property and effects, which under the will of R. Battye were vested in trust for her, or over which she had then or might thereafter have any interest, unto her husband, James Crosland Fenton, absolutely.

Mrs. Fenton died in 1848.

Ellen Elizabeth Battye married Mr. Atkinson, the plaintiff, after the death of the testator; and by indenture of settlement made thereon she appointed all her interest under the residuary gift in R. Battye's will to trustees, upon such trusts as Mrs. Atkinson should by deed or will appoint.

By her will, dated the 26th of July 1849, Mrs. Atkinson appointed her interest under the settlement in favour of her husband; and she died in the year 1849. Neither Mrs. Fenton nor Mrs. Atkinson ever had any children.

Mr. Fenton died in the year 1853, having, by his will, appointed the defendants Jones, Fenton and Rayner his executors. Under these circumstances, the question arose as to what interest the plaintiff and W. Fenton's executors took in the testator's residuary estate under the appointments of their respective wives.

Mr. Rolt, Mr. James, Mr. Dart and Mr. W. H. G. Bagshawe, for the plaintiff and the executors of J. C. Fenton, claimed between them the whole fund. The moiety which was by the testator's will given over on the decease of either daughter without issue, would again become divisible into moieties, one of which would be subject to the appointment of the other daughter, and the other would be divisible as before, and so on *ad infinitum*, continually dividing though never exhausting the residue; and each fresh division would bring one-half thereof within the appointment.

Mr. Daniel, Mr. Hardy and Mr. J. T. Humphry, for the heir-at-law and next-of-kin, contended, that there was an intestacy as to one-half of the moiety of each share, and that when each daughter had appointed one moiety of her own share and one-half of the moiety of her sister's share, the power was exhausted and the residue undisposed of.

Wood, V.C. (without hearing the reply).
—I think that this will is really, though I

hardly like to say so after so many opinions upon it (1), reasonably clear. The testator obviously had only three classes of persons in view—that is to say, first, each of these two daughters; secondly, her children; and, thirdly, his own other children and grandchildren. Those are the only persons he contemplated at all in disposing of the whole residue of his estate, and he goes to work by a set of cross-limitations contemplating that as to each daughter's share it shall be settled on her children, and if she has no child then she shall be the absolute owner of one moiety of her share, that is, she shall have an absolute power of appointment over it, which is pretty much the same thing as ownership. She shall be owner, if she thinks fit to make herself owner of the one moiety; if she does not do that, it is to go to the children and the grandchildren of the testator. Then the idea strikes the testator that he would like to give over the other moiety, in case of that daughter having no child, to the other daughter and her children in the same way. But suppose the other daughter has no children, then he has exactly the same intention with regard to her share, that is to say, he prefers in either of these cases the possible children of these favoured daughters, either to giving each of his daughters an absolute power, or to giving any share to the grandchildren and other children in the event of her not making any appointment. For that purpose and that purpose only, namely, for providing for the children of one daughter, in the event of there being no child of the other daughter he takes it out of the power of disposition. It seems natural that he would have given the daughter who had no children a power over the whole fund, but he says, "No, she has no child, and does not want the whole fund; she shall only have power over half the fund, and the other half shall go to the other sister and her children; but if that other sister and her children do not want it, it shall go back. I do not want any longer to abstract it from the control of the daughter to whom it was originally given. I only want to abstract it for that particular purpose, and

(1) Several eminent conveyancers had written conflicting opinions upon the case.

when that purpose is answered there is no reason for saying that it shall not go back to the old share." He certainly does not advert to the somewhat curious effect it has of drawing it backwards and forwards; it is to go to the same trusts, "or such of them as are subsisting and capable of taking effect." The words, "subsisting and capable of taking effect," would probably remove the absurdity of the case; for if it is written out in full it will then run in this way: "If Mary has no child, then half as Mary shall appoint, and the other half on the same trusts as Ellen's share." Then, when you remember what Ellen's share is, it would be thus: "As to the other half, to Ellen for life, and if she has no child, then as to one moiety as Ellen shall appoint, and as to the other moiety upon the trusts of Mary's share," which are to Mary for life, with remainder to her children, and so on. Those trusts for Mary and her children are no longer capable of taking effect. But Mary's power of appointment still remains, and there still remain the other children and grandchildren of the testator, so that the absurdity is got rid of by the words "or such as are subsisting and capable of taking effect."

It appears to have been thought that when the lady has made an appointment it is done once for all, and though she appoints in words large enough to convey every interest vested or capable of taking effect, there is no trust capable of taking effect. I apprehend when the lady has put her hand to an appointment, her appointees are exactly where the children and grandchildren would have been in the event of no appointment; and the effect of the limitation over would be that the share would have to be continually carried backwards and forwards on each limitation. When you come to the second set of limitations you must leave out the daughter and children, because they would be gone *ex hypothesi*—they would not be capable of taking; but, then, are not the children and grandchildren and the appointees of each daughter still capable of taking? In this way the share would come backwards and forwards. Although this may seem a whimsical way of limitation, and although it was probably not the way in which the testator contemplated it would

go, I think there is apparent an intention to withdraw the moiety in the first instance simply for the purpose of letting in the interest of the others. He introduces a set of words which by this shifting of the limitations seems to me capable of carrying into effect this idea, and I do not see why I am to strike out any portion of the trusts which are capable of taking effect. Even if you take it as a mathematical proposition it will in reality come out that the moiety is given to the appointment of each daughter; and if you take it on the simple practical question, the law would say if the property is given down to a farthing, it is given altogether. Taken either one way or the other, there being no other determination of the case to which I can come, it seems to me that the shares do continue to shift over. It is some satisfaction to find that an eminent conveyancer has thought it right to give a precedent for cross-limitations in this form (2); but I should have thought there would be a more simple way of doing it. I do not remember to have ever met with a will in this form.

Declare that the appointment of Mrs. Atkinson and Mrs. Fenton each effectually disposed of one moiety of the testator's residuary estate.

M.R. }
 March 9, } GREATER v. GREATER.
 11, 16. }

Devise—"Or" read "and"—Introduction of Repugnant Condition—Gift over made void.

A testator devised specific shares in an estate to several persons nominatim, to hold the same as tenants in common, and not as joint-tenants; and in the event of any of them dying before having heirs of their body, "or" making a particular disposition of his or her property, then his or her share was to go to the survivors:—Held, that the devisees did not take estates tail, but estates in fee; that the gift over could only take effect on the happening of two events; that the

(2) See Martin's Conveyancing, by Davidson, vol. 5, p. 83.

word "or" must be read "and," although in effect it introduced a condition repugnant to the estate previously given, and made the gift over void.

Held, also, that the shares of those devisees who died in the testator's lifetime were undisposed of, and passed to the heir-at-law.

Timothy Greated, by his will, dated the 21st of January 1834, devised as follows: "With respect to my real estate, as devised to me by my late sister, I give, devise and bequeath to them (*i. e.* his children thereafter mentioned) and their heirs, for ever, as follows, viz. to Charles Augustine Greated five thirtieth parts, to Joseph Greated four ditto, to T. Greated four ditto, to James Greated four ditto, to William Arthur Greated four ditto, to Elizabeth Greated three ditto, to Catherine King Greated three ditto, to Emily Greated three ditto, to hold the same as tenants in common, and not as joint-tenants; and in the event of any of them dying before having heirs of their body, or making a particular disposition of his or her property, then and in that case his or her share to go to the survivors in the same proportion as aforesaid as the survivors may bear to each other."

The testator died in July 1858. Elizabeth Greated and William Arthur Greated died unmarried in the testator's lifetime. The other devisees were still living.

The suit was instituted by some of the devisees for the opinion of the Court upon the construction of the devise.

Mr. R. Palmer and *Mr. Jessel*, for the plaintiffs.—The testator did not intend to die intestate as to any part of the estate given to him by his sister. The parties to take were designated, and whether in fee or in tail, still the shares of those who died in the lifetime of the testator were to pass to the survivors—

Avelyn v. Ward, 1 Ves. 420.

Doe d. Wells v. Scott, 3 M. & S. 300.

Ledsome v. Hickman, 2 Vern. 611.

Humphreys v. Howes, 1 Russ. & M. 639; s. c. 8 Law J. Rep. Chanc. 165.

Green v. Harvey, 1 Hare, 428; s. c. 11 Law J. Rep. (n.s.) Chanc. 290.

Ive v. King, 16 Beav. 46; s. c. 21 Law J. Rep. (n.s.) Chanc. 560.

Doe d. Stevenson v. Glover, 1 Com. B. Rep. 448; s. c. 14 Law J. Rep. (n.s.) C.P. 169.

Bretton v. Lethulier, 2 Vern. 653.

Mr. Bird, for others of the devisees, supported the plaintiffs.

Mr. G. L. Russell.—If the word "or" is read "and" the devisees would then take an estate in fee, and the condition that the devisee should make no disposition of his share of the estate would be repugnant to the estate given, and the gift over would be void; and as the shares of those dying in the testator's lifetime would be undisposed of, they must pass to the heir-at-law.—

Ross v. Ross, 1 J. & W. 154.

Holmes v. Godson, 25 Law J. Rep. (n.s.) Chanc. 317.

Watkins v. Williams, 3 Mac. & G. 622; s. c. 21 Law J. Rep. (n.s.) Chanc. 601.

Doo v. Brabant, 3 Bro. C.C. 393; s. c. 4 Term Rep. 706.

Calthorpe v. Gough, 4 Term Rep. 707, n.

Tarbuck v. Tarbuck, 4 Law J. Rep. (n.s.) Chanc. 129.

Cuthbert v. Purrier, Jacob, 415.

Harris v. Davis, 1 Coll. 416.

Williams v. Chilly, 3 Ves. 545.

In re Yalden, 1 De Gex, M. & G. 53.

Tracey v. Glover, cited in 3 Leo. 130, pl. 183; s. c. Godb. 16.

2 *Jarman on Wills*, 269, 667, 2nd ed.

THE MASTER OF THE ROLLS.—I have to determine what estate the eight persons named take in the devise made by Timothy Greated. This involves the question, whether the word "or" between the words "dying before having heirs of their body" and the words "making a particular disposition of his or her property" is to be read disjunctively or conjunctively—whether the word "or" is to be read "and." In my opinion the estate given to these persons is an estate in fee, with an executory devise over upon the happening of a contingency consisting of two events, namely, a failure of heirs of the body, and the making a particular disposition of the property. If the latter branch of the alternative were omitted, that is, if the words

"or making a particular disposition of his or her property" were struck out of the will, there is no question but that it would be an estate tail; it would be simply a devise to one and his heirs, and a devise over in the event of his dying without heirs of his body, which would be an estate tail. But this is not the only event on which the devise over is to take effect. The words are "dying before having heirs of their body, or making a particular disposition of his or her property, then, in that case, his or her share to go to the survivors." In my opinion the gift over is to take effect upon a double event, and the estate given to these persons cannot be treated as an estate tail, but as an estate in fee, with a gift over upon the happening of a future contingency, which consists of two events, namely, a particular disposition by the devisee, or the failure of heirs of the body. The cases cited sufficiently establish that the Court will convert the word "or" into "and" where the context requires it, although the effect of this may be to introduce a condition repugnant to the estate previously given. In *The Incorporated Society v. Richards* (1) the words were, "Shall die without issue or make any will," and there the word "or" was read "and," and here the words are, "die before having heirs of their body, or making a particular disposition of his or her property." It is scarcely possible to find two cases more alike; and reading the word "or" as the word "and," which I do for the purpose of giving effect to what is the clear meaning of the context, then I am of opinion that this is a condition repugnant to the estate previously given, and that the gift over after the gift of an estate in fee, on the death of the devisee before having issue or making a particular disposition, is wholly void. It is unnecessary to go through the cases on this point, because it is clear that when an estate is given to a person in fee, with a gift over in case he disposes of the estate, the gift over is wholly repugnant; and the only question here really is, what is the estate given in the first instance—whether it is an estate in fee or an estate tail? and, as I have before stated,

it is an estate in fee. With respect to the shares of Elizabeth and William Arthur, who died in the lifetime of the testator, the question is distinct from that which arises where there is a gift to a person, and in case of the neglect or refusal by him to perform a condition, then over,—in such case, if the devisee dies before the testator, the gift over takes effect. It is unnecessary to go into the distinctions which arise in cases similar to *Avelyn v. Ward*. Most of those cases shew that even if the gift over were not limited to take effect on an event inconsistent with the previous gift, it would fail altogether in consequence of the death of the devisee in the lifetime of the testator. The result therefore is, that the shares devised to Elizabeth and William Arthur were undisposed of, and devolve upon the heir-at-law.

M.R. }
 March 14. } STRINGER v. GARDNER.

Will—Parol Evidence—Ambiguity.

Parol evidence will not be admitted to shew that a bequest in a former will had been inadvertently allowed to remain in a second will.

A testator, in the lifetime of his niece E, made a will containing bequests in her favour. She afterwards died, leaving a granddaughter, E. J, who was a great-great-niece of the testator. With a knowledge of these facts, the testator made a second will, which contained bequests to E, identical with those contained in his former will:—Held, that the testator's great-great-niece was within the description, and that she was entitled to the legacies.

This suit was instituted, by Elizabeth Jane Stringer, to establish her right to the following bequests:—

Benjamin Tapley, by his will, dated the 18th of January 1852, bequeathed as follows:—"I give and bequeath unto my niece Elizabeth Stringer the sum of 20*l.* for mourning"; and after other bequests he said:—"As to all that my cottage and premises, called Rose Cottage, upon trust for my said niece Elizabeth Stringer, her executors, administrators and assigns."

(1) 1 Dru. & W. 258.

The testator died in September 1856. He had not at the date of his will, or at any time afterwards, a niece of the name of Elizabeth Stringer; but Elizabeth Stringer, a niece of the testator, had died, in February 1848, previously to the date of his will, leaving a granddaughter, named Elizabeth Jane Stringer, who was the only relation of the testator of the name of Stringer, or of the name of Elizabeth, living at the date of his will and of his death. She was about five years old at the date of the testator's will.

Evidence was gone into by the next-of-kin to shew that a will, made by the testator in May 1847, contained bequests "to his niece Elizabeth Stringer," who was then living, in the same words as those used in his second will; and that in 1850 he made a codicil to his will, which did not affect those bequests; that in January 1852 the testator instructed his solicitor to prepare a codicil for the purpose of making some alterations in his will; that the solicitor advised the testator not to make a second codicil, but to make such alterations in the will of May 1847 as might be desired; that the solicitor accordingly made such alterations in the will of May 1847, and that the will of the 13th of January 1852 was accordingly executed by the testator; that the solicitor was not aware that Elizabeth Stringer, the testator's niece, was dead at that time, and that the attention of the testator was not drawn to that fact. There was evidence, on the part of the plaintiff, shewing that the testator knew that Elizabeth Stringer was dead, he having been present at her funeral.

Mr. R. Palmer and Mr. Lindley, for the plaintiff.—The will was evidence that the testator did not contemplate intestacy. If there was ambiguity, evidence was admissible to shew the intention of the testator, but the Court would never admit evidence to expunge a bequest: it would be a most dangerous innovation—

Bernasconi v. Atkinson, 10 Hare 345; s. c. 23 Law J. Rep. (N.S.) Chanc. 184.

Miller v. Travers, 8 Bing. 244.

Newbolt v. Pryce, 14 Sim. 354.

Bennett v. Marshall, 2 Kay & J. 740.

Wigram on Evidence, 169, 4th edit.

Mr. Selwyn and Mr. Dean, for the defendants.—Evidence is always admissible to shew a mistake in the will: the gifts had been inadvertently allowed to remain in the will. It was most improbable that the testator would leave a legacy of 20*l.* for mourning to a child of five years old.—

Selwood v. Mildmay, 3 Ves. 306.

Doe d. Hiscocks v. Hiscocks, 5 Mee.

& W. 363; s. c. 9 Law J. Rep.

(N.S.) Exch. 27.

THE MASTER OF THE ROLLS.—The plaintiff is entitled to this bequest. The rule as to the reception of parol evidence to explain a will is perfectly clear. In every case of ambiguity, whether latent or patent, parol evidence is admissible to shew the state of the testator's family or property; but the cases in which parol evidence is admissible to shew the person intended to be designated by the testator are those cases of latent ambiguity mentioned by Sir J. Wigram, where there are two or more persons, who answer other descriptions in the will, each of whom, standing alone, would be entitled to take. If there had been another Elizabeth Stringer living at the date of the will parol evidence would have been admissible to ascertain who the person was the testator intended to designate. But in this case the Court is asked to admit parol evidence, not for the purpose of explaining the meaning of the testator, but for the purpose of shewing that he had no meaning at all; in fact, for the purpose of expunging the words from the will altogether. To admit evidence for such a purpose would be to create the greatest alarm in the minds of testators, and to introduce the greatest uncertainty in the construction of wills. All that the Court has to do is to see if the words of the will are sufficiently clear to point to a particular person. If the evidence had gone to shew that the testator had never heard of any Elizabeth Stringer, that there was no such person related to him, and that the person who claimed was a mere stranger, the case would be different. There was a person named Elizabeth related to the testator by blood, who may be described as the great-niece of the testator, or the niece twice removed; but in ordinary language she might be described as the niece of the

testator. The question then is, whether the plaintiff is entitled to take under the words "my niece Elizabeth Stringer," her full name being Elizabeth Jane Stringer. One conclusion alone can be arrived at, which is that the plaintiff is entitled; and I must make a declaration to that effect (1).

LORDS JUSTICES.

May 31;

June 1, 30.

NELSON v. STOCKER.

Infant—Misrepresentation of Age—Husband and Wife—Settlement—Covenant.

*On the marriage between a minor of seventeen and a widow of thirty-two, possessed of 1,000*l.* in business, he covenanted by settlement to pay 1,000*l.* to a trustee, upon trust for the separate use of the lady for life, and if she should die in his lifetime, for the children of the lady by a former marriage. After the marriage the husband possessed himself of the stock of the wife's business, and carried it on till her death, seven years afterwards. The trustee demanded payment of the 1,000*l.*, and on the husband refusing to pay, he filed a bill on behalf of the children of the former marriage. The husband set up as his defence that he was an infant, and that the wife knew the fact, at the time of the marriage. The evidence proved the infancy, and an assertion by the husband to the wife's solicitor that he was of age, but it also proved that the wife knew of the infancy. One of the Vice Chancellors decreed that, on the grounds of misrepresentation and acquiescence, the infancy was no defence, and made a decree for the plaintiff. On appeal,—Held, reversing that decision, that the bill must be dismissed, for that the case upon the evidence must be taken as if the fact of infancy had been stated in the settlement; that the rights of the husband must, as to the ground of acquiescence, be taken to be the same as on the day after his marriage; that to deprive an infant of the privilege of infancy, more is necessary than shewing he made a false representation, for it must be proved that the party to whom it is made was deceived, and that contracts made with an infant, known to be so, are*

binding on those who enter into them, for infancy is a legal privilege, and not to be broken in upon on slight grounds.

This was an appeal from a decree made by Vice Chancellor Stuart, in a suit in which the three surviving (of four) infant children of the late Anne Perkins Stocker (formerly Nelson, widow), by Henry Wise, their next friend, were plaintiffs, and William Burbank Stocker, the second husband of Mrs. Nelson, was defendant, by which his Honour decided that the defendant must pay 1,000*l.*, without interest, within three months. The circumstances are as follows:—The late Mr. J. H. Nelson carried on at Newport, in Monmouthshire, until his death, the business of a pawnbroker, which his widow continued. In contemplation of a second marriage, with Mr. W. B. Stocker, a settlement, dated the 10th of October 1850 was executed, Mr. Stocker being a party of the first part, the widow of the second part, and Mr. Ebenezer Vaughan Jenkins, a trustee, of the third part; by which it was recited that Mrs. Nelson had four children by her former husband, and that she had carried on business at Newport as a pawnbroker, and had then employed in such business a capital of upwards of 1,000*l.*, and that a marriage was intended, and that upon the treaty for the intended marriage it was agreed that Mr. Stocker should enter into such covenant as was thereafter contained for the payment to the said trustee of the sum of 1,000*l.* and interest, and that the said trustee should stand possessed of 1,000*l.* and interest upon and for the trusts thereafter declared. It was then witnessed that, in consideration of the intended marriage and of the agreement, Mr. Stocker thereby for himself, his executors, administrators and assigns, covenanted with the trustee, his executors, administrators and assigns, and also with the trustee or trustees for the time being of the deed, that in case the said marriage should be solemnized, he, his heirs, executors or administrators, would pay to the trustee, his executors, administrators or assigns, or other the trustee or trustees, the sum of 1,000*l.* And it was provided that it should not be lawful for the trustee or trustees, during the lifetime of Anne Perkins Nelson, to compel payment of the 1,000*l.* unless required

(1) July 2.—This decision was affirmed by the full Court of Appeal.

so to do by her, by writing under her hand. The trusts of the 1,000*l.* were declared to be during the joint lives of Mr. Stocker and Mrs. Nelson, for her separate use, and if she survived, for herself absolutely; but if she should die in the lifetime of Mr. Stocker, then for her four children by John Nelson, her former husband.

The marriage took place three days after the date of the settlement, which was executed by all parties, and Mr. Stocker entered into possession of the stock-in-trade of the pawnbroking business, and carried on the same up to the death of his wife, on the 11th of August 1857. One of her children by the former marriage had died, and she had children by her second husband, the whole family having been maintained in the house and at school by Mr. Stocker and his wife, and after her death, until the institution of this suit, by him alone. A week after Mrs. Stocker died, and on the 17th of August, the trustee of the settlement (who had been appointed in the month of March 1857, in lieu of Mr. Jenkins, who never acted) wrote a letter to Mr. Stocker, requesting payment to be made of the 1,000*l.* A solicitor, on behalf of Mr. Stocker, wrote in reply as follows:—

“Newport, Monday, Aug. 20, 1857.

“Sir,—Mr. Stocker has placed your letter to him in my hands, with instructions to reply that at the time the settlement in question was made he was a minor, and therefore not competent to bind himself by deed, and now that he is of full age and more competent to judge of the propriety of executing such a settlement, he declines to be bound by the document in question; and I may add, that from the time of his majority he has always expressed and acted upon that determination.”

Upon this the bill was filed, alleging that the defendant was, at the execution of the settlement and at the time of his marriage, of full age, and that he represented himself as of full age to his late wife, and that she executed the settlement on the faith of that representation; and praying that the defendant might be decreed to pay to the trustee and next friend of the plaintiffs the sum of 1,000*l.* and interest from the death of the said Anne Perkins Stocker.

The defendant by his answer stated that

shortly after the marriage he found that the business was not worth more than 700*l.*; that he was not of full age at the time of the execution of the settlement and the marriage, and he was then only seventeen years of age, having been born in 1832; that in June 1850 he entered into an engagement with Mrs. Nelson to assist her in her business, and very shortly after Mrs. Nelson, who was then of the age of thirty-two or thereabouts, became very anxious that he should marry her, and frequently pressed him most urgently to do so; that at last he consented, and they were married in October 1850; that at the time when the ceremony was performed, the defendant thought that some person, but who in particular he did not remember, asked him if he was of age, and to the best of his belief Mrs. Nelson answered for him that he was; that at that time he was not aware that he was not of age; that his father died two months before he (defendant) was born, and that he left home at a very early age; that after he had agreed to marry Mrs. Nelson, she proposed the settlement, to which he agreed, and it was executed at her expense; and that previously to his signing the settlement he thought the solicitor asked him, in the course of conversation, whether he was of age, and the defendant replied, as was then the fact, that he thought he was; but he did not then know that the question was of any importance. And by his affidavit he further represented that he had never at any time since he attained the age of twenty-one adopted or confirmed the settlement, but, on the contrary, he had always, since he discovered what his age was at the time of the marriage (which discovery he made within a year after the date of the settlement) refused to be bound by it, and he denied that the marriage was solemnized on the faith of any representation whatever as to his age. Among the pieces of evidence were letters of the late Mrs. Stocker to the trustee, from which it appeared that, in March 1857, she was apprehensive that her husband (as he had threatened) intended to sell the property secretly and at any sacrifice, so as to avoid her claim; and the defendant's near relatives, his mother and his aunt, proved that he was born on the 29th of Novem-

ber 1832, and his age was spoken of in the register book of marriage thus—"William Burbank Stocker, of full age."

There was other evidence in the cause, but it is fully referred to in their Lordships' judgment; and as the effect of the arguments urged on the appeal are there also fully stated and examined, a recapitulation of them is rendered unnecessary.

Mr. Malins and Mr. W. Wylls Mackeson, for the plaintiffs, supported the decision of the Vice Chancellor, citing

King v. King, 30 Law T. Rep. 113.

Clarke v. Cobley, 2 Cox, 173.

Stikeman v. Dawson, 1 De Gex & Sm. 90; s. c. 16 Law J. Rep. (n.s.) Chanc. 205.

Wright v. Snowe, 2 De Gex & Sm. 321.

Overton v. Banister, 3 Hare, 503.

Cory v. Gertcken, 2 Madd. 40.

Eson v. Nicholas, 1 De Gex & Sm. 118, n.

Barrow v. Barrow, 4 Kay & J. 409; s. c. 27 Law J. Rep. (n.s.) Chanc. 678.

Jorden v. Money, 5 H.L. Cas. 185; s. c. 23 Law J. Rep. (n.s.) Chanc. 865.

The Unity Banking Association v. King, 27 Law J. Rep. (n.s.) Chanc. 585.

Field v. Moore, 7 De Gex, M. & G. 691; s. c. 25 Law J. Rep. (n.s.) Chanc. 66.

Zouch v. Parsons, 3 Burr. 1794.

Savage v. Foster, 9 Mod. 35.

Furnivall v. Coombes, 6 Scott, N.C. 522; s. c. 12 Law J. Rep. (n.s.) C.P. 265.

Mr. Elmsley, Mr. Smithies and Mr. Pemberton, for the defendant, the appellant, relied upon the following authorities:

Watts v. Creswell, 9 Vin. 415; s. c. 2 Eq. Abr. 515.

Campbell v. Ingilby, 21 Beav. 567; s. c. 25 Law J. Rep. (n.s.) Chanc. 761.

Strathmore v. Bowes, 7 Term Rep. 482.

Lance v. Norman, 2 Chanc. Rep. 79.

Co. Litt. 259.

Baylis v. Dineley, 3 M. & S. 477.

White and Tudor's Leading Cases, 283.

Statutes—9 Geo. 4. c. 14. s. 5. and 8 & 9 Vict. c. 106. s. 5.

June 30.—**LORD JUSTICE KNIGHT BRUCE.**—It being established in the cause that the defendant did not attain his majority before the latter part of the year 1853, he is *primâ facie* not bound by the instrument of settlement signed and sealed by him in the year 1850, the year of his marriage, which it is the object of the suit to enforce against him. The plaintiffs, however, say that the defendant is bound by the instrument; because, as the plaintiffs contend, the defendant, with knowledge of his true age, misrepresented his age to his now deceased wife, and caused her, when the settlement was agreed to, when it was prepared and signed, and when they married, to believe him not on any of those occasions to be a minor. The plaintiffs say that she accepted the settlement in that faith, and married in that belief—a faith and belief induced, they assert, by the defendant's fraud. The plaintiffs also say that, independently of any question of fraud before the marriage, the defendant's conduct after the marriage, and especially after his majority, amounted to a confirmation by him of the settlement, and that, on both grounds or one of them, he is barred from denying his liability to make it good. It appears to me, upon the whole of the evidence, however, that the defendant's deceased wife is not shewn to have been defrauded or deceived by the defendant in any respect before their marriage. I believe that at the time of the marriage and previous to it—I believe that before the instrument of settlement in question was signed by either of them, and before it was prepared—she was aware of his minority, and that the case stands substantially upon the same footing, so far as the parties to the present record are concerned, as if the fact of his infancy had been stated on the face of the settlement. Then, with regard to confirmation: independently of the difficulty placed, perhaps, in the plaintiffs' way by Lord Tenterden's Act as well as the nature of the document which they seek to enforce against the defendant, I conceive that the plaintiffs' claim in this respect, whether excluded or not excluded by the mode in which the bill is framed, fails on the evidence. I think that there is no confirmation, no agreement to confirm, nor conduct tantamount to proof of

either. The rights of the defendant seem to me to remain as they did on the day after his marriage. I am of opinion, therefore, that the bill is without foundation, but that it is not a case for costs.

LORD JUSTICE TURNER. — This bill is filed by the infant children of Anne Perkins Stocker, the issue of her marriage by her first husband, John Henry Nelson, and by Henry Wise, a newly-appointed trustee of the settlement made upon the marriage of Anne Perkins Stocker with her second husband, the defendant, William Burbank Stocker, and it is filed for the purpose of compelling the payment by the defendant William Burbank Stocker to the plaintiff Henry Wise, of the sum of 1,000*l.*, to be held by him upon the trusts of the settlement. By the settlement, which was dated the 10th of October 1850, the defendant William Burbank Stocker covenanted with Ebenezer Vaughan Jenkins, and also with the trustee or trustees for the time being of the settlement, that in case the marriage should be solemnized he would pay to Ebenezer Vaughan Jenkins, or other the trustee or trustees thereof, the sum of 1,000*l.*; but it was provided that the trustee or trustees should not, during the life of Anne Perkins Stocker, compel payment of the 1,000*l.* until the decease of the defendant, unless required so to do by Anne Perkins Stocker, by writing under her hand; and it was declared and agreed that the 1,000*l.* should be held upon trusts for the separate use of Anne Perkins Stocker during the joint lives of herself and the defendant William Burbank Stocker, and if she should survive him upon trust for her absolutely; but if she should die in his lifetime, upon trusts which, so far as it is material to refer to them, were for the benefit of the plaintiffs, the children of the first marriage. Ebenezer Vaughan Jenkins never accepted the trusts of the settlement, and in the month of March 1857 the plaintiff Henry Wise was appointed under a power in the settlement to be trustee in his place. The marriage between the defendant William Burbank Stocker and Anne Perkins Stocker was solemnized on the 13th of October 1850, and in the month of August 1857 Anne Perkins Stocker died. The bill

alleging these facts alleges also that at the date of the settlement and at the time of the marriage Anne Perkins Stocker carried on the business of a pawnbroker, and was possessed of, and employed in that business, a capital of upwards of 1,000*l.*; that immediately upon the marriage, the defendant William Burbank Stocker took possession of his wife's capital and stock-in-trade, and that he has ever since carried on the business of a pawnbroker; that the defendant William Burbank Stocker was at the execution of the settlement and at the time of the marriage of full age, and that he then represented himself to Anne Perkins Stocker to be of full age, and that on the faith of such representation to the said Anne Perkins Stocker the marriage was solemnized, the settlement executed, and the capital and stock of Anne Perkins Stocker were delivered over to, and taken possession of by, the defendant William Burbank Stocker. It is under these circumstances that the payment of the 1,000*l.* is demanded by this bill. The evidence in the cause seems to me to establish beyond all doubt that at the date of the settlement and at the time of the marriage the defendant William Burbank Stocker was only between seventeen and eighteen years of age, and Anne Perkins Stocker was a widow of the age of thirty-two; and, as I read the evidence, it further establishes in favour of the plaintiffs that the defendant William Burbank Stocker, before the execution of the settlement, was asked by the solicitor who prepared it whether he was of age, and replied that he thought that he was; and in favour of the defendant, that Anne Perkins Stocker herself knew, before the marriage, that the defendant William Burbank Stocker was not of age. This, in my judgment, is the true result of the evidence in the cause, and it is upon these facts that Vice Chancellor Stuart has decreed the payment of the 1,000*l.* The defendant has appealed from the decree. In the course of the argument upon the appeal, some question was raised as to the case being one in which the proper remedy was by an action at law upon the covenant; but, upon consideration, I think that the bill sufficiently alleges a case of fraud on the part of the defendant, and that the case, therefore, is one

in which there must be at least a concurrent jurisdiction in equity. If the case had depended simply upon the point of the defendant having represented himself to be of age, when he was not of age, I should have felt no doubt about it; for it would be too much to call upon the Court to believe that this defendant could really have thought himself to be of age at the date of the settlement, when he was under eighteen years of age; and if he did not so think, the representation he made to the solicitor was false and fraudulent. Infants are no more entitled than adults are to gain benefits to themselves by fraud, and had the case, therefore, depended upon this point alone, I should have agreed most fully with the decision of Vice Chancellor Stuart. It is not, however, upon the question of false representation alone that the decision of the case, in my judgment, depends. It is scarcely less difficult to believe that Anne Perkins Stocker did not know that the defendant was under age at the time of the settlement and of the marriage, than that the defendant himself did not know it. In fact, the evidence proves that she knew it. The question, therefore, seems to me to be, not whether the representation made by the defendant was false, but whether a false representation made to a person who knows it to be false can be said to be a fraud, and such a fraud as will take away the privilege of infancy. There can be no doubt that it is morally wrong in an infant of competent age, as it is in any other person, to make any false representation whatever; but the Court cannot enforce the observance of obligations or duties which rest upon moral grounds only. Some wrong or injury must be shewn to the party complaining in order to call the Court into action; and I do not see how any wrong or injury can be said to have been done to any person to whom a false representation is made, when the person to whom it is made knows it to be false. If the representation is known to be false, the person to whom it is made cannot be deceived by it. Looking at the case in this point of view, it opens a question of great general importance. The law has, for the wisest reasons, thrown around infants a protection against acts done by them during their infancy, and the policy of the

law cannot be maintained if this privilege of infancy be allowed to be broken in upon on slight and insufficient grounds. If the contracts of infants with persons who know them to be under age are held not to be binding, upon the ground that the infants represented themselves to be of age, there will hardly be a case in which the plea of infancy will be of any avail, and the door will be open to all frauds against infants from which the law was intended to protect them. The privilege of infancy is a legal privilege. On the one hand, it cannot be used by infants for the purposes of fraud. On the other hand, it cannot, I think, be allowed to be infringed upon by persons who, knowing of the infancy, must be taken also to know of the legal consequences which attach to it. This decree, so far as I am aware, is in this respect of the first impression, and I am not prepared to support a precedent which goes so far to destroy the legal privileges of infants. The Vice Chancellor seems, as I collect from his judgment, to have considered the knowledge imputed to Anne Perkins Stocker to have been of no importance, because the representation was made to the solicitor; but, according to the evidence, the solicitor was employed by her: he was her agent in the transaction. The settlement was prepared at her instance and for her benefit, and if the representation made to Anne Perkins Stocker herself would not have rendered the covenant binding upon the defendant, I do not see how the representation made to her agent can have that effect. It may be said, indeed, that the solicitor, had he been informed of the infancy, would have advised some different settlement; but I do not see how this can improve the plaintiffs' case. If there was a false representation made under such circumstances as would render the covenant binding upon the defendant, it would equally do so whether a different settlement would have been made or not. It is, indeed, a mere speculation whether a different settlement, or even any settlement, would have been made if the infancy had been disclosed to the solicitor; and it must be remembered, with reference to this point, that, assuming, as I do, that Anne Perkins Stocker knew of the infancy, it was her duty—no less her duty than it was the

duty of the defendant—to have apprised the solicitor of the fact; and that if, on the one hand, there was false representation on the part of the defendant, there was, on the other hand, suppression on the part of Anne Perkins Stocker. It was much insisted upon, on the part of the plaintiffs, that there had been adoption and confirmation by the defendant; but this is wholly denied by the answer, and I can find no evidence of it beyond the fact that the defendant took possession of the business and stock-in-trade, and has continued in possession of it. This was, however, property to which the defendant became entitled *jure mariti*, and not by virtue of the settlement; and even if he can be considered to have purchased it by means of the settlement, it was not until March 1857 that there was any trustee of the settlement to whom he could notify his dissent; and it is clear, from the correspondence referred to in the affidavit in reply, that at the time when the new trustee was appointed, the defendant was disputing the validity of this settlement. Looking at this correspondence, it is very remarkable that this claim was not brought forward in the lifetime of Anne Perkins Stocker, when she might have been examined as to the facts on which the claim depended. Upon the whole case, much as I disapprove the conduct of this defendant, I cannot go the length of saying that he is bound by this covenant; and I am of opinion, therefore, that this bill ought to have been dismissed, and must now be dismissed, but of course without costs.

WOOD, V.C. }
June 25, 30. } *In re SEYMOUR'S TRUSTS.*

Legacy—Alternative Gift to a Legatee or his Executors.

Under a bequest to such of the testator's grandchildren as should be living at the death of a tenant for life, and the executors or administrators of such of them as should be then dead leaving any child or children living at the death of the tenant for life, it was held that the share of a grandchild, who died in the lifetime of the tenant for life

leaving a child, belonged to his estate, and was not given either to his executors beneficially, or to his next-of-kin.

Watson Seymour, by his will, dated the 15th of August 1845, directed his executors to purchase such a sum of stock as, together with any sum in the 3l. per cent. reduced bank annuities he might have at the time of his decease, should make up 9,000l. like annuities, and to hold the same upon trust as to 4,000l. stock, part thereof, during the life of his daughter Elizabeth Fowler, to pay the dividends thereof to her for her separate use, and after her decease to pay and divide the said 4,000l. equally between such of his grandchildren (the children of his said daughter) as should be then living, and the executors or administrators of such of them as should be then dead leaving a child or children surviving his said daughter, so that the executors or administrators of any such grandchild who should have so died as aforesaid leaving a child or children surviving his said daughter should take the same share as such grandchild would have taken under the last-mentioned bequest had he or she survived his said daughter; and as to the sum of 4,000l. (other part of the 9,000l. stock), upon trust to pay and apply the dividends thereof for the support, clothing, maintenance and benefit of the testator's son, Watson Seymour, during his life; and after his decease upon trust as to 2,000l., part of the last-mentioned 4,000l., to pay and divide the same between the testator's said daughter and such of his grandchildren as should be living at the death of his said son, and the executors or administrators of such of his said grandchildren as should be then dead leaving any child or children living at the death of his said son, in equal shares, so that such executors or administrators of any such grandchild so dying or leaving a child or children as aforesaid, should take the same share as such grandchild would have taken under the last-mentioned bequest, if he or she had been living at the time of the decease of his said son; and as to 2,000l., residue of the last-mentioned 4,000l., the testator declared trusts similar to those affecting the first-mentioned 4,000l.; and as to 1,000l., residue of the 9,000l., upon trust for his

when that purpose is answered there is no reason for saying that it shall not go back to the old share." He certainly does not advert to the somewhat curious effect it has of drawing it backwards and forwards; it is to go to the same trusts, "or such of them as are subsisting and capable of taking effect." The words, "subsisting and capable of taking effect," would probably remove the absurdity of the case; for if it is written out in full it will then run in this way: "If Mary has no child, then half as Mary shall appoint, and the other half on the same trusts as Ellen's share." Then, when you remember what Ellen's share is, it would be thus: "As to the other half, to Ellen for life, and if she has no child, then as to one moiety as Ellen shall appoint, and as to the other moiety upon the trusts of Mary's share," which are to Mary for life, with remainder to her children, and so on. Those trusts for Mary and her children are no longer capable of taking effect. But Mary's power of appointment still remains, and there still remain the other children and grandchildren of the testator, so that the absurdity is got rid of by the words "or such as are subsisting and capable of taking effect."

It appears to have been thought that when the lady has made an appointment it is done once for all, and though she appoints in words large enough to convey every interest vested or capable of taking effect, there is no trust capable of taking effect. I apprehend when the lady has put her hand to an appointment, her appointees are exactly where the children and grandchildren would have been in the event of no appointment; and the effect of the limitation over would be that the share would have to be continually carried backwards and forwards on each limitation. When you come to the second set of limitations you must leave out the daughter and children, because they would be gone *ex hypothesi*—they would not be capable of taking; but, then, are not the children and grandchildren and the appointees of each daughter still capable of taking? In this way the share would come backwards and forwards. Although this may seem a whimsical way of limitation, and although it was probably not the way in which the testator contemplated it would

go, I think there is apparent an intention to withdraw the moiety in the first instance simply for the purpose of letting in the interest of the others. He introduces a set of words which by this shifting of the limitations seems to me capable of carrying into effect this idea, and I do not see why I am to strike out any portion of the trusts which are capable of taking effect. Even if you take it as a mathematical proposition it will in reality come out that the moiety is given to the appointment of each daughter; and if you take it on the simple practical question, the law would say if the property is given down to a farthing, it is given altogether. Taken either one way or the other, there being no other determination of the case to which I can come, it seems to me that the shares do continue to shift over. It is some satisfaction to find that an eminent conveyancer has thought it right to give a precedent for cross-limitations in this form (2); but I should have thought there would be a more simple way of doing it. I do not remember to have ever met with a will in this form.

Declare that the appointment of Mrs. Atkinson and Mrs. Fenton each effectually disposed of one moiety of the testator's residuary estate.

M.R. }
March 9, } GREATER v. GREATER.
11, 16. }

Devise—"Or" read "and"—Introduction of Repugnant Condition—Gift over made void.

A testator devised specific shares in an estate to several persons nominatim, to hold the same as tenants in common, and not joint-tenants; and in the event of any of them dying before having heirs of their body, "or" making a particular disposition of his or her property, then his or her share was to go to the survivors:—Held, that the devisees did not take estates tail, but estates in fee; that the gift over could only take effect on the happening of two events; that the

(2) See Martin's Conveyancing, by Davidson vol. 5, p. 83.

go to the executrix of his sister, to be administered by her as part of her estate; and that, after payment of her debts and legacies, it will belong to her residuary legatee." Then, the only remaining question is, whether under this limitation H. Fowler himself took any interest which would pass to his assignees in bankruptcy, and it was contended that there was no such interest as would pass to them; but I cannot distinguish this case from the case of a gift to a grandchild in either of two events: that is, either his surviving the tenant for life, or dying in her lifetime leaving issue; in which case the estate takes the benefit through the executors and administrators. In *Holloway v. Clarkson* the bequest was to females, some of whom were married and some single, for their separate use for their respective lives, and after their decease to such persons as they should appoint; and in default of appointment, to their respective executors, administrators and assigns. It is true that in that case the parties took preceding life interests; but in dealing with that point the Vice Chancellor put that circumstance entirely out of the question, and held that each of the legatees was entitled to an immediate transfer of the *corpus* of her share in the fund. That is exactly what I hold here. I have fortified myself with these authorities; but it seems to me quite clear that this interest belongs to the estate of the bankrupt, and I apprehend it is clearly such an interest as would pass to his assignees, under the 141st section of the Bankruptcy Act. The petitioner, therefore, is entitled to the fund.

M.R. { COLE v. THE WEST LONDON
July 4, 5. { AND CRYSTAL PALACE RAIL-
WAY COMPANY.

Lands Clauses Consolidation Act, s. 92.
—*Railway Company—Part of a House—Garden.*

Three houses were built upon a plot of land, a portion of which was laid out in gardens for each house; a summer-house and other detached out-houses were also built. A railway company, under the Lands Clauses Consolidation Act (8 & 9 Vict. c.

18.), required a portion of the gardens for the purpose of their undertaking, but they refused to purchase the whole premises:—Held, upon a bill by the freeholder, that the gardens were part of the houses to which they were attached, and that the company was bound to purchase the two houses and premises from which parts of the gardens were taken, and to make compensation for any injury sustained in respect of the third house.

The bill in this suit was filed, by Thomas Cole, to restrain the defendants from summoning or requiring the Sheriff of Surrey to summon a jury to settle the amount of compensation to be paid by the company for the purchase of a piece of land taken from the plaintiff's garden, or from assessing any damage that might have been sustained by the plaintiff by reason of the execution of the works of the company. It also prayed that they might be restrained from entering upon, or taking or using or continuing in possession of the land and premises, and from taking any further proceedings to acquire the land and premises by compulsory purchase until the defendants should have purchased the whole of the plaintiff's land, houses and premises, and made compensation for all damage sustained in consequence of the entry.

On the 20th of August 1850 the plaintiff was seised in fee of three messuages or dwelling-houses, with the curtilages, buildings, gardens and appurtenances, in the parish of St. Mary, Battersea. These were respectively occupied by the plaintiff T. Cole, the Rev. Monck Mason, and Mary Greenfield, the curtilage, garden and appurtenances attached to each of the houses being less than half an acre.

The company was incorporated by the 16 & 17 Vict. c. clxxx, and the act incorporated in it the Companies Clauses Consolidation Act, the Lands Clauses Consolidation Act, and the Railways Clauses Consolidation Act, and the plan and books of reference shewed that the railway was to pass through the gardens of the three houses.

On the 25th of August 1855 the company served the plaintiff with notice that they required the lands specified in the

schedule. The plaintiff required the company to purchase the whole of the three houses and premises, as the damage which they would sustain by portions of the gardens being taken was irreparable; this led to correspondence.

On the 27th of October 1856 the company sent a bond to the plaintiff under thier common seal, with two sureties, which, after reciting that the company desired to enter upon the pieces of land immediately, and that the value had been fixed by Daniel Norton at 900*l.*, and that such amount had been paid into the bank, it was conditioned to be void if the company paid or deposited in the Bank of England for the benefit of the parties interested in the land, such purchase-money or compensation with interest as therein mentioned.

On the 13th of February 1857 the company took possession of a piece of each of the gardens belonging to the houses occupied by Thomas Cole the plaintiff, and by the Rev. M. Mason. It was also alleged that Mrs. Greenfield's premises had been damaged, and that the plaintiff had been forced to reduce her rent.

The plaintiff afterwards caused the three houses to be surveyed by three surveyors, and they were of opinion that the company ought to take the whole of the property, unless the company were prepared to pay liberally for the damage done, and they valued the property at 3,390*l.*, exclusive of the fixtures, which were to be taken at a valuation.

The company refused to purchase the entire property. The plaintiff then filed this bill, alleging that the defendants ought to be held to have come under a liability to purchase the three houses, with the curtilages, gardens and appurtenances, and to pay 3,390*l.*, or such price as the Court might consider proper.

Mr. Selwyn and Mr. W. Morris, for the plaintiff.—A mere payment for land without compensation to a householder for injury present and future, is not a sufficient consideration for a compulsory purchase.

Lord Grosvenor v. the Hampstead Junction Railway Company, 1 De Gex & Jo. 446; s. c. 26 Law J. Rep. (N.S.) Chanc. 731.

Sparrow v. the Oxford, Worcester and Wolverhampton Railway Company, 2 De Gex, M. & G. 94; s. c. 21 Law J. Rep. (N.S.) Chanc. 731; 9 Hare, 436.

Spackman v. the Great Western Railway Company, 1 Jur. N.S. 790.

Barker v. the North Staffordshire Railway Company, 2 De Gex & Sm. 55.

Mr. R. Palmer and Mr. L. Webb, for the railway company.—The full value of the land has been ascertained with reference to its locality; it was wholly distinct from the houses, and ought not to be considered, as to any part of them, within the meaning of the Lands Clauses Consolidation Act.

THE MASTER OF THE ROLLS.—The plaintiff can scarcely expect the company to take Mrs. Greenfield's house and premises: it is a mere question of damage to that house, and he will be entitled either here or at common law to have the amount assessed. The company, however, does not take any portion of that house: they go from the extreme west corner in a line parallel with the railway, cutting through the premises called Belmont Lodge, the house of Mr. Cole, and through the premises occupied by Mr. Mason. As respects Belmont Lodge I entertain no doubt: the railway cuts off not only a yard at the end, but it cuts off the last house—it cuts off the summer-house and a considerable portion of the garden, several feet. The taking these buildings must seriously prejudice the habitation of the place. In *Lord Grosvenor v. the Hampstead Junction Railway Company*, it has been determined that when the company required the garden, or a part of the garden, they must, under the Lands Clauses Consolidation Act, section 92, be considered as taking what in a conveyance would be termed a part of the house. Under the word "house" they are liable to take the whole, and the meaning of the word "house" in the Lands Clauses Consolidation Act, section 92, is so much as would be included in the word "house" in an ordinary legal instrument; that is to say, supposing Mr. Cole had conveyed a house called Belmont Lodge to A. B. in

The testator died in September 1856. He had not at the date of his will, or at any time afterwards, a niece of the name of Elizabeth Stringer; but Elizabeth Stringer, a niece of the testator, had died, in February 1848, previously to the date of his will, leaving a granddaughter, named Elizabeth Jane Stringer, who was the only relation of the testator of the name of Stringer, or of the name of Elizabeth, living at the date of his will and of his death. She was about five years old at the date of the testator's will.

Evidence was gone into by the next-of-kin to shew that a will, made by the testator in May 1847, contained bequests "to his niece Elizabeth Stringer," who was then living, in the same words as those used in his second will; and that in 1850 he made a codicil to his will, which did not affect those bequests; that in January 1852 the testator instructed his solicitor to prepare a codicil for the purpose of making some alterations in his will; that the solicitor advised the testator not to make a second codicil, but to make such alterations in the will of May 1847 as might be desired; that the solicitor accordingly made such alterations in the will of May 1847, and that the will of the 13th of January 1852 was accordingly executed by the testator; that the solicitor was not aware that Elizabeth Stringer, the testator's niece, was dead at that time, and that the attention of the testator was not drawn to that fact. There was evidence, on the part of the plaintiff, shewing that the testator knew that Elizabeth Stringer was dead, he having been present at her funeral.

Mr. R. Palmer and Mr. Lindley, for the plaintiff.—The will was evidence that the testator did not contemplate intestacy. If there was ambiguity, evidence was admissible to shew the intention of the testator, but the Court would never admit evidence to expunge a bequest: it would be a most dangerous innovation—

Bernasconi v. Atkinson, 10 Hare 345; s.c. 23 Law J. Rep. (N.S.) Chanc. 184.

Miller v. Travers, 8 Bing. 244.

Newbolt v. Pryce, 14 Sim. 354.

Bennett v. Marshall, 2 Kay & J. 740.

Wigram on Evidence, 169, 4th edit.

Mr. Selwyn and Mr. Dean, for the defendants.—Evidence is always admissible to shew a mistake in the will: the gifts had been inadvertently allowed to remain in the will. It was most improbable that the testator would leave a legacy of 20*l.* for mourning to a child of five years old.—

Selwood v. Mildmay, 3 Ves. 306.

Doe d. Hiscocks v. Hiscocks, 5 Mee. & W. 363; s.c. 9 Law J. Rep. (N.S.) Exch. 27.

THE MASTER OF THE ROLLS. — The plaintiff is entitled to this bequest. The rule as to the reception of parol evidence to explain a will is perfectly clear. In every case of ambiguity, whether latent or patent, parol evidence is admissible to shew the state of the testator's family or property; but the cases in which parol evidence is admissible to shew the person intended to be designated by the testator are those cases of latent ambiguity mentioned by Sir J. Wigram, where there are two or more persons, who answer other descriptions in the will, each of whom, standing alone, would be entitled to take. If there had been another Elizabeth Stringer living at the date of the will parol evidence would have been admissible to ascertain who the person was the testator intended to designate. But in this case the Court is asked to admit parol evidence, not for the purpose of explaining the meaning of the testator, but for the purpose of shewing that he had no meaning at all; in fact, for the purpose of expunging the words from the will altogether. To admit evidence for such a purpose would be to create the greatest alarm in the minds of testators, and to introduce the greatest uncertainty in the construction of wills. All that the Court has to do is to see if the words of the will are sufficiently clear to point to a particular person. If the evidence had gone to shew that the testator had never heard of any Elizabeth Stringer, that there was no such person related to him, and that the person who claimed was a mere stranger, the case would be different. There was a person named Elizabeth related to the testator by blood, who may be described as the great-great-niece of the testator, or the niece twice removed; but in ordinary language she might be described as the niece of the

A number of partners trading as a company, on the terms that their shares shall pass by delivery, does not necessarily shew that they are assuming to exercise the powers of a corporation, or render the company illegal.

If a company not otherwise illegal was rendered so by the 4th section of the statute 19 & 20 Vict. c. 47, the acts done and debts incurred by it in the interval of time between the passing of that act and the passing of the statute 20 & 21 Vict. c. 14. (repealing the 4th section of the former act) are valid and binding on the company, and are not the mere acts and debts of individual shareholders.

These were two appeals from orders (dated the 18th of April and the 4th and 7th of May last) of the Master of the Rolls, refusing to disturb a decision of his chief clerk, by which he had placed the names of Messrs. Grisewood and Smith, of the Stock Exchange, and of Messrs. B. & D. de Pass, merchants of London, on the list of contributories of the Mexican and South American Company. As the circumstances of the projection and constitution of the company, and of its mode of proceeding are common to both cases, a narrative is sufficient before proceeding to the particulars of each. The Mexican and South American Company was projected in the year 1835 by Messrs. Poules, Ewbank & Schneider, its objects being to promote mining and similar operations in America, by making advances to miners and supplying them with stores in anticipation of the produce of their mines, and to receive in payment gold and silver ore at fixed rates; and also to form a general mercantile establishment for dealing in bullion, metals and stores; the capital to consist of 10,000 shares of 10*l.* each. The projectors constituted themselves a board of management, adding subsequently to their number a Mr. H. Ranking, and opened an office in London, and at once entered upon preliminary operations. No deed of settlement was drawn up, but scrip certificates were issued, upon the back of which was printed the prospectus which had been originally circulated, which, after setting forth the objects of the company,

was in the following words:—"For the foregoing purposes it is proposed to raise a capital of 100,000*l.* in 10,000 shares of 10*l.* each; of this sum 5*l.* per share is to be paid at the following periods, namely, 1*l.* per share on subscribing; 1*l.* ditto on the 1st of September 1835; 1*l.* ditto on the 1st of December 1835; 1*l.* ditto on the 1st of February 1836, and 1*l.* ditto on the 1st of April 1836. The remainder of the capital to be called for when required by the directors, in sums not exceeding 1*l.* per share at each call, and at an interval of not less than two months between each call; thirty days' notice of each call to be given in the *London Gazette* and three daily morning and evening papers. If any call be not paid within thirteen days of the same becoming due, the directors shall, at the first convenient opportunity, sell the shares so in default, and hold the proceeds thereof, after deducting the amount of the call and interest thereon at 5*l.* per cent. per annum, at the disposal of the proprietors thereof. As the principle on which the company is formed is that of putting its capital speedily into active operation, and as one engagement has already been made for this purpose, it is proposed that the dividend at the rate of 6*l.* per cent. per annum on the subscribed capital shall be at once fixed, and that the directors shall make such additions from time to time thereto in the shape of bonus as the state of the company may authorize, the first dividend to be paid on the 1st of January 1837. In the event of the operations of the company admitting of the advantageous employment of a larger amount of capital, the directors shall have the power to create 10,000 additional shares of 10*l.* each, the same to be issued preferably to the holders of the existing shares; and in the event of its appearing expedient still further to increase the capital, a further creation of shares may take place, with the consent of the majority of the shareholders at a general meeting to be called for that purpose, the same being in all cases to be issued preferably to the holders of existing shares. The affairs of the company to be managed by the board of directors; the directors remain in office until the second Wednesday in May 1840,

when, and at the same period annually, one director shall go out of office. Vacancies in the direction previously to the second Wednesday in May 1840 shall be filled up by the directors; after that period they shall be filled up by the proprietors at the general annual meeting, or at a general meeting to be called specially for that purpose. A director retiring to be immediately re-eligible. The auditors shall be elected annually at the general meeting of the proprietors. Fifty shares shall be the qualification of a director, and forty shares the qualification of an auditor. A general meeting of the proprietors shall be held on the second Wednesday in May in each year, when the state of the company's affairs will be laid before them. Certificates will be issued for the shares; a proprietor of twenty-five shares to have one vote, &c. &c. It is proposed that on the payments of each dividend a sum equal to 10*l.* per cent. of the amount thereof shall be appropriated to form a reserve fund, and that if at any time the shares of the company should be below par, the directors shall have authority, if they shall see fit, to apply the amount of the reserve fund to the purchase of such shares for the account of the company, such shares, if afterwards disposed of, to be sold by public tender for the account of the company."

The certificates of shares, signed by three of the directors, so issued were in this form:—"The holder of this certificate, having paid 5*l.* to the directors of the Mexican and South American Company, will be entitled to five shares on his making the following payments," &c., and coupons for dividends were attached to each certificate. The scrip passed by delivery without any transfer, and the holder was treated as the owner. No registration of the company was ever effected under any of the Joint-Stock Companies Acts, nor was any deed of settlement ever executed or prepared—the prospectus being the only document of the rules and constitution of the company. The company commenced business, proceeded to make advances, and to work silver and quicksilver mines on their own account. Under their powers in the prospectus the directors increased the capital of the company by the issue of scrip certificates for 10,000 additional shares of

10*l.* each. In the year 1848 the directors undertook operations in Chili, and engaged a manager and superintendent, and established works for the smelting of copper ore in that country. In 1852 the directors called in the scrip certificates which had been issued, and issued others in the following form:—"The holder of this certificate is entitled to five shares of 10*l.* each in the Mexican and South American Company, on which 9*l.* per share has been paid." On the 12th of February 1855 the directors called a special general meeting of the scripholders at the London Tavern, when a resolution was passed, authorizing the directors to create 10,000 additional shares of 10*l.* each, on such terms as they might think expedient, which were to stand in all respects upon the same footing as the other existing shares, and to participate in dividends from the date of their issue; but they were not to be issued at a less price than 6*l.* 10*s.* per share. In accordance with this resolution scrip certificates for 10,000 additional shares were issued. In the mean time the company was regularly paying dividends, and between the years 1852 and 1855 paid, as was alleged, 60,150*l.*, the whole of which came out of the capital, the company never having made any profits applicable to that purpose. The last dividend paid was at the end of the year 1855, and was at the rate of 7*s.* 6*d.* per share for the previous half-year. On the 28th of March 1857 an extraordinary meeting of the company was held, at which the chairman informed the proprietors that serious errors, amounting in the whole to 13,000*l.* or 14,000*l.*, had been discovered, and that a large portion of the capital was lost, and this was attributed partly to interruption of the mining proceedings in Mexico, in consequence of the invasion of that country by the United States, and partly to the fraudulent conduct of the manager of the company's affairs in Chili; the questions were then discussed, and the meeting separated, after unanimously passing a resolution expressing its confidence in the board of directors, and their management of its business. In this year the usual annual meeting in May was not held, nor was any dividend declared, but on the 6th of November 1857 another extraordinary meeting was held, at which it was

COURTS OF CHANCERY:

explained that the whole remaining capital had been lost, and large debts were due, and a resolution was passed to wind up the company. A petition for that purpose was accordingly presented, and on the 24th of November 1857 an order for winding up the company was made by the Master of the Rolls; and on the 27th of April 1859 his Honour ordered a call to be made for the payment of debts at the rate of 9l. per share.

GRISWOOD AND SMITH'S CASE.
were placed on the

GRISWOOD AND SMITH'S CASE.

These names were placed on the list in respect of 405 shares thus:—

Bought of Mr. Henry Lemire, on the 18th of November 1857	...	30 shares.
— of Mr. Henry Witherby	...	50 "
— of Messrs. Mackie & North,	...	150 "
on November 23	...	25 "
— of Mr. George Snow	...	150 "
— of Casenove & Co.	...	405 "

of Casenove

Mr. Selwyn, Mr. Waley and Mr. Horace Lloyd, for the appellants, argued that their shares were bought in open market, in the usual course of their business, as share-brokers, on the Stock Exchange, at an average rate of 7½d. per share, and at a time when the affairs of the company were about to be wound up. As to 300 of the shares, the transaction was completed before the date of the winding-up order, the 24th of November 1857, though, as to the remaining 105, a like agreement had been made before that date, yet the scrip certificates were not delivered until afterwards. It was admitted that the certificates of the whole 405 shares did ultimately come into the hands of the appellants; but at the same time it was to be remarked that they never signed any contract, nor executed any deed, nor attended any meeting of the shareholders, paid no call, received no dividend, nor did any other act which could constitute them partners in the concern. All the liabilities which existed, it was admitted by the directors, had been contracted at a date long anterior to the earliest purchase of shares by the appellants; and they, therefore, were not liable as contributors, and claimed to be exempt. If this reason was not deemed sufficient, then it was contended, on the appellants' behalf, that the company was all along altogether

6 d.
19 s.
20 s.
Ex parte
Patent
637.
Vice v
Finlay
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HANCERY:
illegal, because the directors had committed
frauds in making out false accounts in
order to deceive the shareholders, and in
paying dividends out of capital; and be-
cause the debts and liabilities now charged
against the company and demanded from
the shareholders, were, in point of fact,
matters for which the directors alone were
justly responsible. But even if the Court
should be of opinion, notwithstanding all
this, that the appellants had incurred
any liability, it could not properly be ex-
tended to debts incurred before the 18th
of November 1857, when they first became
the owners of any shares. It was con-
tended, also, that the winding-up order
ought never to have been made, and ought
now to be discharged or varied, and that
the call was altogether excessive and unne-
cessary. They cited, on the illegality of
the company, and on the several points
before urged, the following statutes and
cases:—
1. *1 c. 18. (Bubble Act).*
2. *1 c. 91.*
3. *1 c. 4.*

Section 6 Geo. 1. c. 18. (Bubble Act).

Stat. 6 Geo. 1. 8. 1.
6 Geo. 4. c. 91.
19 & 20 Vict. c.

Stat. 6 Geo. 4. c. 41. s. 3.
19 & 20 Vict. c. 41. s. 3.
20 & 21 Vict. c. 14. s. 3.
Barton, in vs the
Comp...

Ex parte Barton, in re the New
Patent Steam Fuel Company, ante.

Patent Steam
657. Anson, 7 B. & C. 409.
Bristol and Exet

687.
Vice v. Anson, 7 B. C. 117.
Finlay v. the Bristol and Exeter
way Company, 7 Exch. Rep. 409;
a. c. 21 Law J. Rep. (n.s.) Exch. 117.
Nicol, ante, 257.
De Gex & Sm. 66
Hall

way Company,
s.c. 21 Law J. Rep. (N.S.)
Ex parte Nicol, ante, 257.
Sanderson's case, 3 De Gex & Sm. 66
s.c. 1 Mac. & G. 306; 1 Hall &
486; 19 Law J. Rep. (N.S.)

s.c. 1 Mac. &
Tw. 486; 19 Law J. Rep.
Chanc. 122.
Ratliffe, 1 De Gex & Sme.
Law J. Rep. (N.S.)

Tw. 480.
Chanc. 122.
Clough v. Ratcliffe, 1 De Gex
164; s. c. 16 Law J. Rep. (N. S.)
Chanc. 476.
Cocker, 4 Beav. 59; s. c.
(N. S.) Chanc. 236.
205; s. c.

164; s. c. 18
Chanc. 476.
Jackson v. Cocker, 4 Beav. 59; 18
Law J. Rep. (N.S.) Chanc. 236.
Drew. 205; s. c.
Chanc. 855.

Chanc. 410.
Jackson v. Cocker, 4 Chanc. 205.
10 Law J. Rep. (N.S.) Chanc. 205; n.e.
Ex parte Brockwell, 4 Drew. 205; n.e.
26 Law J. Rep. (N.S.) Chanc. 855.
Palmer and Mr. R. at the Bath

Mr. Roundell Palmer and Mr. R. A. Lushington, in support of the order at the Bath, argued that the winding-up order could not now be discharged, citing *In re the Chepstow, Gloucester and Forest of Dean Railway Company* (1); and besides this,

(1) 2 Sim. N.S. 11.

allowed by the Winding-
With regard to the
t the liability to
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still less
tionable.
scrip
their

s. c.

364.

& W. 121;

(n.s.) Exch. 81.

6 Man. & G. 81;

J. Rep. (n.s.) C.P. 158.

Oxenford, 1 Kay & J. 491.

s case, 5 De Gex & Sm. 395;

s. c. 21 Law J. Rep. (n.s.) Chanc.
852.

Ex parte Cookney, ante, 12.

Ex parte Cape's Executors, 2 De Gex,
M. & G. 562; s. c. 22 Law J. Rep.
(n.s.) Chanc. 601.

Sanderson's case, ubi supra.

Mr. Southgate appeared for the credi-
tors' representative.

Mr. Waley was heard in reply.

DE PASS'S CASE.

June 8.—The particulars of this case are as follows: for eighteen months before the month of November 1857 Messrs. B. & D. de Pass were the legal owners of 250 shares in the company, and had paid calls; one of them had been an auditor of the company; but between the 1st and 9th of that month Mr. B. de Pass disposed of the whole 250 shares by selling them to one of his clerks, a Mr. Spencer, for 20s. He swore that he did so with the intention of benefiting the purchaser, and that he believed some benefit might accrue from the purchase. As the shares passed by mere delivery, there was no agreement, written or otherwise; but the transaction, as deposed to by Mr. B. de Pass himself, was of this nature: he said that at the time mentioned he went to his counting-house

one morning, where he found Mr. Spencer; that he then told him of his intention to let him have the shares, and at once handed them over to him, saying at the same time, "I transfer these shares to you for 1*l.*, and any benefit that may arise from them you are welcome to"; that upon this Mr. Spencer accepted the shares, and paid him a sovereign out of his own pocket at the same time. That no agreement for indemnity from the Messrs. de Pass to Mr. Spencer was then or ever entered into, nor was there any reservation or declaration of trust in favour of the appellants, or any understanding that the shares should be considered to belong, or should be re-assigned, to them in any event. In cross-examination Mr. de Pass said that he could not state accurately the amount of salary earned by Mr. Spencer; he believed it to be about 100*l.* a year, but he stated that in addition to this he received gratuities and derived other emoluments. Mr. Spencer had been six years in his employment. Mr. Spencer was also examined as a witness, and deposed that he was never a shareholder, and had never subscribed for shares, but that he had held 250 shares bought on the 8th of November 1857 of Mr. B. de Pass. That that gentleman had never used any recommendation or even persuasion to induce him to take the shares, but had merely put them in his hands, and said, "Here are 250 shares; they may turn out beneficial to you; I hope they may. You shall have them for a sovereign." The witness replied, "Thank you," and took the shares, at the same time paying the purchase-money for them out of his own pocket. Nothing more passed between them. He sold the shares soon afterwards; within a month after; he thought in three weeks. He sold them to a Mr. Joseph, who was a traveller for the Messrs. de Pass. It appeared that the secretary of the company, after this transaction, on several occasions sent to the Messrs. de Pass notices and circulars, and they were duly received by them; but they admitted that they neither handed them over to Spencer, nor themselves replied to them, but destroyed them. There was no proof nor allegation that Spencer is now or ever was insolvent. The Master of the Rolls was

of opinion that the sale, occurring at the time and under the circumstances mentioned, was not *bonâ fide*.

Mr. Hobhouse, who, with *Mr. Selwyn*, appeared for the appellants, contended that all the legal requirements of a transfer had been observed, and no fraud had been alleged. The appeal of Messrs. de Pass should be allowed. The cases referred to were—

Jeffreys v. Smith, 3 Russ. 158.

Onslow v. Corrie, 2 Madd. 330.

Rowley v. Adams, 4 Myl. & Cr. 534;
s. c. 9 Law J. Rep. (N.S.) Chanc. 34.

Mr. Roundell Palmer and *Mr. Roxburgh*, for the official manager, insisted that the Master of the Rolls had come to a correct conclusion in holding that the transaction between Mr. Benjamin de Pass and Mr. Spencer, a clerk of the firm, was not a *bonâ fide* dealing. It was one resorted to for the purpose of evading liability, it being well known that the concern was in a ruinously bad condition. It was a plain and bare-faced attempt on the part of wealthy merchants to avoid the consequences of holding shares, by pretending to pass them for such an insignificant sum as 1*l.* to a dependent of their own. The cases referred to were—

Blisset v. Daniel, 10 Hare, 493.

Ex parte Jessop, 27 Law J. Rep. (N.S.)
Chanc. 757.

Lund's case, 5 Jur. Rep. N.S. 400.

Mr. Southgate appeared for the creditors' representative.

Mr. Selwyn was heard in reply.

July 15. — LORD JUSTICE TURNER.—The first of these cases, that of Messrs. Grisewood and Smith, is an appeal from an order of the Master of the Rolls, dated the 7th of May last, by which the appellants have been placed or retained on the list of contributories of the company as the holders of 405 shares; and it is asked by the notice of motion on this appeal, not only that the order of the 7th of May last may be discharged, and the names of the appellants removed from the list of contributories, but also that, if necessary, the

order for winding up the company, dated the 24th of November 1857, and an order for a call of 9*l.* per share, dated the 27th of April 1859, may likewise be discharged. The other case, that of Messrs. de Pass, is also an appeal from orders of the Master of the Rolls, dated the 18th of April and 4th of May last, by which those appellants were placed or retained on the list of contributories as the holders of 250 shares in the company. This company was formed in the month of April 1835. It was formed, in the first instance, with the view of making advances of money to the owners of mines in Mexico, and receiving the produce of the mines at fixed rates, yielding a good return for the advances, but it was further extended to mining operations. Upon the foundation of the company, certificates were issued to the subscribers, purporting that the holders of certificates having made a certain specified payment to the directors, were entitled to a specified number of shares in the company, subject to certain further payments mentioned in the prospectus, a copy of which was printed at the foot of the certificates. This prospectus was the only instrument defining the constitution of the company; for there appears to have been no deed of settlement of the company. It is not, in the view which I have taken of these cases, necessary to state the terms of the prospectus. It is sufficient to say it provided for raising a considerable capital, to be divided into a great number of shares; that it placed the company entire under the management of directors; that it contained provisions for the issue of further shares, but that it contained no provisions as to the transfer of shares. The shares were, therefore, as they appeared by the certificates, to be transferable by delivery. At different times after the foundation of the company, further shares were issued, under the powers given by the prospectus, and certificates were issued for these shares, varying somewhat in form from the first certificates, but still purporting that the holders were entitled to the shares. Messrs. Grisewood and Smith, the appellants in the first case, are share-dealers, and the course of their business, as I collect from the evidence, is to

duty of the defendant—to have apprised the solicitor of the fact; and that if, on the one hand, there was false representation on the part of the defendant, there was, on the other hand, suppression on the part of Anne Perkins Stocker. It was much insisted upon, on the part of the plaintiffs, that there had been adoption and confirmation by the defendant; but this is wholly denied by the answer, and I can find no evidence of it beyond the fact that the defendant took possession of the business and stock-in-trade, and has continued in possession of it. This was, however, property to which the defendant became entitled *jure mariti*, and not by virtue of the settlement; and even if he can be considered to have purchased it by means of the settlement, it was not until March 1857 that there was any trustee of the settlement to whom he could notify his dissent; and it is clear, from the correspondence referred to in the affidavit in reply, that at the time when the new trustee was appointed, the defendant was disputing the validity of this settlement. Looking at this correspondence, it is very remarkable that this claim was not brought forward in the lifetime of Anne Perkins Stocker, when she might have been examined as to the facts on which the claim depended. Upon the whole case, much as I disapprove the conduct of this defendant, I cannot go the length of saying that he is bound by this covenant; and I am of opinion, therefore, that this bill ought to have been dismissed, and must now be dismissed, but of course without costs.

leaving a child, belonged to his estate, and was not given either to his executors beneficially, or to his next-of-kin.

Watson Seymour, by his will, dated the 15th of August 1845, directed his executors to purchase such a sum of stock as, together with any sum in the 3l. per cent. reduced bank annuities he might have at the time of his decease, should make up 9,000l. like annuities, and to hold the same upon trust as to 4,000l. stock, part thereof, during the life of his daughter Elizabeth Fowler, to pay the dividends thereof to her for her separate use, and after her decease to pay and divide the said 4,000l. equally between such of his grandchildren (the children of his said daughter) as should be then living, and the executors or administrators of such of them as should be then dead leaving a child or children surviving his said daughter, so that the executors or administrators of any such grandchild who should have so died as aforesaid leaving a child or children surviving his said daughter should take the same share as such grandchild would have taken under the last-mentioned bequest had he or she survived his said daughter; and as to the sum of 4,000l. (other part of the 9,000l. stock), upon trust to pay and apply the dividends thereof for the support, clothing, maintenance and benefit of the testator's son, Watson Seymour, during his life; and after his decease upon trust as to 2,000l., part of the last-mentioned 4,000l., to pay and divide the same between the testator's said daughter and such of his grandchildren as should be living at the death of his said son, and the executors or administrators of such of his said grandchildren as should be then dead leaving any child or children living at the death of his said son, in equal shares, so that such executors or administrators of any such grandchild so dying or leaving a child or children as aforesaid, should take the same share as such grandchild would have taken under the last-mentioned bequest, if he or she had been living at the time of the decease of his said son; and as to 2,000l., residue of the last-mentioned 4,000l., the testator declared trusts similar to those affecting the first-mentioned 4,000l.; and as to 1,000l., residue of the 9,000l., upon trust for his

WOOD, V.C. }
June 25, 30. } *In re SEYMOUR'S TRUSTS.*

Legacy—Alternative Gift to a Legatee or his Executors.

Under a bequest to such of the testator's grandchildren as should be living at the death of a tenant for life, and the executors or administrators of such of them as should be then dead leaving any child or children living at the death of the tenant for life, it was held that the share of a grandchild, who died in the lifetime of the tenant for life

the prospectus defining the constitution of the company, everything is left to the management of individual directors, and all the proceedings of the company appear to have been carried on by the directors in their individual character. I think, therefore, that neither the case of illegality nor the case of fraud can be maintained. What fell from the Court of Common Pleas, in the case of *Harrison v. Heathorn*, seems to me to have an important bearing on this question of illegality, although the case itself may well be distinguished from the present. Another point was raised on the part of these appellants, with reference to the order for the call. It was said that, by the 4th section of the 19 & 20 Vict. c. 47, the trading of the company was illegal from the 3rd of November 1856 to the 14th of July 1857, when the section referred to was repealed by the 20 & 21 Vict. c. 14. s. 3; and that the debts contracted during this period were not debts of the company, but debts of the individuals who were at the time the shareholders in the company. I think that this point is also untenable; for, I apprehend that where an act of parliament, or part of an act of parliament, is repealed, it must, as laid down by Lord Tenterden, in *Suttees v. Ellison* (2), be considered as if it had never existed, except as to transactions which are passed and closed, and it cannot be said that the transactions in this case were passed and closed whilst the debts remained unpaid. I am of opinion, therefore, that the appeal of Messrs. Grisewood and Smith wholly fails, and that their motion must be refused, and with costs.

Then, as to the case of Messrs. de Pass, they are put upon the list for 250 shares which were formerly held by them, and for which they had paid 1,750*l*. Their case is, that, on the 8th of November 1857, sixteen days before the date of the winding-up order, they delivered over these shares to Mr. Spencer, one of their clerks, in consideration of the sum of 1*l*. paid by him to them. It sufficiently appears, I think, from the evidence, that at this time they were aware, or at all events had good reason to suspect, that the company was in

difficulties. It was, indeed, admitted in the reply that their object was to get rid of their liability; and it was insisted that they were entitled to do so. I agree that they were, for I cannot see what equity there would be on the part of the other shareholders to insist upon their retaining the shares. The question, therefore, as to these appellants, seems to me to be, whether they did or did not, on the 8th of November 1857, *bond fide* part with these shares out and out. I had much doubt on this point when the case was argued, more especially from the fact, that even at a later date the shares appear to have been sold in the market at a price that would have yielded more than was paid for them to the appellants by their clerk; but I have since read and considered the evidence more carefully, and I am satisfied that we can come to no other conclusion upon it than that these shares were, on the 8th of November 1857, absolutely and *bond fide* parted with by the appellants out and out, without any trust for their benefit, or any reservation whatever; and I am of opinion, therefore, that this order must be discharged, and the names of these gentlemen removed from the list. I think, however, that the transaction was one requiring the most searching investigation, and that there should be no costs to the appellants of any part of the proceedings.

LORD JUSTICE KNIGHT BRUCE.—I am also of opinion that the appeal of Messrs. Grisewood and Smith fails, and that the appeal of Messrs. de Pass does not. I agree also as to costs.

On the application of their respective counsel the costs of the official manager and of the creditors' representative were ordered to be paid out of the estate; and in the first case the appellants were directed to pay only one set of costs.

July 27.—All proceedings to enforce the call in the first case were ordered to be stayed pending an appeal to the House of Lords, Messrs. Grisewood and Smith undertaking to pay the amount of the call into court, or to give satisfactory security for the same.

KINDERSLEY, V.C.
March 3.

HALE v. THE METRO-
POLITAN SALOON OM-
NIBUS COMPANY.

Fraudulent Sale of Goods—Expectant Execution.

A tradesman expecting the execution of a writ of fieri facias issued by the Court of Chancery for payment of costs in a suit, effected a sale of the whole of his furniture and stock-in-trade. The only document passing upon the occasion was a receipt for the money paid upon the purchase. A few days after the purchaser had taken possession the writ was issued, and the sheriff subsequently filed a bill of interpleader, upon which the question arose whether the sale was fraudulent and void:—Held, that it was not a ground for vitiating a sale, that it was made with a view to defeat an expectant execution; that under the particular circumstances of this case, there was no ground for saying that the purchase was not bona fide, and consequently the sale could not be set aside; but, there being facts of a highly suspicious character attending the transfer of the property, the purchaser was ordered to pay his own costs.

Held, also, that the receipt given for the goods did not amount to a "bill of sale" under the provisions of the statute 17 & 18 Vict. c. 36, and therefore that it did not require registration.

This was an interpleader suit, filed by the sheriff under the following circumstances:—The bill stated, that on the 21st of July last an injunction was moved for in this court by Thomas Hawkins, a tradesman carrying on business as a brush and toy dealer, in the Inverness Road, Bayswater, to restrain the directors of the Saloon Omnibus Company from issuing certain debentures, on the ground that such issue was contrary to the provisions of the Joint-Stock Companies' Acts. The injunction was refused, with costs. The costs, having been taxed, were found to amount to about 100*l.*, and this amount not having been paid, a *fiери facias* was issued under the process of the Court of Chancery.

Previously to the writ being served, Hawkins spoke to his landlord, Mr. Marks, with reference to disposing of his furniture and stock-in-trade, and on the 12th of

November 1858 Hawkins was introduced by Mr. Marks to Mr. Sayer, a pawnbroker living in a distant part of town, as a person likely to purchase Hawkins's goods. In pursuance of what took place at this interview, Sayer went to Hawkins's house to view the goods, and subsequently obtained a valuation from Mr. Robins, the auctioneer, who valued them at 508*l.*, but stated, that if sold by auction, about one-third ought to be struck off, and that 300*l.* would then be about the actual value of the property. Mr. Sayer thereupon offered to purchase the furniture and stock-in-trade for the sum of 300*l.*, which proposal was at once accepted by Hawkins. The sale was completed on the 17th of November, when Sayer paid Hawkins the money agreed upon, and took a receipt from him. He also obtained a lease of the house from Mr. Marks, the landlord. It appeared that Sayer, before he entered into the above purchase, consulted with Mr. Pocock, the secretary to the "London Merchants Trading Protection Society," as to the respectability of Hawkins, and found that there was nothing known by the society against his character. It further appeared, that Sayer intended to carry on the business in which Hawkins was engaged, on his own account, and with that view he was desirous of retaining the services of Mrs. Hawkins and of Louisa Compton, a niece of Hawkins, who had been his assistant in the shop. This he was advised by Mr. Pocock not to do; but, eventually, he did engage the niece, Louisa Compton, at an annual salary.

On the 18th of November, the day after the purchase-money was paid, Sayer took possession of the house, but permitted Hawkins and his wife to sleep there for three nights. Sayer also painted out the name of Hawkins, but did not put up his own name previously to the 23rd of November, on which day the writ of *fiери facias* was executed, and the sheriff took possession.

Upon an application afterwards made in his Honour's chambers, it was arranged that Sayer should give his bond for 400*l.* by way of indemnity to the sheriff, and the sheriff relinquished possession of the premises, which had been occupied ever since by Sayer.

This bill of interpleader was then filed by the sheriff, and the cause now came on to be heard, the question being whether the sale of the goods by Hawkins was fraudulent and void under the statute of Elizabeth, as against the company and directors, it having been made under suspicious circumstances, with a view to defraud the execution creditors, and without an adequate consideration.

The evidence before the Court was taken *vidé voce*, but Hawkins, the principal party concerned in the transactions, was not called as a witness by either side.

Mr. Glasse and Mr. Robinson, on behalf of Mr. Sayer, contended that there was nothing improper or suspicious in his dealing in respect of the purchase of this property. He was applied to by Marks, with whom he was well acquainted, and he made such inquiries as he thought desirable from the secretary to the "Trade Protection Society," as to the respectability of Hawkins. It was not his business to inquire whether there was an expectant execution upon the goods, nor was it necessary for him to ascertain the reason why Hawkins was desirous of selling with so much haste. The amount paid was what an auctioneer of acknowledged skill had estimated as the value of the property, and the money was actually paid and a receipt taken. There was no necessity for any further document to prove the completion of the contract, and thereupon Sayer took possession of the house. The fact of his allowing Mr. and Mrs. Hawkins the convenience of remaining two or three nights in the house was the most natural thing, and it was also natural that he should wish to retain the services of the shopwoman, in order to carry on the business with profit to himself. Even if Sayer had known that there was an execution expected, that would not have invalidated the transaction, according to the decision in *Wood v. Dixie* (1), but he knew nothing of it, and the purchase was altogether *bond fide* on his part.

Mr. Roxburgh and Mr. Hastings appeared for the company, and Mr. W. D. Lewis and Mr. Eddis for the directors, and submitted that the circumstances under which this sale was effected were

in the highest degree suspicious. Mr. Sayer ought to have known, that from the suddenness with which the contract was to be completed there must have been some special liability existing on the part of Hawkins, and he might have discovered the impending execution. The sale was merely a colourable transfer of the property to defraud the creditors. There was no actual transfer of possession. Hawkins and his family were allowed to remain on the premises, and the niece was engaged as shopwoman. Sayer did not even put up his own name over the door, though he took the precaution, for the sake of appearances, to paint out the name of Hawkins. The receipt for the money was, in fact, a bill of sale in its operation, and as such it ought to have been registered under the 17 & 18 Vict. c. 36. The Court would, therefore, see that the whole transaction was collusive, and ought not to be supported against the execution creditors.

The following cases were cited during the argument:—

Cadogan v. Kennett, 2 Cowp. 435.

Devas v. Venables, 4 Sco. 123.

Holmes v. Penney, 3 Kay & J. 90; s. c.

26 Law J. Rep. (N.S.) Chanc. 179.

Windall v. Smith, 1 Campb. 332.

Latimer v. Batson, 4 B. & C. 652;

s. c. 4 Law J. Rep. K.B. 25.

KINDERSLEY, V.C. — This dispute is between Sayer on the one side and the Saloon Omnibus Company and their directors on the other. The defendants are execution creditors against the goods of Hawkins in respect of the costs which he was ordered to pay upon the proceedings in this court. It appears that at this time he was also indebted to his landlord in the sum of 60*l.* for rent. On the 23rd of November the writ of execution, issued under the process of the Court of Chancery, was executed by the sheriff. The question is, whether at the time of the execution the goods really belonged to Hawkins or not. If they were Hawkins's, the execution was regular, and the creditors must have judgment; if Hawkins had made a *bond fide* sale previously to Sayer, they were the goods of Sayer. Was the sale, therefore, valid, or void at common law under the statute of Elizabeth, the company

(1) 7 Q.B. Rep. 892.

taking upon themselves the onus of proving that it was fraudulent? At the present day, whatever fluctuations of opinion there may have been in the courts of this country as to the construction of that statute, it is not a ground for vitiating a sale that it was made with a view to defeat an intended execution on the goods of the vendor, the subject of the sale, supposing it was in all other respects *bond fide*. The case of *Wood v. Dizie* has settled that at law in the most solemn manner, on a motion for a new trial. With respect to the question whether the sale was *bond fide*, it was at one time attempted to lay down rules that particular things were indelible badges of fraud; but, in truth, every case must stand upon its own footing; and the Court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a good and valuable consideration. The result of the evidence appears to me to be this:—Up to the 12th of November Hawkins was a stranger to Sayer, who was an intimate friend of Marks, Hawkins's landlord. Hawkins then spoke to Marks with reference to getting rid of his stock and furniture, and Marks introduced him to Sayer. The negotiation ended in Sayer purchasing Hawkins's stock and furniture, with the interest in the business, for 300*l*. On the 13th of November, before coming to any agreement with Hawkins, Sayer consulted Mr. Pocock, the secretary to a Trade Protection Society, as to his intended purchase, and was cautioned against employing Hawkins's wife and niece in carrying on the business. Now, this application is made the ground of an argument that Sayer knew he was trading on dangerous ground; but I think if Sayer was intending a fraud, he would not have made these inquiries, nor would he have employed Hawkins's niece after the caution given him by Pocock. It was on the 16th of November that Sayer went to look at the property, and, not liking to trust to his own judgment, he asked Mr. Robins, the auctioneer, to look over the goods. Mr. Robins valued the stock and furniture at 508*l*., but he stated that, if sold by auction, one-third ought to be struck off; and that, under all the circumstances, Sayer ought not to give more than 300*l*.

The result was, that Hawkins agreed to take 300*l*., and the contract was entered into, and at the same time the house was let to Sayer by Marks, the landlord. When the money was paid by Sayer, it appears that no document passed beyond the receipt for the purchase-money. Now, on that receipt two arguments are founded. First, it is said that the receipt, on the face of it, shews that it was a sale of everything on the premises, including wearing apparel; but I cannot view it in that light, and no one had the slightest notion of such an intention. When the receipt speaks of goods, it only meant household furniture and stock-in-trade, together with goods *ejusdem generis*. Secondly, it is said that the receipt is, in fact, a bill of sale under the act 17 & 18 Vict. c. 36; but upon referring to the 7th section it does not appear to come within the description of any of the things there enumerated. It is neither a "bill of sale, assignment, transfer, declaration of trust without transfer, or other assurance of personal chattels, power of attorney, authority or licence to take possession of personal chattels as security for a debt," but it is simply a receipt for purchase-money, which does not require registration as a bill of sale. It appears that there was no proper taking of possession until the 18th of November, when Miss Compton was engaged, and that was a manifestation that Hawkins was not in possession. It was natural that Sayer should desire to engage a person who was accustomed to the business, and he probably would have engaged the wife had he not received a caution. The fact of not immediately painting up his own name was accounted for satisfactorily by the fact of the sheriff's officer taking possession, and by the few days which previously elapsed, Sunday being one. So far from this being a badge of fraud, it was quite the contrary; for if fraud had been intended the name would have been immediately painted up. The whole transaction, however, was one of the greatest possible suspicion, which has not been entirely removed; one circumstance, in particular, brings its weight of suspicion, namely, the absence of Hawkins as a witness. A number of persons have been called to testify to the transactions in question; but he was a party to them all.

COURTS OF CHANCERY:

KINDERLEY, V.C. } LAWRENCE G. CAMPBELL.
March 7. } BELL.

Attorney and Solicitor—Privileged Communications—Scotch Solicitor in England.

The rule as to privileged communications between an English solicitor and his client, applies equally to a Scotch solicitor resident in England, not being admitted in England, and his client in Scotland.

the other hand, it was competent to execution creditors to have called him, at the principal obligation to do so lay upon Sayer, although it does not lie in the mouth of the other side to contend that the omission was a proof of fraud. Suspicion, though a good ground for the most minute and searching investigation, is no ground for decision; and that principle applies to this case. Hawkins, if called, could have confirmed the statements of the other witnesses, and removed the suspicion naturally attaching to a transaction, whereby all his stock-in-trade, furniture and lease were transferred at one sweep, without valuation or inventory as between him and Sayer, and without any assignment or question asked. Sayer, a pawnbroker in Brydges Street, Covent Garden, became suddenly, for the first time, a dealer in toys, at Inverness Road, Bayswater, no bill of sale being given, which was certainly suspicious; there was sufficient delivery, but that all this was begun and ended between the 12th and 17th of November, resulting in an actual sale and transfer. No doubt, the execution creditors had just grounds of suspicion, and were misled to expect success by the view that an intention to vitiate the execution was sufficient to defeat the sale. In my opinion, the result of the evidence is, that the sale was bona fide for a sufficient consideration; and there is no ground for imputing fraud, or that Sayer knew anything about Hawkins why he wanted to sell, and Hawkins had told him that it was to defeat an execution, that would have been no ground for impeaching the transaction. With regard to the costs, this is a matter of considerable difficulty; the sheriff, as the stakeholder, must have his costs of money is allowed to deduct his costs first; but here there is no money in court, and therefore the failing parties, must pay what the sheriff (had there been a fund) would have deducted. With regard to Sayer's costs, it is from the beginning a case of grave suspicion, which Hawkins's absence does not tend to remove.

This suit was instituted to enforce payment of the sum of 1731., alleged to have been remitted by the defendant Campbell to the defendants Messrs. Robertson & Simpson, who were practising in London as Scotch solicitors and law agents, in trust for the plaintiff. The defendants Messrs. Robertson & Simpson admitted that they had received from Mr. Campbell a sum of 3000l., which would, under certain circumstances not fulfilled, have been applicable to the payment of the plaintiff's demand, but they denied that they held the money, or any part of it, in trust for the plaintiff. The plaintiff alleged that certain letters and documents in the defendants' possession which had passed between Mr. Campbell and Messrs. Robertson & Simpson, would make out a trust for the plaintiff, and that he was entitled to the production of such documents. The defendants filed an affidavit, with a schedule, containing the alleged documents, but objected to produce them, on the ground of their being privileged communications. The plaintiff obtained the usual order for the production of all documents, and the case now comes on upon adjournment from chambers. The defendants Messrs. Robertson & Simpson stated in their affidavit as follows:—"We have been duly admitted solicitors before the Courts of law in Scotland, and we have been and now are resident and practising in London as Scotch solicitors and law agents, and in our capacity as such were professionally employed by Thomas Rankin, of Edinburgh, the solicitor for the defendant R. D. Campbell, in the actions in the plaintiff's bill mentioned, and we acted in such professional capacity and not as ordinary agents and trustees for the defendant R. D. Campbell, and

said bill untruly alleged, and the documents set forth in the second part of the said schedule to the said affidavit consist of letters written to and received by us from the defendant R. D. Campbell and of copies of letters written by us to the defendant R. D. Campbell; and the said letters are communications which passed between us and the defendant R. D. Campbell, in the course and for the purpose of the said employment, and are of a professional and confidential nature, and we object to produce the same or make any further discovery thereof, inasmuch as the said letters and copies of letters were written and received by us confidentially in our professional capacity as aforesaid."

Mr. Anderson and *Mr. Rogers*, for the plaintiff, contended that the rule respecting privileged documents did not apply to any but English solicitors. Messrs. Robertson & Simpson were solicitors in Scotland only, and here they were mere agents acting for the other defendant. Moreover, as these documents contained the *res gestæ* of the litigation, they would not, in Scotland, be privileged. The documents did not contain strictly legal matters such as would pass between a solicitor and his client, but they were such as might have been communicated to any ordinary agent.

Mr. Glasse and *Mr. G. W. Collins*, for Messrs. Robertson & Simpson, submitted that as these gentlemen were Scotch solicitors, practising in London, their status must be fully recognized by the Courts of this country. The documents in question were such as this Court always considered as privileged, and according to the affidavit of the defendants they were communicated in the ordinary professional capacity, and therefore they ought to be protected from inspection. If the Court should hold otherwise, the business of Scotch solicitors, acting as legal and parliamentary agents in London, would be put an end to.

The following cases were cited :—

Tugwell v. Hooper, 10 Beav. 348; s. c. 16 Law J. Rep. (n.s.) Chanc. 171.

Reid v. Langlois, 1 Mac. & G. 627; s. c. 19 Law J. Rep. (n.s.) Chanc. 337.

Daniel, Ch. Prac. 2nd ed. 530.

Goodall v. Little, 1 Sim. N.S. 155; s. c.

20 Law J. Rep. (n.s.) Chanc. 132.

Bunbury v. Bunbury, 2 Beav. 173; s. c.

9 Law J. Rep. (n.s.) Chanc. 1.

Calley v. Richards, 19 Ibid. 401.

Steele v. Stewart, 1 Ph. 471; s. c. 14

Law J. Rep. (n.s.) Chanc. 34.

Herring v. Clobery, Ibid. 91; s. c. 11

Law J. Rep. (n.s.) Chanc. 149.

Cleave v. Jones, 7 Exch. Rep. 421;

s. c. 21 Law J. Rep. (n.s.) Exch. 105.

Cromack v. Heathcote, 2 B. & B. 4.

Greenough v. Gaskell, 1 Myl. & K. 98.

Enthoven v. Cobb, 2 De Gex, M. & G. 632.

Hawkins v. Gathercole, 1 Sim. N.S.

150; s. c. 20 Law J. Rep. (n.s.) Chanc. 303.

Carymael v. Powis, 1 Ph. 687; s. c.

9 Beav. 16; 15 Law J. Rep. (n.s.) Chanc. 275.

Glyn v. Caulfeild, 3 Mac. & G. 463.

Gainsford v. Grammar, 2 Campb. 9.

Walker v. Wildman, 6 Madd. 47.

Pearse v. Pearse, 1 De Gex & Sm. 12;

s. c. 16 Law J. Rep. (n.s.) Chanc. 153.

Kid v. Bunyan, 5 Co. of Sess. Ca. 2nd ser. 193.

KINDERSLEY, V.C.—Had I entertained any doubt on this question, I should not have decided it adversely in the absence of *Mr. Campbell*; but being of opinion that the privilege ought to prevail, I shall not put the parties to that expense. The statement in the answer and affidavit is distinct; and if these gentlemen had been English solicitors, these documents would have been protected without question, and their statement must be taken to be true, unless on the face of the affidavit or answer it should appear to be otherwise. The case is new *in specie*, but the authorities have established such a principle as requires the Court to act upon it in the present instance. The general principle is this: the exigencies of mankind require, that in matters of business which may lead to litigation with respect to rights and obligations, a man should be entitled to communicate freely with his professional adviser, and that such communications should be confidential and secret, which no one

has a right to require either the client or his professional adviser to disclose. There is no mischief in this rule; nor does it unjustly trench upon the abstract principle, that Courts of equity require production of documents which would assist in establishing the case. Whatever fluctuations of opinion have taken place on the question, it is not now necessary, in the case of an English solicitor, for the purpose of privilege and protection, that the communications should pass, either during or relating to actual or expected litigation; it is sufficient if they are confidential between the attorney and his client, in that capacity. This privilege is generally confined to barristers and solicitors: a wholesome limitation, but subject to some exceptions. This case is not an exception, but rather an appendage to, or illustration of the rule, which is not a general rule with persons not professional, legally speaking. Thus, in the case of a medical or spiritual adviser, although it may be a comfort to a party freely and confidentially to communicate, yet these communications are not privileged by law. In this case, Mr. Campbell is a Scotchman, residing in Scotland, and he, it seems, undertook matters of business relating to the debts of his nephew, who was probably a Scotchman, but resident in England, with obligations, perhaps, of which the Court knows nothing. Suppose Campbell had consulted a writer to the signet or solicitor in Edinburgh, and he happened to cross the border and be found in England, and a bill had been filed, making it requisite to communicate with his client in Scotland, and production was asked of those communications, surely the finding him in England would never prevent the Courts of this country giving protection. It makes no difference, in principle, if a Scotch solicitor is resident in England, as is often the case. It may be more convenient for him to conduct the case of a Scotch client, the case being Scotch, and an English solicitor may not serve the purpose so well; and it is not disputed, that in a Scotch case there is, to a certain extent, a privilege in the Scotch courts. The question really comes to this:—If a Scotchman has occasion to communicate with a professional adviser in this country, may he con-

sult a Scotch solicitor, or must he employ an English lawyer? It appears to me, that the same principle that would justify an Englishman in consulting his English solicitor while in Edinburgh, would justify a Scotchman in employing a Scotch solicitor. As to what the privilege is which is allowed in the Scotch courts, that would in fact be inquiring into the Scotch law, which it might be difficult to ascertain; but sitting in an English court, I am bound to apply the English rule of privilege, and I think that rule applies to these documents. My opinion therefore is, that the letters in question are privileged from production, but as the case is new *in specie*, I shall direct that the costs be costs in the cause.

STUART, V.C. }
March 17. }

TEED v. BEERE.

Statute of Limitations—Confidential Relation—Barrister and Clerk—Retention of Fees—Practice—Chief Clerk's Certificate—Res Judicata—Administration of Estate in Chancery.

To a suit by a barrister to recover out of the assets of his deceased clerk fees embezzled and retained by such clerk, the Statute of Limitations cannot be set up as a defence.

Under a decree in an administration suit, a barrister tendered his claim for an amount of fees embezzled and retained by the intestate, who had been his clerk. The chief clerk, by his certificate, disallowed the claim, on the ground that it was barred by the Statute of Limitations. The claimant took no proceeding in the administration suit to vary the certificate, and a decree was soon afterwards made on further directions, under which the residuary estate was distributed amongst the parties beneficially interested. The barrister subsequently instituted another suit in this court for the recovery of his demand out of the assets in the hands of the parties amongst whom they had been distributed:—Held, that he was entitled to maintain such suit, and to a decree for payment, with costs.

John Beere, deceased, was for many years employed as clerk to the plaintiff, Mr. John Godfrey Teed, one of Her

Majesty's counsel, and was in that character accustomed to receive fees for the use of his master. In 1846 he suddenly left the service of Mr. Teed, and it was soon afterwards discovered that he had embezzled fees to the amount of 495*l.*, which he had received for the use of Mr. Teed. Mr. Teed heard nothing further of him until notice of his death, at Guernsey, appeared in the public journals, in the early part of 1854.

A suit having been instituted, in February 1854, for the administration of John Beere's estate, Mr. Teed carried in his claim for the amount of fees of which he had been defrauded, before the chief clerk of Vice Chancellor Wood, to whose court the administration suit was attached.

The claim was, however, disallowed, the chief clerk considering it to have been barred by the Statute of Limitations.

The plaintiff did not move in the administration suit to vary the chief clerk's certificate, and, in March 1857, an order was made in that suit, pursuant to which the residuary estate of the intestate was, in April of that year, paid and distributed to and between his widow and Eliza Caroline Amelia Beere, his daughter and only child.

Mr. Teed, in October 1857, filed his bill in the present suit, which, as originally framed, was against the widow and daughter of Beere, as defendants.

In July 1858 the plaintiff, Mr. Teed, and Mrs. Beere entered into an agreement for the compromise and settlement of the plaintiff's claim, by which the plaintiff agreed to accept and Mrs. Beere to pay the sum of 150*l.* in discharge of the plaintiff's claim; but it was expressly agreed that the said compromise should be without prejudice to the claim of the plaintiff against the other defendant to the bill as originally framed.

Mrs. Beere subsequently paid the 150*l.*, pursuant to the compromise. The plaintiff then amended his bill by making the daughter of John Beere the sole defendant.

The amended bill prayed that it might be declared that the plaintiff was entitled to stand as a creditor against the estate of John Beere, deceased, and to be paid out of his assets the sum of 485*l.* or other the

full amount of what was due from the said John Beere to him at the time when he absconded, with interest; and that the defendant Eliza Caroline Amelia Beere ought to be deemed a trustee for the plaintiff of so much of the personal estate of the said intestate John Beere as should be requisite to pay two-thirds of the said sum of 485*l.* and interest; and that the said defendant might be decreed to pay the same.

Mr. Bacon and *Mr. Cracknall*, for the plaintiff, submitted that, this being a case of fraud committed upon his principal by a confidential agent, the Statute of Limitations was not available as a plea in bar of the demand; and the fact of the plaintiff having failed in his proceeding in the administration suit to obtain the allowance of his claim, did not conclude his right to institute another suit to recover it out of the assets of the testator in the hands of the beneficiaries amongst whom it had been distributed.—They cited

Gillespie v. Alexander, 3 Russ. 130.

Greig v. Somerville, 1 Russ. & M. 338.

Vooght v. Winch, 2 B. & Ald. 662.

Joly v. Swift, 11 Irish Eq. Rep. 411.

Stone v. Marsh, 6 B. & C. 551; s. c. 5 Law J. Rep. K.B. 201.

Marsh v. Keating, 1 Bing. N.C. 198.

Ex parte Jones, in re Jones, 3 Deac. & C. 525; s. c. 3 Law J. Rep. (N.S.) Bankr. 11.

Davis v. Combermere, 15 Sim. 394.

Lee v. Flood, 2 Sm. & Gif. 250.

Crosby v. Leng, 12 East, 409.

Brown v. Lake, 1 De Gex & Sm. 144.

Smith v. Armstrong, 6 De Gex, M. & G. 150.

Mr. Malins and *Mr. Shebbeare* contended that this was not a case of trustee and *cestui que trust*, but a simple case of debtor and creditor, as in *Foley v. Hill*, (1), and that the debt therefore became barred by the statute at the end of six years; and, secondly, that the plaintiff, having come in under the decree in the administration suit, and having neglected to take any proceeding in that suit to vary

the chief clerk's certificate disallowing his claim, was bound by that certificate as soon as it was allowed by the Court. The 34th section of the act, 15 & 16 Vict. c. 80, enacted that "when any certificate or report of the chief clerk shall have been signed and adopted by the Judge, the same shall be filed in like manner as reports are now filed, and shall thenceforth be binding on all the parties to the proceedings, unless discharged or varied, either at chambers or in open court, according to the nature of the case, upon application by summons or motion." And, in *Hayward v. Hayward* (2), Wood, V.C. had said, "It is extremely important that it should be understood, with reference to the practice in chambers, that the chief clerk never makes any order which may be called his own order in any sense. All the orders made in chambers are the orders of the Judge." And in *The Earl of Mansfield v. Ogle* (3) the Lords Justices of Appeal had decided that a certificate of the chief clerk that a certain sum was due to a creditor as arrears of an annuity was not an order under which "a sum of money was payable," under the 18th section of the 1 & 2 Vict. c. 110, so as to carry interest. The plaintiff's contention in the present case, however, goes much further, for to decree in his favour would be, in effect, to decide that the chief clerk's certificate is not a judicial proceeding at all.

STUART, V.C. (without requiring a reply) said that, as to the first question, whether the claim was or was not barred by the Statute of Limitations, he felt no doubt. The clerk was clearly a receiver and agent, by whom money was received in confidence, and therefore under the same implied contract as that supposed to arise out of the duty of trustees, assignees and executors, of faithfully, diligently and accurately accounting, when called upon, to his principal—*The Earl of Hardwicke v. Vernon* (4), *Dinwiddie v. Bailey* (5). That being so,

the money must be considered as money of the employer in the hands of his confidential agent. There had, therefore, been all along possession by the agent, but no adverse possession; and therefore the bar of the statute, which was founded on adverse possession, did not apply. So much for that part of the defence which was grounded on the Statute of Limitations. Then, as to the effect of the chief clerk's certificate. There had been no order of the Court, but the chief clerk had thereby simply disallowed the claim, i. e., he had certified it as a debt which could not be proved to be legally due. The question was, whether that concluded the claimant from ever making a demand against the assets of the person by whom he had, without doubt, been defrauded. He was of opinion that it did not. The mere fact that the assets had been distributed under the certificate did not bar the right of a creditor of the estate to make the residuary legatee or next-of-kin refund. The only effect of an administration decree was to discharge the executor from responsibility. The difficulty which attended the establishment of the creditor's claim was protection enough to those amongst whom the assets had been distributed, because the creditor who, wilfully and with full knowledge of the decree, allowed the assets to be distributed, was obliged to have recourse to a circuitous proceeding, attended with great risk, and the relief from which, if he obtained relief at all, would probably be upon terms. In such a case, if the Court found there had been negligence on the part of the creditor, it would impose upon him very severe terms. The Court, however, would examine all the circumstances of the case before it imposed any terms. In the present case, he was of opinion that there was no ground whatever for holding that this demand should remain unanswered as against the assets in the hands of the defendant. There had been no adjudication upon the claim till now, and he felt himself bound to decide it against the defendant; and, considering the nature of the plaintiff's demand, there did not appear to be any reason for imposing terms upon the plaintiff, notwithstanding what had taken place in the other suit.

(2) Kay, App. xxxi.; s.c. nom. *Hayward v. Price*, 23 Law J. Rep. (N.S.) Chanc. 549.

(3) *Ante*, p. 422.

(4) 14 Ves. 504.

(5) 6 Ibid. 136.

The decree would, therefore, be in favour of the plaintiff, with costs.

The decree was made against the defendant personally, and not as administratrix, a sum being agreed upon as costs.

KINDERSLEY, V.C. } MAPLETON v.
May 5. MAPLETON.

Power of Appointment—Partial Execution.

By a marriage settlement personal property was settled in trust for the husband for life, remainder to the wife for life, remainder upon trust after the decease of the wife for such children of the marriage and their issue who should be then living, as the husband should appoint; in default of such appointment to such children and their issue living at the death of the husband as the wife should appoint. There were five children of the marriage all living at the husband's death, and the wife survived her husband. The husband appointed four-fifths to four of these children, omitting any appointment of the remaining fifth. The fifth child died before the wife, leaving three children, one only of whom was born at the husband's death. The wife then appointed the remaining fifth to the only child of the deceased son, who was living at the husband's death, omitting the two children subsequently born, who were the plaintiffs in this suit:—Held, overruling Simpson v. Paul (1), that the partial execution of the primary power by the husband did not preclude the wife from exercising the secondary power in appointing the unappointed fifth; that both the appointments were valid, and that the plaintiffs could take no share in the fund.

A question was raised in this suit as to the validity of two appointments made in pursuance of a power in a marriage settlement. By the settlement, dated the 27th of August 1807, and made upon the marriage of David Mapleton and Sarah Louisa Banbury, certain sums of stock, amounting to 3,000*l.*, were vested in Henry Golding and R. M. Tozer, upon trust to pay the dividends and interest to David Mapleton for life, remainder to Sarah

(1) 2 Eden, 34.

Louisa Banbury for life; and after her decease to pay over, apply, distribute and divide the said trust monies amongst all and every the child and children of the said intended marriage, and the issue of such child or children who should be then living, in such parts, shares and proportions, if more than one, and with, under and subject to such limitations and conditions, and in such manner and form, and with or without power of revocation, as the said David Mapleton should from time to time during his natural life, by any deed or deeds, writing or writings, or by his last will and testament in writing to be duly executed and attested, give, direct or appoint; and for want of such gift, direction or appointment by the said David Mapleton, unto and amongst all and every the child or children of the said intended marriage, and the issue of such child or children who should be living at the time of the decease of the said David Mapleton, in such parts, shares and proportions, if more than one, and with, under and subject to such limitations and conditions, and in such manner and form, and with or without power of revocation, as the said Sarah Louisa Banbury, in case she should survive the said David Mapleton, and he should have made no such gift, direction or appointment, should from time to time during her natural life by any deed or deeds, writing or writings, or by her last will and testament, to be duly executed and attested, give, direct or appoint; and for want of such gift, direction or appointment by the said Sarah Louisa Banbury, then upon trust to pay over, apply, distribute and divide the said trust money and every part thereof, unto and amongst all the children of the said intended marriage, and the issue of such child or children, share and share alike, equally to be divided between them (such issue taking only so much as their respective father or mother, if living at the death of the said David Mapleton, would have taken), to go wholly to such child, if but one, or the issue of such child, and to be paid and payable to him, her or them respectively when and as he, she or they should respectively attain the age of twenty-one years. There was also a trust for maintenance and advancement, with benefit of survivorship.

There were issue of the marriage five children, David Robert Banbury Mapleton, Tamesia Sarah Louisa Mapleton, Henry Mapleton, Christiana Frances Mapleton and Martha Ann Blanche Mapleton, who all survived David Mapleton. In 1837, Tamesia S. L. Mapleton married John Banbury, and David Mapleton appointed one-fifth of the trust fund to her, and that one-fifth was settled upon her and her husband and children. In 1840, Martha A. B. Mapleton married Horatio Compigne, when David Mapleton appointed one other fifth of the trust funds to her, and by a settlement of the same year, that fifth was settled upon her and her husband and children. David Mapleton the elder died on the 22nd of March 1842, having made his will, dated the 16th of August 1829, and a codicil dated the 2nd of December 1840, whereby he appointed one other fifth to Christiana F. the wife of Henry Hockin, and one-fifth to Henry Mapleton. David R. B. Mapleton married in 1839, but no settlement was made upon that marriage. His wife dying, he married Anne Compigne, when the usual settlement was made. There were three children of that marriage, one of whom only was living at the death of David Mapleton, namely, Maberly Anne Mapleton, and two born after his death, Harriet Mapleton and Frederick Mapleton, who were the infant plaintiffs.

Sarah Louisa Mapleton, the wife of David Mapleton, died on the 28th of July 1858, having made her will on the 3rd of November 1855, reciting that four-fifths of the trust fund had been appointed, and thereby appointing the remaining one-fifth (except 20s. part thereof) to Maberly Anne Mapleton, who was living at the death of her said deceased husband, and the sum of 20s. as to one-fourth to Tamesia S. L. Banbury and her issue living at the death of David Mapleton the elder; one other fourth to Christiana F. Shelton, in the same terms; one other fourth to Martha Blanche Compigne, in the same words, and the remaining fourth to Henry Mapleton, in the same terms. The testatrix then ratified and confirmed the several appointments made by her said husband, David Mapleton, of the four fifth parts of the trust fund.

The bill was filed, by the two children of David Robert Banbury Mapleton born after the decease of David Mapleton, praying a declaration that the appointment made by Sarah Louisa Mapleton might be declared void, and that such of the appointments executed by David Mapleton or Sarah Louisa Mapleton as excluded the plaintiffs might be declared void, and that the rights of the parties might be ascertained.

Mr. Anderson and *Mr. Briggs*, for the plaintiffs, submitted that neither of the powers given by the settlement of August 1807 was exclusive, and that all the children and issue of children were objects of the powers; that the power executed by David Mapleton, the husband, ought to have included the plaintiffs, who were issue of one of the sons, and were alive at the decease of the wife; that after the partial execution of the primary power by the husband, the wife was precluded from exercising the secondary power, which was a proposition expressly laid down in *Simpson v. Paul*, and that if the wife was capable of exercising her secondary power, then it was invalid, because it did not include the plaintiffs as appointed by way of substitution for their father who was alive at the death of David Mapleton, the husband.

The following authorities were also cited:—

Lee v. Head, 1 Kay & J. 620; s. c. 24 Law J. Rep. (N.S.) Chanc. 569.
Bristow v. Warde, 2 Ves. jun. 336.
Routledge v. Dorril, 2 Ibid. 356.
Wilson v. Piggott, Ibid. 351.
Foster v. Cautley, 6 De Gex, M. & G. 55; s. c. 24 Law J. Rep. (N.S.) Chanc. 252.
Sugden on Powers, 6th ed. vol. 2, pp. 218, 224, 258.

Mr. Lee and *Mr. Lewis*, *Mr. Glass* and *Mr. Higgins*, and *Mr. Baily* and *Mr. Tripp*, who appeared for other parties, were not called upon to address the Court.

KINDERSLEY, V.C. — I entertain no doubt in this case that it is impossible for the plaintiffs to take any share in this fund.

The settlement is extremely ill drawn, and the question before the Court has arisen owing to that circumstance. Under the first power, the fund, after the death of the husband and wife, is to go amongst all the children of the intended marriage, and the issue of such children who should be "then" living, in such manner as David Mapleton should appoint. Without knowing what the defendants' contention is, I will assume for the plaintiffs, but without expressing any opinion upon the point, that the words of that power are not such as to give a right to an exclusive appointment, but that if there is an appointment of the whole fund, it must be in favour of all the children, and the issue of such children who should be "then" living, the word "then" referring to the death of Mrs. Mapleton. I will assume, therefore, that this power is to be exercised in favour of all the children living at the death of Mrs. Mapleton, and the issue then living of children antecedently dead. Then as to the second power, that is, in default of, or for want of, any such gift, direction or appointment, the words are not, who shall be "then" living, but amongst the child or children and the issue of such child or children "who shall be living at the death of David Mapleton." Now, the natural effect of this language, in my opinion, is to include both the children and the issue of children, so that, to entitle any person to claim as an object of the second power, he must be a child of the marriage or the issue of such child living at the death of David Mapleton. I will assume that this power also does not warrant an exclusive appointment. Now, it was contended that whatever was the effect of the power given to the father, the power to the mother was only to be exercised in the event of the father not having exercised his power. The case of *Simpson v. Paul* was cited in support of this contention, but in that case there was mixed up with the construction of the instrument something done by the donee of the power in attempting the exercise of it, and nothing can be less satisfactory than Lord Northington's reasoning; still there is the general proposition that if there is a primary power given to one, and in default of execution, a secondary power given, a partial exercise

by the donee of the primary power will preclude any exercise of the secondary power. The question then is, whether the wife is precluded in this case from exercising the power given to her after her husband has partially exercised his power? and whether such an abstract proposition as that laid down in *Simpson v. Paul* can be maintained? Now, Lord St. Leonards has distinctly expressed his opinion that Lord Northington was wrong; and although there is a difference of opinion upon the point, and there are certain other cases in which *Simpson v. Paul* was referred to without disapprobation, I consider that I am justified in taking Lord St. Leonards' view, that the partial execution of a primary power does not exclude the execution of a secondary power; and in this particular case I think the words are sufficient to enable an exercise of the secondary power by the wife over any portion of the fund not appointed under the original power, provided it is properly exercised, and notwithstanding the partial exercise of the primary power. As to the objects of the wife's power, I think the words must receive the same construction as those used in the primary power, and be held to extend to all the children of the marriage and the issue of such children as should be dead, such issue to be living at the death of David Mapleton. The plaintiffs, therefore, whose father was not dead at the death of David Mapleton, are not within the scope of the second power.

The next question is, whether they are within the scope of the first power. The objects of that power are the child or children of the marriage, and the issue of such child or children who should be "then" living, that is, at the death of Mrs. Mapleton, or the issue of such children living at her death. Now the father of these children predeceased Mrs. Mapleton, but they were living at her death, therefore they are objects of the first power. The facts are these: the father partially executed his power on three occasions, that is, on the marriages of his children, by deed and by will, which he had power to do, but he made no appointment in favour of David R. B. Mapleton, his eldest son, although he was then living, and one-fifth was left unappointed. Now, irrespective

of anything which subsequently took place, it is not contended that any of these appointments were bad, and I am clearly of opinion that they were good and valid, at least, during the life of David Mapleton. Then, Mrs. Mapleton, finding that her husband had, within the scope of his power, appointed four-fifths, and there being one-fifth remaining, but no fifth child living, considered that, so far as equality was justice, she would desire to give that fifth to those children who were evidently objects of the power; but on looking at the power, it was found only to refer to children of the marriage or the issue of children living at the death of David Mapleton, and she was no doubt told that she had no exclusive power, but must embrace all the objects of the power, which were all the children of the marriage living at the death of David Mapleton, and if any of them were dead, then the issue; but none of them were dead except David Robert, and on looking to see what issue of David Robert were living when David Mapleton, the father, died, it was found that only one of those children was living at his death, and she accordingly appointed the whole fund to that one child, except a trifle to satisfy the act relating to illusory appointments. That appointment was within her power, and she has not exceeded it. The effect of this certainly is what, if the parties had had it pointed out to them, might have been obviated in drawing the settlement, namely, that the issue were not benefited as the parties might have desired, and from this it is argued that the exercise of the power by the husband was void, and that the wife's execution of the power was void, not because it was in excess, not because it did not provide for all the objects comprised within the power, but because the result is, that by reason of the settlement being bad and obscure, some objects are not provided for who might have been included. That, however, is no reason for holding the appointments to be bad. They seem to be, on the contrary, all good.

But there remains another point which is fatal to the plaintiffs' case. If all these instruments were void, and if the whole fund, or any part of it, could be considered to be unappointed, still the plaintiffs do not come within the ultimate trust in

default of appointment, there being no express direction for substitution of issue of children in their particular case. The language is "unto and amongst all the children of the said intended marriage and the issue of such child or children, share and share alike, equally to be divided between them (such issue taking only so much as their respective father or mother, if living at the death of the said David Mapleton, would have taken), to go wholly to such child if but one, or the issue of such child, and to be paid to him, her or them respectively when and as he, she or they should respectively attain the age of twenty-one years." It is true that substitution may be inferred from these words, and if no period had been expressly stated, it would be the period of distribution; but it is expressly stated that the period is the death of David Mapleton, and these children who are plaintiffs were not then alive, consequently they would not be entitled to take in default of appointment, even if the powers were improperly exercised. The bill must, therefore, be dismissed, with a declaration that the several instruments referred to were good and valid executions of the powers.

LOrds JUSTICES. }
May 26. }

RUDGE v. WEEDON.

Practice—Supplemental Order—Married Woman sued as a Feme Sole—Divorce and Matrimonial Causes Act—Chancery Practice Amendment Act.

A married woman obtained an order from a magistrate, protecting her property, on the ground of desertion by her husband, under the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85). A bill was filed against her (her husband not being a party), and she obtained leave to put in a separate answer, and a decree was made against her. Another suit was instituted for the same purposes as the former suit, and she and her husband were made defendants. On his application to the magistrate who granted the protection order, the husband satisfied his Worship that there had been no desertion, and the protection order was discharged. The plaintiff in the first suit thereupon, under the

52nd section of the Chancery Practice Amendment Act (15 & 16 Vict. c. 86.), made the husband a defendant by supplemental order in that suit; but, upon the application of the husband, the order was discharged, by one of the Vice Chancellors. On appeal, by the plaintiff in the first suit,—Held, reversing his Honour's decision, that the supplemental order was proper.

This was an appeal from an order made by Vice Chancellor Kindersley under these circumstances:—A suit was instituted in the month of March 1859 by two infants named Rudge (by Robert Harris, their next friend), two of the residuary legatees of the estate of William Weedon, for the administration of his estate. Another of the residuary legatees was Mrs. Elizabeth Grace Rudge (wife of Mr. George Bickerton Rudge), and she, in the month of August 1858, applied to Mr. Elliott, a police magistrate of the Lambeth district, for an order of protection, on her assertion that she had been deserted by her husband for a period of seventeen years, and obtained the order under the 21st section of 20 & 21 Vict. c. 85; by which section it is provided, that the effect of the order shall be to protect the wife's "earnings and property acquired since the commencement of such desertion from her husband, and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*;" and further, that "if any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act, if she obtained a decree of judicial separation." It was also enacted, by the 26th section, that "in every case of a judicial separation the wife shall, whilst so separated, be considered as a *feme sole* for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding."

In this state of circumstances the plaintiffs made Mrs. Rudge a defendant as a *feme sole*, her husband not being either plaintiff or defendant. Thereupon Mrs. Rudge ob-

tained leave on motion to put in her answer separately, as a *feme sole*, and a decree was made against her.

The same infants, by another next friend, afterwards filed a bill for the same purposes, and George Bickerton Rudge and Elizabeth Grace Rudge were made co-defendants. By reason of the proceedings in the second suit Mr. Rudge became aware of the protection order, and on the 28th of March 1859 he applied to Mr. Elliott for its discharge, and having satisfied his Worship that he had never deserted his wife, the order was discharged. On the 30th of the same month, the plaintiffs in the first suit obtained the common supplemental order at the Rolls, under the 52nd section of the Chancery Practice Amendment Act (15 & 16 Vict. c. 86), to make Mr. Rudge a co-defendant with his wife. On motion on behalf of Mr. Rudge, Vice Chancellor Kindersley, on the 16th of April, discharged the supplemental order for the reasons adduced in the following judgment.

"The question in this case turns entirely upon a technicality, and is very unsatisfactory to decide, because it will involve the parties in expense without advancing the suit. I speak of the motion to discharge the order in the nature of a supplemental order, the question on which turns upon the construction to be put upon the 52nd section of the Chancery Practice Amendment Act, 1852. My duty is not to do otherwise, in construing an act of parliament, than to put a fair and natural construction on the words, and not to distort the language in order to give it a more extensive construction. Now, here is a case in which Mrs. Rudge, a married woman, is made a defendant by a person who has an interest in the character of residuary legatee, Mrs. Rudge being also a residuary legatee or at least having an interest in the residue; and she is made a defendant without her husband, the suit being for the administration of the estate. As it turns out, her husband ought to be a party with her, except so far as that rule has been affected by that section of the Divorce Act which makes an exception to the general rule that he must be a party. It appears that before the suit was instituted a magistrate made an order giving

her protection, on the ground that she had been deserted by her husband. The effect of such an order is to make her so entirely sole that she may sue and be sued as a *feme sole*; that is different from the case of a married woman who has a separate estate, for the act of parliament says she may sue and be sued without him, and it has been determined that he need not and ought not to be a party to a suit. The suit, then, was rightly constituted, and the plaintiff had no choice in the matter. A decree was taken with nothing special in it; but it seems that the order for protection was wrong, for there had been no desertion, and accordingly the order was discharged on the ground of its having been wrong *ab initio*. Then, that order, except so far as there is anything special in the Divorce Act, stood in no higher position than an order made by any Court of justice, and afterwards discharged by another branch of that Court as being wrong, and unless there is something to give it a different effect, the whole of that order is swept away as *ab initio*. Now it appears to me that there is nothing in the act of parliament to give it any different effect. By the act 21 & 22 Vict. c. 108. s. 8, it is enacted, that 'no discharge, variation or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied or discharged in respect of any debts, contracts, or acts of the wife incurred, entered into or done between the times of the making such order or decree, and of the discharge, variation or reversal thereof.' So that the effect of the amending statute is, that if, pending that order, the wife has contracted any debt, or entered into any contract, or done any other act as a *feme sole*, there is to be no alteration, but otherwise the act of parliament gives no validity to her acts. Now, the plaintiff found himself in this position: he had got his decree against a married woman, treating her as a *feme sole*, and the husband was not before the Court. It is clear, now, that the husband ought to have been a party to the suit, and that the decree, as it stands, is defective. Therefore, the plaintiff says he will obtain an order according to the 52nd section of the 15 & 16 Vict.

c. 86, in the nature of a supplemental decree, and has done so. I cannot find any fault with him; but the question is, whether that order is valid as being regular and proper. It appears to me that it is irregular and improper. The 52nd section of the Amendment Act is this: 'Upon any suit in the said court becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive or of the usual supplemental decree may be obtained as of course upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an order so obtained, when served upon the party or parties who, according to the present practice of the said Court, would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said Court; and such party or parties shall thenceforth become a party or parties to the suit, and shall be bound to enter an appearance thereto in the office of the Clerks of Records and Writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any general order of the Lord Chancellor, to apply to the Court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill, stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon.' Has then this suit become defective by reason of any change or transmission of interest or liability? If there has been none, then this

order is not valid. Now, here the magistrate's order has been swept away, and the thing stands upon the same footing as any discharged order of a Court. Transmission of interest there has been none, and there is nothing changed. *Edwards v. Bailey* (1) and *Cartwright v. Shephard* (2) were cases in which an actual party to a suit died, and it was decided that there the act did apply. In *Pickford v. Brown* (3) there was the birth of a child—that is to say, a change of interest; but here there is no change of interest. Mr. Rudge's rights are now just what they were when the decree was made, although, by the erroneous decision of a magistrate, there had been an order of protection against them. It is just as if there was a decree of the ecclesiastical Court, declaring a marriage null and void. As long as that decision stands the marriage is null and void; and if, pending that decision, there had been a suit against the wife, the husband would not have been a party. But suppose that afterwards that decision was set aside, would she not be a married woman *ab initio*? The marriage still exists; they do not become married, for they were married throughout. And it appears to me that Mrs. Rudge was not in this case a *feme sole* from the beginning. For these reasons it appears to me that I must come to the conclusion, that there is in this case no change or transmission of interest; and, therefore, this case does not come within the terms of the 52nd section. The Court had, therefore, no power to make a supplemental order, and the order must therefore be discharged."

From this decision the plaintiffs in the first suit appealed.

Mr. Glasse and *Mr. Rogers*, for the appellants.

Mr. G. M. Giffard and *Mr. George Simpson*, for Mr. Rudge.

The cases of *Baile v. the Bank of England* (4) and *Edwards v. Bailey* (5) were referred to.

(1) 19 Beav. 457; a. c. 23 Law J. Rep. (N.S.) Chanc. 872.

(2) 20 Ibid. 122.

(3) 1 Kay & J. 643.

(4) 4 Ibid. 564; a. c. 27 Law J. Rep. (N.S.) Chanc. 630.

(5) *Ubi supra*.

LORD JUSTICE KNIGHT BRUCE.—Assuming the magistrate's protection order to have been rightly discharged, still it was an order in force when the first bill was filed, and in force when the decree was made. According, therefore, to what I consider the true construction of the several acts of parliament that have been mentioned, the decree, so far as the absence of the husband was concerned, was right in form and substance, and I consider that, after the magistrate's protection order was discharged, it was a right and direct course to apply to the Rolls for the order in question of the 30th of March; and, with deference to the Vice Chancellor, if his Honour thought otherwise, I am of opinion that that order was also correct in form and substance; and, considering the nature of the wife's interest which is brought into question in this litigation, I am of opinion that the husband should pay the costs of the motion before the Vice Chancellor, and also the costs of the motion here.

LORD JUSTICE TURNER.—It seems to me also that the order made at the Rolls was a correct and proper order. There are two questions in this case, one arising upon the Divorce Acts, the other arising upon the Equity Jurisdiction Improvement Act. Now, with respect to the Divorce Acts, the 21st section of the 20 & 21 Vict. c. 85. says, that a wife deserted by her husband may apply in this case to a police magistrate for an order to protect any money or property she may acquire by her industry, or which she may become possessed of after such desertion, against her husband or his creditors, or any person claiming under him; and the magistrate, if satisfied of the fact of such desertion, and that the same was without reasonable cause, may make and give to the wife the order granting her protection for her property and earnings; and it is said that if the order be made, the wife "shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation." And by the 26th section of the act it is provided, "In every case of a judicial separation the wife shall, whilst so separated, be con-

sidered as a *feme sole* for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding." Now, what has happened in this case is, that on the 18th of August 1858 there was an order made by a police magistrate giving the wife the benefit of the protection of her earnings and property, acquired since the commencement of the desertion; and that order remained in force until the 28th of March 1859, when it was discharged at the instance of the husband. That order being discharged at the instance of the husband, stating that there never was, in fact, any desertion, the argument takes this course, that the statute only applies to the case of a wife deserted by her husband. But when we look at the language of the acts, it is plain that the words used in the act, "a wife deserted by her husband," mean a wife alleging herself to be deserted by her husband, because the immediate and subsequent provision is a provision that the fact of desertion is to be established to the satisfaction of the magistrate. It is impossible, therefore, to read that section without seeing that the words in the early part of it, "a wife deserted by her husband, may, at any time after the desertion, apply to the magistrate," must mean "a wife alleging herself to be deserted may, at any time after such alleged desertion, apply to the magistrate;" and then the magistrate, if satisfied of the desertion, may make the order. I read then the latter part of that section, "If any such order for protection be made, the wife shall during the continuance thereof be, and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this act if she obtained a decree of judicial separation." There the words "such desertion" apply, as I understand the act, to the desertion established to the satisfaction of the magistrate; and, therefore, if there has been an establishment of a desertion to the satisfaction of the magistrate, from that time the wife is in the same position in all respects as she would be under a decree of judicial separation; and by the 26th section of the act she is then placed in the position of a *feme sole* for the purpose of

suing and being sued. It is, however, as well to observe, that the 10th section of the amending act of the 21 & 22 Vict. c. 108, seems to me to shew very clearly what, in the view of the legislature, was the construction of the previous act; for the 10th section says, "All persons and corporations who shall, in reliance on any such order or decree as aforesaid, make any payment to, or permit any transfer or act to be made or done by the wife who has obtained the same, shall, notwithstanding such order or decree may then have been discharged, reversed, or varied, or the separation of the wife from her husband may have ceased, or at some time since the making of the order or decree been discontinued, be protected and indemnified in the same way in all respects as if, at the time of such payment, transfer or other act, such order or decree were valid and still subsisting"; treating it as perfectly clear that under the prior act the order had its effect as long as it remained in force, and going to the extent of validating and confirming it, notwithstanding the separation may have ceased—validating and confirming it, I mean, as to persons who take any transfer from the wife; validating and confirming it to that extent, notwithstanding even the separation may have ceased, provided that the party who took the transfer had no knowledge of the fact of the separation having so ceased; and the order having been discharged, it seems to me that, upon the true construction of this act, this lady was, at the time of the filing of this bill, to be considered as a *feme sole*, to sue and be sued only as a *feme sole*. Then, if that be the case, we come to the question upon the Improvement of the Jurisdiction in Equity, and by that act, s. 52, it is provided, that if there be any change of interest, the same order is to be made on a motion of course, or on an application of course, as would be made upon the filing of a supplemental bill. Now, can it be said here that there was no change of interest, when the effect of the discharging order is this—that the property which had belonged to the wife for her separate use has, by the operation of that discharging order, ceased to belong to her, and has become the property of the husband? It seems to me that that is clearly a change of interest within the meaning of

this act. I think, therefore, that the order made at the Rolls was correct, and that the order of the Vice Chancellor which discharged it must itself be discharged. I have felt for some time some doubt about the question of costs; but I think that that is entirely set at rest by the production of the bill which has been filed by the husband's brother, and by the same solicitor who is acting for the husband in this suit. That perfectly satisfies my mind that this is no more than a contrivance on the part of the solicitor for the purpose of displacing another suit instituted, and properly instituted, on behalf of these infants. I think, therefore, the order must be discharged, with costs, both before the Court below and here.

LORD JUSTICE KNIGHT BRUCE added— I believe that we are both of opinion that if the husband shall be desirous of rehearing the decree, he will be entitled to do so.

LORD JUSTICE TURNER.—Yes. I confine the observations I have made entirely to this particular case. There may be cases in which it would not be right that there should be such a supplemental order made, but in this case there is no question, except the interest of the wife. If she had been executrix before the separation, I am not at all clear that this order could have been properly made.

LORDS JUSTICES. }
June 13, 14, 15; } THOMPSON v. WHITELOCK.
July 4. }

Will—Construction—Mistake or Miscalculation by Testator—Gift to Legatees "or their Legal Representatives"—Exception out of Residue—Lapse.

*A testator gave a legacy to each of his brothers and sisters (naming them), or to their "legal representatives," to be paid to them two years after his death, and legacies to his nephews, the whole amounting together to 6,100*l*. He then gave the residue of his property to his widow absolutely, except 4,100*l*., which she was only to take for life, and after her death it was to be divided among his relations before mentioned, "in proportion to the legacies left above, which will just make their legacy double the first*

bequest." One of the sisters of the testator and two of his nephews died after the date of the will, but in his lifetime, and after his death the widow died.

One of the Vice Chancellors decided that there was not sufficient evidence before the Court to justify it in departing from the words of the will respecting the apparent miscalculation of the amount excepted out of the residue; and with regard to the postponed legacies, that notwithstanding the words "or to their legal representatives," the shares of the pre-deceased legatees in the amounts postponed to the widow's life interest lapsed, and that as the 4,100*l*. was not given as part of the residue, but as an exception out of the residue, those shares which lapsed fell into the residue, and did not go to the testator's next-of-kin; and on appeal the same was affirmed.

This was an appeal from a decision of Vice Chancellor Stuart in an administration suit, and on a petition in the same suit. The questions, two in number, arose on the construction of the will of the late Mr. Miles Whitelock, dated the 4th of March 1815, by which he gave to each of his three brothers and six sisters (naming them), or to their legal representatives, the sum of 500*l*., to be paid to them in two years after his death. He also gave 500*l*. to each of two of his nephews, and 300*l*. to each of two other nephews. After giving two annuities, the testator proceeded thus—"As to the remainder of my property, I leave the same to my wife Sarah, for her to have the absolute disposal of it, except 4,100*l*., of which she is only to have the use during her life, and which I wish to be divided amongst my relations to whom I have left legacies in the fore part of this instrument, in proportion to the legacies left above, which will just make their legacy double the first bequest." Mary Thompson, one of the testator's sisters named in the will (a legatee for 500*l*.), and also two of his nephews, died after the date of the will, but before the testator's death. The testator's wife, and his other relations named in the will, survived him. The testator excepted out of the residuary gift to his wife the sum of 4,100*l*. only, which he stated would just make the legacies previously given to his

relations double the first bequest; while the total amount of the legacies given to those relations was 6,100*l.*; and a question arose whether the sum of 4,100*l.* or 6,100*l.* was to be excepted out of the residue. The suit was, therefore, instituted to administer the testator's estate, and to determine the construction of his will. A decree was made by Vice Chancellor Stuart in favour of the smaller amount; and after that the widow, Sarah Whitelock, died, and the reversionary legacies became payable; whereupon a further question arose, whether the shares of Mary Thompson and the two deceased nephews in the sum of 4,100*l.* did or did not lapse, and if they did, whether they went to the widow as residuary legatee, or to the next-of-kin, as undisposed of, on which his Honour decided on petition in the cause that the shares of the sister and nephews lapsed, and fell into the residue for the benefit of the estate of Sarah Whitelock. From these decisions the parties interested appealed.

At the hearing of the appeals, the Lords Justices required the production of the original will, when upon examination it was discovered that there were several erasures and also some interlineations in a different coloured ink from the rest of the will. The exception, 4,100*l.*, was not written in figures, but in words at length. The alterations were proved as part of the will.

On the question whether the exception out of the residue should be read 6,100*l.* or 4,100*l.*,—

Mr. Malins and *Mr. Rogers*, for the next-of-kin, argued that the insertion of the latter amount was the result of error or miscalculation, for that the expression the testator had used made his intention quite plain, namely, when he said "which will just make their legacies double the first bequest," and that as the 6,100*l.* would effect that intention, the Court would rectify the mistake and declare that the exception from the residue should be of that amount. They cited—

Milner v. Milner, 1 Ves. sen. 106.

Trevor v. Trevor, 5 Russ. 24; s.c. 6 Law J. Rep. Chanc. 182.

Jordan v. Fortescue, 10 Beav. 259; s.c. 16 Law J. Rep. (N.S.) Chanc. 332.

Sir Francis Goldsmid and *Mr. Kingdon*, for the personal representatives of Sarah Whitelock, the widow and residuary legatee, claimed to be entitled to the whole residue, with the deduction only of the sum of 4,100*l.*, upon the ground upon which the Vice Chancellor relied in his judgment, namely, that there was no principle of construction to support the view entertained by the plaintiff, that the amount to be deducted from the residue was so much as would make an amount equal in value to the aggregate of the preceding legacies, or 6,100*l.*, and not the lesser sum of 4,100*l.* mentioned in the will. The gift of the last-named sum was plain, clear and distinct, and a gift made in plain, clear, and distinct terms could not be controlled, modified or altered by ambiguous terms, loosely used, moreover, for the purpose of describing the consequences or effect of the gift. The testator had in the clearest language given as a deduction from the residue a sum of 4,100*l.*, and it could not be increased merely because he might have, in a moment of mistake or miscalculation, or which there was no proof whatever, spoken as if he thought that such sum would have the effect suggested.

The cases cited in support of this view were:—

Langham v. Sandford, 19 Ves. 641.

Sandford v. Raikes, 1 Mer. 646.

Bibin v. Walker, Amb. 661.

Cole v. Wade, 16 Ves. 27.

Smith v. Fitzgerald, 3 Ves. & B. 2.

Mr. Malins was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—We do not intend to express any opinion on this appeal until we have heard the argument on the other.

Mr. Malins and *Mr. Rogers*, for the next-of-kin, contended that the money—whether the amount should be decided to be 4,100*l.* or 6,100*l.*—was an exception out of the residuary gift, and as part of it had, by the death of Mary Thompson and the two nephews in the lifetime of the testator, lapsed, it did not fall into the residue, but became the property of the

next-of-kin, as upon an absolute intestacy *pro tanto*. For this they relied upon—

The Attorney General v. Johnstone, Amb. 577.

Skrymsher v. Northcote, 1 Swanst. 566.

Lloyd v. Lloyd, 4 Beav. 231; s. c. 10 Law J. Rep. (n.s.) Chanc. 327.

Easum v. Appleford, 5 Myl. & Cr. 56; s. c. 10 Law J. Rep. (n.s.) Chanc. 81.

Mr. Little, for the children of Mary Thompson, insisted that there had been no lapse whatever, either in favour of the residuary legatee or the next-of-kin. That the testator intended the amount excepted out of the residuary gift to be 6,100*l.* was plain beyond reasonable doubt by the expression he had used—"which will just make their legacy double the first bequest"; and he intended such amount to be given to the relations mentioned "in the fore part of this instrument," these relations being his three brothers and six sisters, "or their legal representatives," which words must be held to apply as well to the deferred legacies as to the legacies immediately payable; for as to the immediate legacies, those words constituted a gift by substitution to the next-of-kin of the legatees, in case of the death of those legatees before the death of the testator, and the postponed legacies were intended to be given in the same manner. That such words would properly bear that construction was plain from—

Tidwell v. Ariel, 3 Madd. 403.

Gittings v. M'Dermott, 2 Myl. & K. 69; s. c. 2 Law J. Rep. (n.s.) Chanc. 212.

Bridge v. Abbot, 3 Bro. C.C. 224.

Long v. Blackall, 3 Ves. 486.

Waller v. Meakin, 6 Sim. 148; s. c. 2 Law J. Rep. (n.s.) Chanc. 173.

Cotton v. Cotton, 2 Beav. 67; s. c. 8 Law J. Rep. (n.s.) Chanc. 349.

Milsom v. Awdry, 5 Ves. 465.

[LORD JUSTICE TURNER.—The words "legal representatives" are those used in the Statute of Distributions.]

Sir Francis Goldsmid and *Mr. Kingdon*, in support of the decision of the Vice Chancellor, argued that where a sum of

money is taken out of the residue for a particular purpose, if that purpose failed, the sum fell back into the residue, which was the case in the present instance. All the authorities on the subject had been reviewed by Vice Chancellor Kindersley in *Re Crawford's Trusts* (1), to which, as well as the following cases, they referred.—

Smith v. Barneby, 2 Coll. 728; s. c. 16 Law J. Rep. (n.s.) Chanc. 466.

James v. Irving, 10 Beav. 276.

Corbyn v. French, 4 Ves. 418, 435.

Cambridge v. Rous, 8 Ibid. 12.

July 4.—LORD JUSTICE KNIGHT BRUCE.

—Upon this appeal there are three points for decision, each arising on the construction of the will of Miles Whitelock, a trader or merchant in the city of London, who died in the month of November 1817, and who was survived by his widow, who was the residuary legatee mentioned in his will, for many years. The bill has not set out the whole of the will, but probably enough, and all that is important; that statement is not quite accurate, but still it is not importantly erroneous. The will, when produced here and examined by ourselves, appeared to be entirely in the testator's handwriting, and was altered and corrected in more than one place. The entire instrument, which uniformly represented amounts not by figures, but in words, was to this effect:—[Here his Lordship read the will.]—The words "or to their legal representatives," and the words "one hundred," following the words "four thousand," are interlined; and in the same passage the word "four" appears to have been originally written "five." As I understand, two of the nephews mentioned died in the testator's lifetime, but after the date of the will; and Mary Thompson, a sister of the testator, also died within the same period. The points argued were three: first, whether, by the words "or to their legal representatives," interlined in the will, each or any of the legacies to Mary Thompson and the two nephews was prevented from lapsing, that is, whether it went by substitution,

(1) 2 Drew. 230; s. c. 23 Law J. Rep. (n.s.) Chanc. 625.

to the executors or to the next-of-kin of the legatees. I think that it was not. As to the first legacy the words in question are applied only to the event of the death of the legatee happening after his own death, and before the expiration of the two years for which payment of that legacy was to be postponed; and as to the other two legacies, if the words can be conceived to have any application, they can apply only in the event of the death of the legatees after his own death, and before the death of his wife, during whose lifetime there was postponement of payment. Therefore, there was a lapse of the legacy to Mary Thompson, who had died as I have stated. Then, as to the second point, it was argued that the lapsed portion did not fall into the residue, to the wife as residuary legatee, but lapsed as undisposed of to the testator's next-of-kin. I, however, think that the right of the residuary legatee is not taken away; but my clear opinion is, that the legacies were liable to all the incidents of lapse in the ordinary way, and the exception following the residuary gift and the word "only" in that clause, were not intended to prejudice or affect the wife's interest, except as to the amount of the 4,100*l.* According to my judgment, there has not been an intestacy, total or partial. Then, as to the third point, the first seven legacies given by the will amount together to 6,100*l.*; and it was argued that, by force of the words of the will, "which will just make their legacies double the first bequest," the expression "four thousand one hundred pounds" ought to be read "six thousand one hundred pounds." This construction has appeared, and it still appears to be plausible, although the appellant by that contention calls on the Court to read the word "just" as meaning "exactly." The testator must clearly have made a miscalculation or mistake; but does it follow that he meant to give 6,100*l.*? I am not satisfied of that; I think the testator must have intended to give only 4,100*l.* of postponed legacies, though erroneously calculating the amount of his previous bequests. At all events, his expression is "four thousand one hundred," from which there should be no departure, unless plainly there is *aliter sensus*, and on the entire will it is not clear to me *aliter*

sensusse testatorem; this does not clearly appear upon considering the whole instrument. I cannot say that I differ from the conclusion in favour of the residuary legatee, at which the Vice Chancellor has arrived.

LORD JUSTICE TURNER.—The testator has by will given to each of his three brothers and six sisters, or their legal representatives, a sum of 500*l.*, and those legacies, together with other legacies, amount to 6,100*l.* He then gives to his father and mother an annuity of 100*l.* Upon the production of the original will, it appeared that the words "or to their legal representatives" had been interlined; that the word "four" was written in a different ink, and was written over another word, which, so far as I am able to judge, had been the word "five." Vice Chancellor Sir John Stuart has declared that, according to the true construction of the will, the testator's widow, Sarah Whitelock, is entitled to the whole of the testator's estate except the legacies and the sum of 4,100*l.*, which was to be apportioned in a certain manner amongst the legatees; and the widow having died subsequently to the decree, his Honour has, by a subsequent order, declared that Mary Thompson and two of the testator's nephews having died in the lifetime of the testator, the legacies given to them have lapsed, and that Sarah Whitelock, the widow, is entitled to them. These were the orders under appeal. The first and most important question arises upon the decree, the appellant contending that the exception from the residuary gift ought to have been 6,100*l.*, and not 4,100*l.*; and he so contended on the ground that it was the intention of the testator that the legacies to his relations should be doubled upon the death of his widow, and that 6,100*l.* being required to double the legacies, "four thousand one hundred" had been written by mistake for "six thousand one hundred." It may well be that the Court will set right such an error or mistake as this, for it is the duty of the Court to carry the intention of a testator into effect, and if it is clearly demonstrated that the intention is different from what is expressed by the words, the Court will, as a general rule, pay more regard to the intention than to the words. But this rule

must be acted on with the utmost caution. It was well said in *Mellish v. Mellish* (2), that "the rule is, that wherever there is a clear mistake or a clear omission, recourse is to be had to the general scope of the will, and the general intention to be collected from it; but the first thing to be proved is that there is a mistake. I do not find enough to convince me that there is a mistake; and whenever it comes to a doubt, the safest way is to adhere to the words." In the present case there does not appear to be a clear mistake; it therefore comes to a doubt. This is the will of a testator, engaged in trade, who must be presumed to have been fully competent to make such calculations as were here required. The will itself is wholly in his own handwriting, and he has himself altered it, and must, therefore, twice over have made the mistake, if, indeed, there is any mistake at all. There was deliberation, and the testator does not say that "four thousand one hundred pounds" will "exactly" make their legacies double, but that it will "just" make them double. It is possible that he may have meant "nearly." But I attach no great weight to this. Looking at all the circumstances, I cannot bring my mind to a judicial conclusion that there is any mistake at all. I adopt what was said by Sir Pepper Arden, in *Mellish v. Mellish*, that the safest way is, when it comes only to a doubt, to adhere to the words. Upon these considerations, therefore, I agree with the Vice Chancellor. The other points relate to the order made on the petition. It was contended, by the appellant, that the shares of the deceased legatees do not form part of the residue, but that the 4,100*l.* being excepted from the residue, those shares go to the next-of-kin; but here, again, I think this contention cannot be maintained. The 4,100*l.* is given, not as part of the residue, but as an exception out of it. A more plausible claim was advanced by Mr. Little on behalf of the estate of a sister who died in the testator's lifetime, but this will depend wholly on there being a gift by way of substitution by virtue of the words of the will "or to their legal representatives." But I do not think that those words could affect the

decision as to the part of the 4,100*l.*, the only point now in dispute. I agree with the Vice Chancellor as to all the points, and the appeals must be dismissed, but without costs.

M.R. }
March 22. } RHEDEN v. WESLEY.

Practice—Evidence—Cross-Examination on Answer.

Upon a notice of motion for a decree a plaintiff may cross-examine a defendant on his answer, but other defendants may object to such cross-examination being read as evidence against them.

After notice of motion for a decree witnesses in chief cannot be examined.

An administration suit was instituted, by a party interested in the testator's estate, against the two executors and against other parties interested. The executors alone were required to answer the bill. They put in separate answers. The plaintiff served the defendants with a notice of motion for a decree, and he added to it a notice that he should cross-examine the executors on their answers, and also that he should examine witnesses in chief.

The executors, when before the examiner, objected that the plaintiff had no right to examine them upon their answers. They also insisted that he had no right to examine witnesses in chief.

The examiner certified these objections to the Court.

Mr. Waller, for the plaintiff, insisted that the plaintiff had a right to cross-examine the executors on their answers—*Wightman v. Whiddon* (1).

Mr. Smythe and *Mr. Surrage*, for the executors.—The plaintiff cannot examine the executors on their answers: it would be evidence against the executors and against all the other defendants. The plaintiff must confine himself to the examination in chief. The case cited had reference to an application for an injunction, and not to a motion for a decree.

(2) 4 Ves. 45.

(1) 23 Beav. 397.

THE MASTER OF THE ROLLS.—The plaintiff is entitled to cross-examine the defendants on their answers. If it is intended to use the answer of one defendant or the evidence taken on his cross-examination upon it against other defendants, those defendants must have liberty to cross-examine him upon it. The order, therefore, must be made without prejudice to the right of such of the defendants as are not to be cross-examined to object that the evidence taken on such cross-examination ought not to be used against them. The plaintiff is not entitled to examine witnesses in chief,

KINDERSLEY, V.C. { **BRYON v. THE METRO-**
April 21. { **POLITAN SALOON OM-**
 { **NIBUS COMPANY.**

Costs—Set-off.

An order was made against the plaintiff for payment of the costs of an application for an injunction, and execution was issued upon failure of payment by the plaintiff, but no return had been made to the writ. The defendants were subsequently ordered to pay the costs of an application to dismiss the plaintiff's bill. An appeal by the plaintiff against the first decision of the Court was still pending. The defendants moved to set off their costs against those ordered to be paid by the plaintiff. The motion was granted, upon the defendants undertaking not to levy for more than the balance; and as the defendants had not applied for a set-off when the order was made against them, no costs as to this application were given on either side.

On the 21st of July 1858, the plaintiff in this case moved for an injunction to restrain the defendants, the Metropolitan Saloon Omnibus Company, from issuing certain debentures alleged to be contrary to the powers of their act of parliament. The Court, upon that motion, refused the injunction, and ordered the plaintiff to pay the costs, which amounted, upon taxation, to about 81*l*. The defendants, being unable to obtain payment of these costs, issued process against the plaintiff in respect of such costs, but the sheriff had as yet made no return to the writ. The decision, upon the application for an injunction, was

appealed against to the Lords Justices; who differed in their opinion, and the decision of this Court was therefore confirmed. The plaintiff then appealed to the House of Lords, and that appeal was still pending. On the 25th of March last the defendants moved to dismiss the plaintiff's bill, for want of prosecution, but that motion was refused, with costs; the costs amounting to about 21*l*. A motion was now made on behalf of the defendants that they might be at liberty to set off the costs ordered to be paid by them on the 25th of March, against the costs ordered to be paid by the plaintiff to them under the order of the 21st of July 1858.

Mr. Hastings, in support of the motion, submitted that the defendants were entitled to set off their costs against the plaintiff's costs, and cited—

Cattell v. Simons, 6 Beav. 304; s. c.

14 Law J. Rep. (N.S.) Chanc. 139.

Lee v. Pain, 4 Hare, 201, 256; s. c.

14 Law J. Rep. (N.S.) Chanc. 346.

Hawkins v. Hall, 4 Myl. & Cr. 280;

s. c. 8 Law J. Rep. (N.S.) Chanc. 225.

Mr. Glasse, for the plaintiff, contended that the special circumstances of this case would preclude the defendants from the right to a set-off. The defendants had already issued process against the plaintiff in respect of these costs, and no return had yet been made, and there was an appeal still pending; therefore the time had not yet arrived for dealing with the costs. Moreover, the defendants ought to have asked for a set-off at the time when the order for costs was made against them; and even if they now succeeded, they ought to pay the costs of this application.

Mr. Hastings was heard in reply.

KINDERSLEY, V.C.—It appears in this case that an order was made for payment of costs by the plaintiff in July 1858, and up to this time nothing has been paid by him, but it does not follow that nothing will be obtained upon the execution of the writ. If the writ had not been issued, or if a return of *nulla bona* had been made, then there would have been no difficulty; but I cannot assume that such a return will be made. The pendency of an appeal

is no ground for refusing a motion of this nature, nor does it prevent the execution of the writ, no special order to that effect having been made by the Court of Appeal. I think, under the circumstances, the defendants are entitled to set off the costs they have been ordered to pay to the plaintiff against those ordered to be paid by the plaintiff, and should give an undertaking not to levy for more than 60*l.*, being the difference after the set-off. As to the costs of this application, I should infer from the language of the Master of the Rolls, in *Cattell v. Simons*, that he considered it right to order the person against whom the application for a set-off was made, to pay the costs of the motion; but I do not think that course consistent with justice. On the other hand, it does not appear to me to be right that the party against whom the application is made should have his costs; and considering that the defendants ought to have applied to set off their costs when the order was made against them, I shall grant the present application without costs on either side.

divide the net profits of the straw department of the defendant's business from the 25th of December 1857 until the winding up of the said department? secondly, in case the aforesaid question should be answered in the affirmative, then, whether the said agreement provided for the calculation and ascertainment of the said net profits; and, if so, in what manner were the said net profits to be calculated and ascertained? thirdly, in case the first question should be answered in the affirmative, then, whether the said agreement was to divide in the proportion of one-half of the said profits to the plaintiff and one-half to the defendant's firm?

The motion was supported by an affidavit of the plaintiff's solicitor, that he believed the questions were such as ought to be tried by a jury, and by the answers and affidavits in the cause; and it was now asked that a day might be fixed for the trial of the said questions of fact, and that an order might be made for the sheriff to summon a common jury for such trial, or that such other order might be made as to the Court should seem fit.

KINDERSLEY, V.C. } BRADLEY v. BEVING-
May 4. } TON.

Practice—Trial of Question of Fact by a Jury—21 & 22 Vict. c. 27.

A cause being ready for hearing upon bill and answer and affidavits, a preliminary motion was made under the statute 21 & 22 Vict. c. 27, that a jury might be summoned to try certain disputed questions of fact:—Held, in conformity with a decision of the Master of the Rolls, that the act was only intended to apply to cases in which, under the old practice, an issue would have been directed at the hearing.

This was a bill for taking the accounts of a partnership. The answer had been put in, and evidence had been gone into upon affidavit, and the cause was set down for hearing. A motion was now made on behalf of the plaintiff, under the act, 21 & 22 Vict. c. 27, that the following questions of fact arising in the cause might be tried by a common jury before the Court:—first, whether there was any agreement between the plaintiff and the defendant to

Mr. Higgins, in support of the motion, contended that it was competent for the Court to make an order of this nature at any period of the suit. The 3rd section of the act made it lawful for the Court to "cause any question of fact arising in any suit or proceedings to be tried by a special or common jury before the Court itself." It had been held, in the case of *George v. Whitmore* (1), that such an order could only be made after the cause shall have come on for hearing; but this never could have been the intention of the act, for if that was to be the practice the cause would have to be tried twice over, first upon affidavit, and then upon *voir dire* evidence before a jury. The act provided that the question of fact should be reduced into writing, in such form as the Court should direct, and the Court would be able to settle the terms of the issue by looking at the evidence which had been taken upon affidavit without hearing the cause throughout. It was evident that the act intended that the Court should be at liberty to

(1) 7 W. Rep. 225; s. c. *ante*, p. 720.

direct a trial by jury at any stage of the cause on a preliminary motion, for otherwise the utility of the act would be completely neutralized. The affidavits in this case shewed that the evidence was contradictory upon matters of fact; and under the old practice this was a case in which an issue would have been directed, and therefore it was a proper case for a jury to be summoned under the act.

Mr. Baily and *Mr. Martindale* appeared for the defendant, but were not called upon to address the Court.

KINDERSLEY, V.C.—The words of the act would, no doubt, appear to favour the plaintiff's construction; but the point has already been decided by the Master of the Rolls in the case of *George v. Whitmore*, and in that decision I entirely agree. My opinion is, that the act was only intended to apply to cases in which under the old practice an issue upon a matter of fact might have been directed either at the hearing or upon an interlocutory application, otherwise the Court might be called upon to go into the whole of the evidence merely for the purpose of deciding whether there is a question proper to be referred to a jury, and what that question is to be. Without hearing all the evidence taken in the cause, the Court cannot ascertain that question so as to exercise its discretion under the act. Agreeing as I do with the decision of the Master of the Rolls, I must dismiss this motion with costs.

STUART, V.C. } *In the matter of THE TRUSTEES' RELIEF ACT, AND OF THE TRUSTS OF THE WILL OF JOHN BOOTH.*
June 2.

Probate Duty—Confirmation of Will in Scotland—Statute 21 & 22 Vict. c. 56.—Domicil—Jurisdiction.

Where a testator died domiciled in Scotland, and entitled to property in Scotland, and also to a fund standing in this court, and his executor, after the passing of the statute 21 & 22 Vict. c. 56, obtained a grant of confirmation of the testator's will in Scotland, which he afterwards got sealed under the statute in England,—Held, that

this Court had no jurisdiction to question the scale at which the probate duty upon the fund in court had been assessed by the Scotch Commissary Court.

This was a question arising out of the new act (21 & 22 Vict. c. 56), extending the effect of probates in England and Ireland, and confirmations of wills in Scotland, over all parts of the United Kingdom.

The act, section 9, gives power in the case of a person dying domiciled in Scotland, and having assets in England or Ireland as well as in Scotland, to the Commissary Court of Scotland, to grant confirmation to his executors, which shall extend over all his effects, in whatever part of the United Kingdom they may be situated; and the executors in Scotland are to make an inventory of all his assets in all parts of the United Kingdom, and to pay the probate duty on all.

The 12th and 13th sections then provide that the confirmation being produced in the Probate Courts of England or Ireland, and sealed, shall thenceforth have the effect of an English or Irish probate.

In the present case, the testator, William Booth, died, domiciled in Scotland, and entitled to property in Scotland, and to a reversionary interest in a fund in England, expectant on the death of a tenant for life.

The testator died in 1838; the tenant for life did not die until 1857; and the testator's executors did not obtain confirmation of his will until December 1858, after the passing of the new act.

They included in the inventory of the testator's assets the English fund which had just fallen into possession, and paid the duty upon it, calculated according to the Scotch law.

According to the custom of the Scotch Courts, the duty was calculated on the value of the reversion at the death of the testator, and was, therefore, very much less than the duty which would have been payable in England, where it is calculated on the value of the fund when it falls in.

Mr. Dickinson, in support of a petition by the executors, asked for payment to them of the fund which had been paid into court under the Trustees' Relief Act.

Mr. Hanson, for the Commissioners of Inland Revenue, claimed duty upon the fund calculated, as was the custom in England, upon the value of the fund at the death of the tenant for life.

Mr. Dickinson, in reply, submitted that the amount of the duty had been settled by the Scotch Commissary Court, a Court of competent jurisdiction for that purpose, and that this Court would not disturb that settlement.

STUART, V.C. disclaimed any jurisdiction to decide the question; but, upon the parties expressing their desire to have, and consenting to be bound by, his decision upon it, his Honour observed that the grant of confirmation having been regularly obtained in Scotland, the grantee became absolutely entitled, under the recent statute, to have it sealed in England without further inquiry; the effect being to confer on him in England the same rights as if he had obtained probate in England. But if this Court were to sit in judgment on the regularity or irregularity of the grant in Scotland, the intention of the legislature in passing the act would be defeated, and the act itself rendered worse than useless. His opinion, therefore, was, that this Court was bound by the proceedings of the Scotch Commissary Court, and that no additional duty could be claimed.

WOOD, V.C.	}	BRISTOW v. WHITMORE.
1858.		
May 4, 27, 29;		
Dec. 21.		
L.C.		
1859.		
June 3, 4.		

Ship and Shipping—Expenses connected with Freight—Indemnity of Master—Pleading.

A, the master of a vessel, at the Mauritius, in April 1856, entered into a charter-party, under seal, therein describing himself as commander and owner, with the commissariat officer there, for the conveyance of troops to Gravesend, and paid certain monies and incurred liabilities for fitting up the vessel for the purpose. In the following month *A*. entered into another charter-party,

not under seal, at the Cape of Good Hope, for the conveyance of other troops, and, thereupon, paid further sums and incurred further liabilities to enable him to perform the contract. In October, *T*, the owner, became bankrupt, having previously mortgaged the vessel to *R. & F*, who, upon its arrival in the Thames, seized it. The bills drawn by *A*. upon *T*, the owner, were dishonoured, and *A*. filed a bill against *T*'s assignees and *R. & F*, praying a declaration that he was entitled to be repaid and indemnified out of the fund due from the Admiralty on account of the freight, and the Commissioners of the Admiralty paid the amount into court:—Held, by Wood, V.C., that *A*. was entitled to be reimbursed out of the fund; but, upon appeal to the Lord Chancellor, this decision was reversed.

The Court has not jurisdiction to declare an equitable right on behalf of the legal owner of property, without something on which the Court can act.

The plaintiff in this case was the master of the ship *Kenilworth*, of 580 tons, of which John Beckwith Towse was the sole owner, and the bill was filed for a declaration of his rights under the following circumstances:—

On the 19th of April 1856 the ship was lying in the harbour of Port Louis, in the Mauritius, and on that day a charter-party was concluded at Port Louis between the plaintiff (described as commander and owner of the ship) and Commissary General Laidley, the senior commissariat officer at the Mauritius, on behalf of the Lords Commissioners of the Admiralty, for the conveyance of troops to Gravesend; and thereby, amongst other things, the plaintiff agreed to provide and issue to the troops and other persons embarked, during the time they were on board, sweet and wholesome provisions, according to a specified scale; the quality of which provisions was to be approved by a board of officers appointed to inspect them. The vessel was to be provided with a supply of provisions equal to twenty-four weeks' consumption, and the owner to find water in sufficient quantity, as well as fuel for the voyage; in consideration of which it was agreed that the plaintiff should be paid for the passage and accommodation (including

victualling) of each officer 65*l.*, of each non-commissioned officer and private soldier 29*l.* 10*s.*, of each woman 25*l.*, and of each child of ten years and above 15*l.*; and the plaintiff engaged to put up, at the expense of the ship, such fittings, berths, tables, &c. as might be required for the men, women and children, the whole to be subject to the approval of the Deputy Quartermaster-General. It was further agreed that the payments should be made after the accounts were passed at the respective offices, by navy bills in the customary manner, but not before all government stores, &c. put on board had been accounted for, in failure of which the value of the deficiency was to be paid for or abated from the freight. For the due performance of this charter-party the plaintiff bound himself in the penalty of 100*l.*, and the document was signed and sealed by both the contracting parties.

To enable the plaintiff to comply with the charter-party, large quantities of provisions and other necessities were purchased and put on board at Port Louis; and other expenses were incurred previously to commencing the voyage, amounting altogether to 810*l.* 12*s.* 9*d.*, of which the plaintiff paid 64*l.* 17*s.* 2*d.* out of his own money, and drew bills for the residue upon the owner.

The ship sailed from Port Louis on the 19th of April 1856, and touched at the Cape of Good Hope, where, on the 27th of May, another charter-party, not under seal, was entered into between the plaintiff and John Nugent Macgregor, the acting naval storekeeper at the Cape, for the conveyance of other troops, women, children, baggage and stores, at the rate of 45*l.* for an officer, 19*l.* 15*s.* for each man, 15*l.* 10*s.* for each woman, and 10*l.* for each child; and it was stipulated that the vessel should be provided and fitted up according to the annexed Inspection Report, as to accommodation, ventilation, fumigation and all other requisites, at the expense of the vessel.

To enable the plaintiff to comply with the terms of this second charter-party, large quantities of provisions and other necessities were purchased and put on board, and other expenses were incurred,

amounting to 700*l.* 15*s.* 1*d.*, of which the plaintiff paid 27*l.* 7*s.* 9*d.* out of his own money, and drew a bill upon Towse, the owner, for the residue.

On the 29th of October 1856 Towse became bankrupt, and the bills, on arriving at maturity, were dishonoured, and one of the indorsees commenced an action and recovered judgment against the plaintiff for the amount.

The defendants W. R. Robinson and John Fleming were mortgagees of the ship, under an indenture of mortgage, executed previously to the bankruptcy, and they gave notice of their claims to the Commissioners of the Admiralty, who, in consequence of such notice, and also of the refusal of the assignees in bankruptcy to authorize the payment to the plaintiff of the amount due under the charter-parties, refused to pay the amount of the freight until the right thereto should have been determined by a competent tribunal. The bill, therefore, was filed against the assignees in bankruptcy of Towse and the mortgagees; and it prayed that it might be declared that the plaintiff was entitled to be repaid, out of the monies so due from the Commissioners of the Admiralty, the sums paid by him out of pocket, and also to be indemnified out of the same monies against the amounts of the several bills, and all costs incurred by him in relation thereto; and that such indemnity might be made available for his protection in such a manner as to the Court should seem fit.

Mr. Rolt and *Mr. Baggallay*, for the plaintiff, were about to open the case, when—

Mr. Amphlett and *Mr. E. Macnaghten* objected that the Court had no jurisdiction to make such a declaration as was asked by the prayer. Notwithstanding the large words of the 15 & 16 Vict. c. 86. s. 50, a bill for a declaratory order alone could not be maintained, unless the plaintiff was entitled to consequential relief—*Jackson v. Turnley* (1)

Wood, V.C. reserved his judgment upon the point, and the case was then argued

(1) 1 Drew, 617; s. c. 22 Law J. Rep. (n.s.) Chanc. 949.

upon the question whether the plaintiff was or was not entitled to a lien upon the freight for the expenses and liabilities incurred by him in pursuance of the charter-parties, in supplying provisions and fittings, and otherwise putting the ship in a condition to earn the freight.

Mr. G. M. Giffard appeared for the assignees in bankruptcy of Towse, the owner.

The following cases were cited:—

Hussey v. Christie, 9 East, 426; s. c. 13 Ves. 594, 600.

Smith v. Plummer, 1 B. & Ald. 575.

Morrison v. Parsons, 2 Taunt. 407.

Kerswill v. Bishop, 2 Cr. & J. 529; s. c. 2 Tyrw. 602; 1 Law J. Rep. (n.s.) Exch. 227.

Gibson v. Ingo, 6 Hare, 112.

Stainbank v. Fenning, 11 Com. B. Rep. 51; s. c. 20 Law J. Rep. (n.s.) C.P. 226.

Samsun v. Braggington, 1 Ves. 443.

Cato v. Irving, 5 De Gex & Sm. 210; s. c. 21 Law J. Rep. (n.s.) Chanc. 675.

Curling v. Long, 1 Bos. & P. 634.

Alsager v. the St. Katherine's Dock Company, 14 Mee. & W. 794; s. c. 15 Law J. Rep. (n.s.) Exch. 34.

Wilkins v. Carmichael, Dougl. 101.

May 27.—Wood, V.C.—I have made up my mind as to the rights of the parties, but I feel great difficulty in determining anything, in consequence of the objections raised by Mr. Amphlett; and if they are not waived I do not know what I can do but let the cause stand over, with liberty for the plaintiff to take such proceedings as he may be advised. It strikes me there is no power in this Court to make any declaration without something upon which the Court can act. If the Court can act upon anything in the cause—if it has jurisdiction to act—it may waive acting, and may make the declaration; but if there is no jurisdiction to act I cannot make a mere declaration. I have turned over very carefully in my mind every way in which it was suggested that I could interfere by injunction; but what have I to enjoin the defendants from doing? I cannot enjoin them from asserting that they have the legal right to recover the fund. I am

exceedingly sorry that I am driven to such a position as that, and I wish very much that the Lords Commissioners of the Admiralty could be persuaded to pay the money into court in the suit. I have clearly made up my own mind as to the merits of the case, but I do not see my way to dealing with it, or how I can do more than say that the suit may stand over, with liberty for the plaintiff to take such proceedings as he may be advised for the recovery of the fund.

Mr. Baggallay.—I understand your Honour comes to the conclusion, that this Court has no power to declare an equitable right. What we ask is a declaration of an equitable right.

Wood, V.C.—I consider that I have not the power to declare an equitable right on behalf of the legal owner of the property.

Mr. Baggallay.—But where that legal owner cannot enforce his legal right.

Wood, V.C.—You see you can enforce it by petition of right, and that is the difficulty. If you like it, I will dismiss the bill, so that you may raise that question; or the cause may stand over, with liberty to you to take such proceedings as you may be advised, and liberty to either party to apply.

Ultimately it was arranged that the cause should stand over until the 29th of May, for the plaintiff to consider what course he would adopt.

May 29.—*Mr. Rolt* mentioned that the Lords Commissioners of the Admiralty had consented to pay the money into court, with the leave of the Court, and the cause was ordered to stand over, with liberty for them to do so. This having been done accordingly, on

Dec. 21, Wood, V.C. delivered judgment as follows.—The case that arose upon this bill was a question as to the right of Mr. Bristow, the master of a ship called *The Kenilworth*, to be recouped certain sums which he had advanced in performance specifically of the contracts entered into by him, on behalf of the owners, with the agent of the Commissioners of the

Admiralty for the Mauritius, for the transport of troops, he having entered into two contracts, one at the Mauritius and the other at the Cape. One contract, which is under seal, is an instrument in which he describes himself, somewhat incorrectly, as the master and owner of the vessel. That contract is dated the 19th of April 1856. The other contract is dated the 27th of May. It is not under seal, but a mere memorandum of agreement between the agent of the Admiralty and Mr. Bristow, therein described as the master of the ship.—[His Honour stated the effect of the two contracts and the facts of the case as above detailed, and proceeded as follows:—]—Those two being the contracts, what happened was this. The master himself found some money for the purpose of making those fittings which are specifically mentioned in the contract. The master, with respect to the provisioning of the vessel according to the terms of the contract, drew bills on the owner, Mr. Towse, two of which bills were current at the time of the filing of this bill; and, in the mean time, Mr. Towse, in England, being in a state bordering on insolvency, makes an assignment to the two principal defendants, Mr. Robinson and Mr. Fleming; he makes a transfer of the ship prior to her arrival in England, and afterwards becomes bankrupt. There is also a Mr. Morice who had some claim or lien on the fund, but he raises no discussion on it, and the assignees of the bankrupt raise no question with regard to this freight; so that the whole question is between the plaintiff and the defendants Fleming and Robinson, who claim, under the assignment from Towse, an interest in the freight, on the ground that the ship passed to them, and they took possession of it as owners, claiming as mortgagees before the cargo was fully discharged; and, therefore, within the principle of the authorities, it is said that is time enough to arrest the freight, and make themselves masters of the freight. If it turned on that alone, I confess I should not think that I was justified in deciding against their claim, on the ground that some of the troops had been disembarked. The whole delivery of the troops does not seem to have taken place, and, on the evidence, it would ap-

pear to me as if they have brought themselves within those authorities which say that, in that position, they had made themselves masters of the ship so far as that would give them a title to the freight in question.

I have been looking through the authorities on the question, how far the master is or is not entitled under the very peculiar circumstances of this case to be repaid out of the freight these particular charges, which are charges contained in the contract itself, and which were, in fact, payments made in performance of the contract. As regards the general law, no doubt, by a number of cases, by degrees it has been settled that, in the first place, notwithstanding the Roman Law, and the law of almost every foreign country, does give to the master a power not only to hypothecate the ship by way of bottomry, or otherwise for the purpose of raising supplies, but gives him a lien for the expenditure he may have been put to in respect of the ship and its repairs, or any other matter which may be necessary and incidental to the due performance of the ship's voyage; our law does not adopt that view, and in *Hussey v. Christie* it was held, after considerable discussion on a case sent from the Court of Chancery, where a different view seemed to be held in some degree by the Lord Chancellor, that there was no such lien on the ship. In that case, however, the Court said, that as no opinion was asked as to the master's lien on the freight, they abstained from giving any. In a subsequent case of *Smith v. Plummer*, which is a leading case on the subject of the freight itself, it was decided by the Court that this lien could not be claimed by the master in respect of freight, and in respect of monies which had been advanced by him in order to put the ship into a condition in which she was able to obtain a charter-party. The circumstances of that case were these:—The ship required repairs before any charter-party could be obtained at all. One Mr. Thompson was the person abroad who lent the money to the master, the master drawing bills on the owners. Thompson also procured the charter-party. He was entitled by arrangement with the master to be paid a premium in respect of so procuring a charter-party, and for that pre-

mium and for the repairs necessary to bring the ship into a condition to obtain the charter-party the bills were given, and, under these circumstances, the Court held that there was no lien on the freight. There the question arose upon two sums of money: one the sum which was advanced under the circumstances I have described, and the other a sum of 150*l.* which was paid to the captain by the consignees of the goods after notice that the freight was the property of another person, was paid by them in England, and was attempted to be supported by them as being an advance made for the current purposes of the ship. The judgment of Lord Ellenborough, which is very short, is this: He says, "The owner has, undoubtedly, the primary right to receive the freight and to sue the consignees of the goods for it; and whether the master has any right to receive the freight from them as against his owners will depend upon the question, whether he has any lien upon the freight. In the first place, he has no lien on the ship for his wages; then as to the advances made abroad, they may indeed constitute a debt due to him from the owners, but he has no lien for them. The case of *Wilkins v. Carmichael* decided that a captain of a ship has no lien on the ship for wages, stores, or repairs done in England, and *Hussey v. Christie* decides that he has none for money expended or debts incurred by him for repairs on the voyage. Then, if he has no lien on the ship, as appears from these cases, he can have none upon the freight, as the lien on the freight is consequential to the lien upon the ship; and here there is the additional circumstance, that it is not proved that these advances abroad were made for the current expenses of the ship. There is, therefore, in this case no pretence for the lien on the part of the master, through whom the defendant sets up this claim." So, again, Mr. Justice Abbott, as he then was, in speaking of the 150*l.*, says, "It is said that the advance of the 150*l.* to the master was made to enable him to defray the current expenses of the vessel; but it is not stated that these current expenses were actually paid by him, and for anything that appears, the owners might have furnished him with money for that purpose. It is not necessary to say what the law

would be if the money had been advanced abroad, and had been actually applied to the expenses of the ship, for this takes place after the arrival of the ship in the river Thames; and it is quite sufficient for the decision of the present case to say that an advance of money to enable the master to defray the current expenses in England cannot be considered as a part payment of freight to the owners by the consignees." I notice those observations, both of Lord Ellenborough, that there was no evidence that the advances were made for the current expenses abroad as regards the first portion of the case, and of Lord Tenterden, that clearly as to 150*l.* they were made for current expenses in England, if at all, and therefore there was no necessity justifying expenditure on the part of the master, as having a considerable bearing on the question now before me of the expenses incurred by the master, not in order to obtain a freight, nor merely for the current expenses after the freight had been obtained; but the position appears to me to be much higher, the money being actually advanced under the contract, and in fulfilment of it.

I have looked through numerous authorities cited by Mr. Amphlett, and other cases which his citation of those authorities enabled me to discover, but I do not find any case in which a precise determination has been come to as to what would be the position of the master borrowing money for the purpose of current expenses abroad. In this particular case there seems to be that which is different entirely from every one of the cases cited, and the difference is this: the expenses incurred by the master in the present case were entirely and simply in fulfilment of the contract which he had made on behalf of the owners. He contracts, on the part of the owners, to fit up a certain ship in a specified manner; it is not the general case of doing certain repairs to the ship in order that she may be able afterwards on a charter-party being made to earn a freight; and it is not the ordinary supply of wages to the crew while earning the freight under the charter-party; but it is a specific part of the charter-party in each of these cases, the charter under seal in the one case and the agreement in the other, that there should be certain fittings and certain provisions pro-

vided; and it is made a specific part of the contract that if the provisions are not according to a specified quality there is to be a deduction from the freight in that respect. It is the case of the master buying on behalf of the owners property which is to be paid for in express terms, according to the amount supplied; and the question then really is, simply, whether the person, whoever he be, whether the owner, or assignee by way of mortgage of the ship, or the person entitled to hold the freight, can claim all the benefit of the contract without fulfilling any part of it himself, but leaving the whole to be fulfilled by another. It seems to me that this is a case entirely different from all that have been cited. It is simply the case of a contract entered into by the master for the owners, performed by the master for the owners, and for whoever takes the freight. *Qui sentit commodum sentire debet et onus.* It is impossible to say that they can take the whole of the freight, not submitting to perform the very contract which has been entered into and performed on their part by the master in respect of the obligations that were entered into by the charter-party.

There is one remark to be made on one of the two instruments which, I think, would clearly entitle the master, independently of these considerations, but I have been unwilling to rest my judgment on that technical view, namely, that it is by deed. One of the charter-parties was made by the master treating himself as owner, and was made by deed. He binds himself under the penalty of 100% for the fulfilment of the contract; and it is quite clear as to that, that the owner could not himself sue for the freight, as he could under the charter-party merely effected on behalf of the ship by the master, in which case either the master or owner can sue. The owner if he chooses to sue can do so instead of the master; but as regards the contract under seal the master alone would be the person to sue, as is emphatically stated by Chief Justice Abbott in his work on Shipping, referring to *Atkinson v. Cotesworth* (2), where the contrary case existed, in which, the contract not being under

seal, it was held that the owner could sue, but that it would have been different if the contract had been under seal. Now the master, if he were the person to sue, clearly on receiving this money, though he would receive it as a trustee of course for the owners, would be entitled, by way of set-off, to deduct all the monies which he had expended in earning the money in question. That, however, would not apply to the other contract, and I have had, therefore, to consider in both cases what was the right course to adopt.

As regards the other charter-party, it may be observed that the parties claiming by assignment, as the mortgagees do in this instance, the payment to them would be a good payment. Yet, there again, according to *Morrison v. Parsons*, the action would have to be brought in the name of the original owner or the original contractor, and could not be brought by the assignees in their own names; but it does not appear to me that that would make any difference in favour of the master. As regards that second instrument, therefore, I was bound to consider what the effect was on the whole of this contract as to the right of the master to say, I have fulfilled all the terms and conditions of this contract, and everybody who takes the freight is bound by those conditions; and I have come to the conclusion that the plaintiff is entitled to be repaid everything which he paid in the way of performance of the specific obligations entered into by that contract. That does not extend to the wages, as to which nothing is said by the bill, but the payments and liabilities for the fittings, and the payments and liabilities for the provisions of the ship.

The difficulty that arose when the case was before me originally, was one which I felt to be insuperable in point of law. The Lords Commissioners of the Admiralty had not paid the money and would not pay it, in consequence of a notice from Mr. Amphlett's clients of their claim. The money, therefore, was in a position in which neither party could get it, except by a petition of right. Then I was asked by the bill to make a declaration of the right, in order to guide the Lords Commissioners of the Admiralty to a conclusion. There was no other relief whatever that

could be given, and it did appear to me that notwithstanding the passages in the Chancery Amendment Act, which pointed to the Court making declarations, when declarations alone are necessary, still the cases in which this could be done must be cases in which there is otherwise jurisdiction in the Court, and in which some other operation is to take place than a mere declaration. In other words, it was not intended by that act of parliament that this Court should have a power of declaration, which has often been advocated as a desirable and necessary thing to be exercised by the Court, but which certainly at present it does not possess. Therefore I did not see any mode of giving relief to the plaintiff as matters then stood. Since that time, upon a suggestion I made at the hearing, the Lords Commissioners of the Admiralty have paid the money into court, and the cause having stood over for that purpose, it appears to me that a portion of the costs should be paid to Mr. Amphlett's clients, the cause having been brought on prematurely in a state in which no decree could be made. It was no fault of those defendants that matters were not in that position, and if the plaintiff had not been able to procure the Commissioners to pay the money into court, the consequence must have been that the bill would have been dismissed, though, certainly, in such a case, without costs. I think, therefore, it will be proper to give Mr. Amphlett's clients all costs incurred since the day when the cause was in the paper before for judgment. The order which I now propose to make is this: the Lords Commissioners for executing the office of Lord High Admiral of the United Kingdom having paid into the Bank of England, to the credit of this cause, the sum of 3,155*l.* 18*s.* 6*d.* in respect of the freight herein mentioned, declare, that the plaintiff F. Bristow is entitled as against all persons interested in the freight, contracted to be paid under or by virtue of the deed of the 19th of April 1856, and the agreement of the 27th of May 1856 respectively, to be indemnified out of the freight in respect of all payments and liabilities made and incurred by the plaintiff, in the fulfilment of the obligations specifically imposed by the said contracts respectively, on the owners

of the vessel, as to the fitting and provisioning of the said ship, and also in respect of the costs of this suit. Then inquire what payments have been made or liabilities incurred by the plaintiff in respect of such fittings and provisions. Tax the costs of the plaintiff up to and including the 27th of May 1858, the day on which the cause was ordered to stand over, and also the costs of prosecuting the said inquiry and carrying the directions hereby given into effect; and also including the sum of 78*l.* 18*s.* 6*d.* paid in respect of brokerage; and also tax the costs of the defendants Robinson and Fleming since the 27th of May 1858, up to and including this hearing. And let the plaintiff pay to them the amount of their costs when so taxed, and let out of the said sum of 3,155*l.* 18*s.* 6*d.*, the amount which in prosecuting the inquiry hereinbefore directed shall be certified to have been paid by the said plaintiff, and which he is liable to pay, be paid to the plaintiff; and let thereout also the amount of the said taxed costs of the plaintiff be paid, &c.; and let the residue of the said cash be paid to the defendants Robinson and Fleming. Liberty to apply.

June 3, 4.—From this decision Robinson and Fleming appealed.

Mr. Rolt and *Mr. Baggallay* appeared for the plaintiff, the respondent.

Mr. Amphlett and *Mr. E. Macnaghten*, for the appellants.

In addition to the cases cited in the Court below, the following were referred to:—

Stainbank v. Shepard, 13 Com. B. Rep. 418; s. c. 22 Law J. Rep. (n.s.) Exch. 341.

Higgins v. Senior, 8 Mee. & W. 834; s. c. 11 Law J. Rep. (n.s.) Exch. 199.

Beckham v. Drake, 9 Mee. & W. 79; s. c. 11 Law J. Rep. (n.s.) Exch. 201.

Lindsay v. Gibbs, 22 Beav. 522; s. c. on appeal, *ante*, 692.

Lister v. Payn, 11 Sim. 348.

Gladstone v. Birley, 2 Mer. 401.

The LORD CHANCELLOR.—The question in this case is, whether the master of a vessel has any equitable right to indemnity out of the freight in respect of advances

made and bills of exchange drawn by him for the purpose of enabling him to adapt the vessel to the specific performance of two charter-parties, which he entered into with the Commissioners of the Admiralty, at the Mauritius and the Cape of Good Hope; the former being under seal and the latter not under seal.

The bill was filed praying that it might be declared that the plaintiff is entitled to be repaid out of the monies due from the Commissioners of the Admiralty, the sums of 64*l.* 17*s.* 2*d.* and 27*l.* 7*s.* 9*d.*, and also to be indemnified out of the said monies against the amount of the several bills, and against all claims and demands whatsoever which have been or may be made upon him, by reason or on account of such bills, or any of them, and against all costs and expenses which have been or may be incurred or sustained by him in relation thereto.

Upon the case coming on to be heard before Vice Chancellor Wood, his Honour was of opinion that he had no jurisdiction under the 50th section of the act of the 15 & 16 Vict. c. 86, or otherwise, to make a declaration of right, unless it were one upon which the Court could act by granting consequential relief, and he decided that he had no jurisdiction to entertain the suit, unless the Commissioners of the Admiralty would consent to pay the fund into court. This was afterwards done, and on the final hearing in court the Vice Chancellor pronounced a decree, by which he declared that the plaintiff was entitled to be indemnified out of the freight in respect of all payments and liabilities made and incurred by the plaintiff in fulfilment of the obligations specifically imposed by the said contracts respectively, on the owners of the vessel, as to the fittings and provisions of the said ship, and also in respect of the suit. Against this decree the petition of appeal was presented.

[After stating the circumstances of the case his Lordship continued:—] In determining what are the equitable rights of the master (if any) under the circumstances, it will be necessary, first, to ascertain how the matter would have stood at law. No question has been raised as to the authority of the master to bind the owner by the charter-parties, upon the ground that they

are contracts not relating to the usual employment of the vessel; it must, therefore, be assumed that the master had full authority to enter into them. It has been long settled that the master of a vessel has no lien upon the ship or the freight for money which he may have expended or liabilities which he may have incurred for the repairs of the ship or for stores supplied to her, or for wages which he has paid, or for other disbursements which he has made during the voyage. This was determined as to the ship by the case of *Hussey v. Christie* and others, and as to the freight by the case of *Smith v. Plummer*. The law upon this subject having been established by those and other decisions, it appears to be a superfluous task to inquire into the reasons which have occasioned the difference between the rule which prevails in this country, and that of most other foreign countries in this respect.

It may have been partly owing to the technical nature of our law of lien, which requires that there should be possession of the property upon which it attaches to enable a party to enforce it. But the master is only the servant of the owner, and therefore cannot, as against him, have any possession of the ship or the freight. He may, on behalf of the owner, detain the goods of a consignee, *i. e.*, assert a lien upon them until the freight is paid; but this is a very different thing from converting a possession of ship or freight in his character of agent for the owner into an independent possession of his own to enforce his rights against the owner. Our law may also have proceeded upon a view of the inconvenience which would result from allowing the master's lien, as the owner would be deprived of his ship and his freight until he had first settled all accounts with the master. But that which most recommends the general rule is, the power which the master has of pledging the credit of the owner, or of hypothecating the vessel for necessary repairs and disbursements, or, according to the case of *Stainbank v. Shepard*, of doing both, provided the personal credit of the owner is pledged, and the hypothecation of the ship is made by separate and distinct instruments. If, therefore, the master chooses to make advances himself, and he finds

that he has no lien for them, he has no right to complain, because, as Mr. Justice Bayley says in *Smith v. Plummer*, it was in his power, in order to protect himself against any loss from non-payment of wages, or for advances, &c. made by him abroad, to make a specific bargain with the owners and require security for the performance; and a similar remark is made by Lord Ellenborough, in *Hussey v. Christie*. "If," he says, "the necessary repairs be done abroad, the master may hypothecate the ship for them, and it is his own fault if he subject himself to any personal liability, which he may renounce." Cases may easily be suggested in which it would be extremely hard upon the master that he should not have the power of satisfying himself for advances which he has made, by means of a lien, was here his personal expenditure has been bestowed upon matters of absolute necessity from an utter inability to obtain money, either by pledging his owner's credit or by hypothecation. But the convenience of the general rule, which excludes a lien by the exercise of which the master might detain a vessel or withhold the freight until a general settlement of his accounts with the owner, more than compensates for an inconvenience or hardship which it may produce in a few cases, especially as is observed by Mr. Justice Bayley, in *Smith v. Plummer*, "If any hardship arise to the master from this, it is owing to his having made an imperfect bargain with his owners." It was contended, on the part of the plaintiff, that, in the case of *Smith v. Plummer*, the question of a lien for the current expenses of the vessel was left open by both Lord Ellenborough and Mr. Justice Abbott. With respect to the former, I do not think that the mistake imputed to the report, by Mr. Amphlett, sufficiently appears; although, if the judgment be read as it stands, his Lordship seems to have omitted all mention of the 150*l.*, which was claimed as a distinct deduction by the defendants, as a part payment of the freight. He had already stated his opinion that for the advances made abroad the master had no lien. But it had been observed in argument that it was not even shewn that the money advanced was necessary for the ship's dis-

bursements, and, for anything that appeared, it might have been advanced to the master to pay his own wages. This Lord Ellenborough adopts, and, after observing that there was no lien either upon the ship or the freight, he adds, "And here there is the additional circumstance, that it is not proved that these advances abroad were made for the current expenses of the ship." As if he had said, "I have already stated that there is no lien generally, but in this case the possibility of lien is excluded by the absence of proof that the advances were for current expenses." Mr. Justice Abbott, in speaking of the current expenses, is dealing with the advance of 150*l.* to the master, which the defendants, the consignees, claimed as a part payment of the freight, as it was made to enable him to defray the current expenses of the vessel. This was wholly distinct from the question of the lien by the master, of which he had previously disposed. It is difficult to consider the question of a lien for the current expenses of a vessel to be still undetermined when it has been decided that the master has no lien for disbursements for the vessel, unless some distinction can be suggested between "current expenses" and "disbursements," which I am unable to perceive. I asked during the argument whether there was any case to be found in which, upon the general law on the subject, a master had been allowed to have a lien upon ship or freight for an outlay of any description made by him for the purposes of the voyage, and I received for answer that there was none. But it was contended for the plaintiff, that there was a peculiarity in this case which distinguished it from others which were mentioned in the course of the argument; that the money laid out and the liability incurred by the master was only useful for the earning of the particular freight; that it was a necessary expenditure according to the stipulations of the charter-parties to enable the freight to be earned, and might be therefore regarded as an outlay upon the freight itself. Some doubt was expressed in the course of the argument whether the master could have hypothecated the vessel in order to obtain the means of providing the fittings and the other requisites for the particular voyage.

But, if the engagement was not foreign to the usual employment of the vessel (which appears to have been taken for granted), and the master had therefore authority to bind his owner by the charter-parties, I see no reason for thinking that he might not have hypothecated the vessel to provide for things incident and necessary for the due performance of the contract just as he might to enable him to do the necessary repairs to render the vessel seaworthy for the voyage, without which the contract would be equally incapable of performance. I have endeavoured in vain to comprehend the distinction which has been pressed upon me between things which are necessary to adapt a vessel to the particular voyage for which she is engaged, and those which are not peculiar to any one voyage, but which are common to all, such as the repairs of the vessel and the provisioning of the crew. All alike are essential to the due performance of the contract, all are equally an expenditure to enable the freight to be earned ; without them, in all cases, the particular voyage could not be performed, and as the freight cannot become due until the determination of the voyage, they may all be similarly regarded as an outlay upon the freight. I think, therefore, that there is nothing peculiar to this case to remove it from the reach of the authorities which have refused a lien to the master of a vessel for advances made by him for the purposes of the voyage. It is contended, however, that there must, at least, be a difference in this case between the two charter-parties as to the right of the master ; and that, although in the one not under seal the owner might have sued in his own name, according to the cases of *Higgins v. Senior* and *Beckham v. Drake*, yet, upon the contract under seal, the action could only be brought in the name of the master. It is quite true that in either case the master might have sued in his own name if the owner had not interposed, and that, with respect to the charter-party under seal, the owner would have been entitled to have brought his action in the name of the master upon indemnifying him against the costs. If the master had brought the action and had recovered and received the freight, he might have paid himself the advances out of it ;

for the owner could have obtained the money from him at law only by an action for money had and received, in which the master might have set off the money he had advanced, but he would have obtained no indemnity against his liability on the bills. I do not see what equitable rights the plaintiff has beyond those which he would have had at law. The mortgagees would clearly have been entitled to receive the whole of the freight without being bound to pay the master for the advances which he made, for which the owner alone is personally liable, and of course they could not have been compelled to indemnify the plaintiff from his liability on the bills. I do not think that the mere payment of the freight into court, under the circumstances, by the Commissioners of the Admiralty can give the Court a right to deal with it as against the defendants, the mortgagees. They are not making any claim to it or applying for any relief, but are merely defending themselves in a suit which, when originally brought, the Court had no jurisdiction to entertain. The mortgagees are, in my opinion, entitled to the whole of the freight, without any deduction. They are willing, as I understand, to pay to the plaintiff the money which he has actually disbursed, and they ask for no costs against him in the suit. I think that I am bound to declare that the defendants Robinson and Fleming are entitled to the whole sum of 3,155*l.* 18*s.* 6*d.* standing in the bank to the credit of the cause, and to order it to be paid out to them accordingly.

M.R. }
March 16.} CALDWELL v. ERNEST.

Company, Suit by—Winding up—Official Manager—Substituted Plaintiff—Costs.

The trustees of a freehold land society instituted a suit against the defendant, and pending the proceedings the society became insolvent, and a winding-up order having been obtained, the official manager was substituted as plaintiff by an order of court ; but he was refused leave, by the Court making the winding-up order, to prosecute the suit. Upon a motion by the official manager to the

court, which had substituted him as plaintiff, asking that the suit might be stayed on terms, or that some order might be made for its future prosecution:—Held, that insolvency was no ground for staying a suit or preventing its being dismissed, and that the official manager must pay the costs of the motion personally.

The bill in this case was filed, on the 17th of February 1858, by the trustees of the Home Counties Metropolitan Freehold Land Society against Henry Ernest, for the specific performance of an agreement to take certain allotments of land. The defendant put in a voluntary answer on the 13th of May 1858, and a replication was filed on the 3rd of November 1858. On the 13th of November Wood, V.C. made an order to wind up the company, and on the 1st of December 1858 Mr. Caldwell was appointed the official manager. On the 31st of January 1859 an order *ex parte* was made at the Rolls, under the 11 & 12 Vict. c. 45. s. 53. (the Winding-up Act), substituting the official manager as plaintiff in the suit, and directing him to prosecute the same as nominal plaintiff for and on behalf of the society. The official manager subsequently applied to the chief clerk of Wood, V.C., where the order for winding up was being prosecuted, and he refused to authorize him to take any step in the suit. On the 16th of March a motion was made by the official manager before the Master of the Rolls, that, notwithstanding the order of the 31st of January 1859, the further prosecution of the suit might be stayed on such terms as the Court should think fit, or that such order might be made for prosecuting the suit as might be just.

Mr. Beavan, in support of the motion, referred to the 11 & 12 Vict. c. 45. s. 53, declaring that it should be lawful for the official manager to prosecute suits against third parties. It was necessary that some step should be taken, as the defendant, under the 117th General Order of 1845, might move to dismiss the bill, as upon the merits, and this would effectually prevent any further proceedings being taken against him.

Mr. Selwyn and *Mr. Speed*, for the defendant.

The MASTER OF THE ROLLS.—The official manager must prosecute the suit with the sanction of the Court, or he must abandon it altogether. A suit could not be stayed merely because the plaintiff had become insolvent. If the plaintiff omits to prosecute the suit the defendant has a right to ask that the bill may be dismissed, that he may be relieved from the proceedings. This motion must, therefore, be refused, with costs.

Mr. Speed.—As the motion is made by the official manager as plaintiff, he must answer the costs personally.

Mr. Selwyn.—The question was decided in *The Official Manager of the Grand Trunk Railway Company v. Brodie* (1).

Mr. Beavan.—The official manager ought not to be restricted in seeking the advice of the Court. This would be the effect if he were personally made liable for costs.

The MASTER OF THE ROLLS.—I must make the order. He must answer the costs of this application personally.

M.R. }
May 31. } CALDWELL v. ERNEST.

Company—Winding up—Official Manager—Costs—Liability to pay.

An official manager appointed under an order made to wind up a company was by an order of course substituted as plaintiff in a suit instituted by the trustees of the company. He applied to the Court asking either that the suit might be stayed or that direction might be given for its prosecution. The application was refused, and he was ordered to pay the costs personally. Upon a motion by the defendant, which was served on the original plaintiffs and on the official manager,—Held, that the bill must be dismissed with costs.

Held, also, that the application made by

(1) 9 Hare, 823; s. c. 3 De Gex, M. & G. 146; 22 Law J. Rep. (N.S.) Chanc. 514.

the official manager was not an adoption of the suit, and that he was not personally liable to pay the costs, but that they must be paid by the original plaintiffs.

On the 4th of May, the defendant served a notice of motion upon the official manager and on the original plaintiffs, asking that the bill might be dismissed and that the costs might be paid by the official manager personally.

The official manager had no funds in hand, and no list of contributories had been made out.

Mr. Selwyn and Mr. Speed, in support of the motion.—The official manager by moving to stay proceedings adopted the suit and made himself liable to the costs personally; he ought not to have done any act without the sanction of the Court.—

11 & 12 Vict. c. 45. s. 60.

The Official Manager of the Grand Trunk Railway v. Brodie, 9 Hare, 823; s. c. 3 De Gex, M. & G. 146; 22 Law J. Rep. (N.S.) Chanc. 514.

Mr. R. Palmer and Mr. Beavan, for the official manager, were not called upon.

The original plaintiffs, though served with the notice of motion, did not appear.

THE MASTER OF THE ROLLS.—If the official manager takes no step in a cause, if he repudiates it, the mere fact of his being substituted as plaintiff for the original plaintiffs does not make him personally liable to the payment of costs. Were it otherwise, the effect of substituting the name of the official manager for the original plaintiffs would be to transfer the liability to pay costs from the shoulders of the plaintiffs to the official manager, to be paid by him personally on the authority of the case referred to, and to be recovered over by him under the winding-up order as best he could. The question here is, whether the costs of the official manager are such as to bring him within the case cited. All that he has done has been to move that the further prosecution of the suit might be stayed on such terms as the Court might think fit, or that such order might be made in relation to the further prosecution of the

suit as might be just: the meaning of this is, that the official manager declines to proceed with the suit;—that he repudiates it unless the Court shall think fit to direct him to proceed and specify the terms on which he is to proceed. I dismissed that motion with costs. So far as it goes, that amounts to a prohibition to the official manager to proceed, and I am of opinion that he is not liable to the costs of the suit. The original plaintiffs, though served, have not appeared. The defendant, as against them, is entitled to the usual order for costs, and he must obtain them under the winding-up order against the company.

M.R.	}	FEATHERSTONHAUGH v. TURNER.
1858.		
March 1, 2, 23;		
Nov. 19.		

Partnership—Shares—Mutual Agreement to purchase—Refusal on Death.

A surgeon sold a share of his business, and took the purchaser into partnership. The articles specified that the partnership was for such term as they should mutually agree, and that in case of death, absence or incapacity of either of the partners the survivor should have the right of purchasing his share at two years' value, or, in case of dispute, at a price to be named by valuers; but in case he should decline to purchase such share, then that it might be sold to any person willing to purchase. The purchaser died fifteen months after the date of the articles; and on his death the surviving partner refused either to purchase his deceased partner's share, or to admit any other person to be a partner with him:—Held, that the surviving partner could not repudiate the articles; and that his refusal to purchase the deceased partner's share, or to admit a new partner in his place, left the surviving partner liable to reimburse the value of the deceased partner's share, and also, in the mean time, to account for the accrued profits.

James William Turner for many years carried on the profession and practice of a surgeon, at Kensington. In January 1856 he agreed to sell one-fifth part of such

practice to Edwin Hooker Marsh for two years' purchase, to be computed on the receipts of the previous year, which, upon an investigation of the books, was considered to be worth 800*l*.

By an indenture, dated the 1st of January 1856, after reciting the agreement, Messrs. Turner and Marsh agreed to become partners as surgeons from the date thereof for such term and time as they should mutually agree so to continue partners. It also provided that the instruments, implements, and the fixtures, stock and effects, used in the said business should remain and continue vested in, and be the sole and separate property of Mr. Turner, subject, nevertheless, to be applied and used by the said partners at all times during the co-partnership for the purposes thereof. It then provided, "that if during the said co-partnership either of the said parties shall die or be absent for the space of six consecutive calendar months, or become incapacitated from fulfilling the contract or agreement hereinbefore contained on his part, it shall be deemed and taken to be a retirement from the co-partnership business and practice by and on the part of such absent or incapacitated partner, and a dissolution of such co-partnership, as if the same had happened by or through the death of such last-mentioned partner; and then and in either of the said cases which shall first happen it shall be lawful for the surviving or continuing partner, and he shall have the right of pre-emption accordingly of purchasing the share and interest of such dying or retiring partner of and in the co-partnership business and practice, at and after the rate of two years' purchase for the same, to be calculated upon the gross receipts for the previous year of the co-partnership, ending on the 25th of December then preceding; and also all his estate and interest (if any) in the messuage and premises wherein or whereon the business or practice shall for the time being be carried on, and in the stock, fixtures, implements and things then belonging to or used in the said business or practice, for such price or sum at which the same shall be valued or appraised by two indifferent persons, one to be named on each side; or in case of neglect or refusal by either party to name such valuer or appraiser, then both to be

named by the other of them, and such referees shall choose an umpire before entering on such valuations in the ordinary or usual way in case they should differ thereon; and that such surviving or continuing partner shall be allowed and entitled to the space or time of twelve calendar months for paying or discharging the amount of such purchase, upon his giving and entering into a bond, with sufficient surety for the due payment of the said monies aggregately, with interest, at the expiration of such twelve calendar months accordingly; or in case such surviving or continuing partner shall decline to purchase the share and interest of and in the said partnership business and effects of the said partner so dying or retiring therefrom, then and in such case such share and interest of and in the said co-partnership business shall or may be sold and disposed of to any other person who may be willing or desirous to purchase the same."

E. H. Marsh died on the 20th of March 1857; and letters of administration to his estate and effects were granted to the plaintiff, Jane Featherstonhaugh, who was a specialty creditor for 400*l*., lent to enable Mr. Marsh to purchase the one-fifth share of the business.

Mr. Turner refused either to purchase Mr. Marsh's share in the business, or, in case it should be sold, to admit any other person to be a partner with him.

The plaintiff therefore filed this bill against Mr. Turner, praying that the defendant might be restrained from excluding from the business any competent and qualified surgeon who might be willing to purchase the share and interest of E. H. Marsh in the partnership, or that the defendant might be directed to pay to the plaintiff, as such administratrix, a sum by way of compensation in the nature of unliquidated damages.

Mr. R. Palmer and Mr. Macnaghten, for the plaintiff.—The partnership was entered into and the share purchased upon the mutual terms of each purchasing the other's interest on dissolution or death. The partnership was not to be dissolved even by death without a purchase. There was no accruing right even from death. Throughout the price was fixed at two years' value.

A partner might refuse to purchase, but still he was bound to allow a sale. He could not, by refusing to admit a purchaser, obtain an advantage for himself. He had no right to decide on his own personal contract, for his own personal advantage. He was bound either to pay the value, or answer in damages. A party who received a premium to take a person into partnership never could be allowed to determine it immediately afterwards. He must return, at the least, a portion of the consideration—

Bury v. Allen, 1 Coll. 589.

Freeland v. Stansfeld, 2 Sm. & G. 479;
s. c. 23 Law J. Rep. (N.S.) Chanc. 923.

Buxton v. Lister, 3 Atk. 383.

Hercy v. Birch, 9 Ves. 357.

Crawshay v. Maule, 1 Swanst. 495.

Mr. Selwyn and Mr. Martindale, for the defendant.—The purchaser obtained all the advantages he contracted for, social position and income. The partnership was at will; it was determined by death. The plaintiff might sell the deceased's share in the business, but the articles did not compel the defendant to accept a partner, or prevent an immediate determination of the partnership. The accident which determined the partnership was common to both; it had fallen on Mr. Marsh, and the partnership had survived to the defendant. There was no ambiguity in the contract; the plaintiff had nothing to sell. The Court could not extend the duration of the partnership or limit a time to which it should extend. It cannot give value to nothing: it cannot sell a shadow, or enlarge the interest of Mr. Marsh merely because he had a chance of survivorship. If any right existed under the articles, it was infinitesimal:—

Davies v. Hodgson, 25 Beav. 177;
s. c. 27 Law J. Rep. (N.S.) Chanc. 449.

Austen v. Boys, 24 Ibid. 598; s. c.
27 Law J. Rep. (N.S.) Chanc. 714.

Asle v. Wright, 23 Ibid. 77; s. c. 25
Law J. Rep. (N.S.) Chanc. 864.

Moore v. Moore, 25 Ibid. 8; s. c. 27
Law J. Rep. (N.S.) Chanc. 385.

Mr. R. Palmer, in reply.

March 23.—The MASTER OF THE ROLLS.
—The defendant refuses to buy Mr.

Marsh's share in the business, or to allow it to be sold. He insists, except as to one-fifth part of the outstanding debts due to the partnership at the decease of Mr. Marsh, that nothing is owing to his estate. I cannot accede to that construction of the clause in the articles of partnership; it would reduce it to a nullity. To save expense, I suggested the propriety of the parties leaving it to me to consider the sum which ought to be awarded in the shape of damages for any interest which Mr. Marsh might have had in the partnership. I expressed a doubt whether, by the mutual submission of the parties, it was within the power of this Court to enter into a consideration of that question, but the defendant declines to submit to that course. He has a right to insist that the meaning of these words shall be expounded, and that the rights of the parties shall be declared and construed for the benefit of the surviving partner and the estate of the deceased. There is in the clause of pre-emption nothing compulsory on the surviving and continuing partner to purchase the share. It is difficult to construe, because the greater part of the profit of the business must arise from the professional skill and knowledge of the persons who conduct the principal part of the business; but, at the same time, if persons enter into a contract, a meaning and an effect must be given to it. It was argued that the clause had reference solely to the probability that the elder partner would die before the younger, and that it referred only to the event of Mr. Marsh surviving Mr. Turner. To come to that conclusion, the words "if during the said co-partnership either of the parties shall die" must be read "if during the continuance of the partnership W. Turner shall die"; but no such construction can be made or conclusion arrived at. The parties themselves had a meaning; they knew what was to be carried into effect. Very little of the stock, fixtures and implements, probably none at all, belonged to Mr. Marsh. So far, then, the clause of the partnership articles was in abeyance: it could not apply to any property of Mr. Marsh at that time upon the premises; it could apply only to the property that Mr. Turner had. Yet in the

progress of the partnership those circumstances might be altered. The clause, however, applies to both the partners, on the event occurring in either case, and it must be so considered. What it would have been in the event of Mr. Turner dying, and Mr. Marsh being the survivor, is only necessary to mention for the purpose of shewing that the same course would have been taken then as must be taken now. But then Mr. Turner declines to purchase, so that I have to consider the effect of the words, "Or in case such surviving or continuing partner shall decline to purchase the share and interest of and in the said co-partnership business and effects of the partner so dying or retiring therefrom, then and in such case such share and interest of and in the said partnership business shall or may be sold and disposed of to any other person who may be willing or desirous to purchase the same." It is difficult to arrive at a meaning, but still I must carry the words into effect; I must first endeavour to sell the share of the deceased partner. It is possible and highly probable that, unless Mr. Turner will give great facilities, it will be extremely difficult to carry any sale into effect. If, then, no facilities are given, will not this Court ascertain what was the interest of the deceased partner under these articles at the time of his decease, and fix a price upon it accordingly, and charge the continuing and surviving partner with that price? That is distinct from pre-emption, because if the surviving partner consented to buy the business, he was to do so at two years' purchase, to be calculated on the gross receipts of the business for the previous year; that is perfectly separate and distinct from ascertaining what the interest or value of the deceased partner was in the business. One of the greatest difficulties in considering this was, whether the interest of the deceased partner did not continue in the profits made by the firm subsequent to his death, and whether, in that event, he would not be entitled to a share of the profits up to the present time, and up to the time when the business was sold? and if so, the share of the profits would have to be calculated. In that case the Court would have to consider what was the amount of the net profits

made by the concern (after making a liberal allowance and compensation to the surviving partner for his knowledge, trouble and occupation in carrying on the business), and then to divide it into fifths, and give one-fifth to the estate of the deceased partner. A great number of the words of the clause point in that direction; otherwise, as this is an interest in a surviving partner, what interest is there to sell if the deceased partner has no capital in the concern, that is to say, no interest in the utensils, goods, stock-in-trade, fixtures or implements with which the business is carried on, and, in addition, no connexion (persons brought to the concern by reason of Mr. Marsh being a partner)? If he has none of these, it is not without difficulty that he can be said to have a continuing interest in the business.

The clause is made applicable to events contemplated between the parties when they entered into the partnership, and "absence, incapacity and death" are to be treated in the same way. It follows, therefore, that death must be considered as a dissolution of the partnership, and yet the interest of the surviving or continuing partner is to be sold. I cannot, therefore, as at first inclined, treat this as a continuing partnership, except so far as there were any goods, &c., or any connexions brought to the business by the deceased. What I propose to do is, to refer it to chambers, to sell the share of Mr. Marsh in the business, and to settle and consider the conditions of sale necessary for that purpose; I shall then ascertain the course which the defendant intends to take. If he shall, as he may, interpose any obstruction, so as to deter any person from giving an adequate sum to join the partnership in consequence of an apparent prospect of dissension and trouble, I shall in that event ascertain what the interest of the deceased partner in the business was; and if it shall appear that such interest cannot be sold, there must be an inquiry whether any of the stock, &c. belonged to Mr. Marsh, and whether he had been the means of introducing any patients or customers; and if it shall appear that there were any, and that any profits have been made, then ascertain how much of the profits since made have arisen from such customers. I shall

then reserve further consideration of the case, and the costs of the suit.

Mr. Selwyn.—The defendant asks for a decree of the Court. He will as far as possible abide by it, but he will not do what he is not legally compelled to do. In the absence, therefore, of an express decision he will say to any professional gentleman inquiring for a partnership, there is nothing to sell; but assuming you buy a partnership, I have an immediate power of dissolving it.

The MASTER OF THE ROLLS.—That is not my view of the case. When Mr. Marsh purchased a share in the partnership for 800*l.*, it was not in the power of Mr. Turner to dissolve it the next day and keep the money. The Court would have interfered and compelled him to repay it. The contract was, that in case Mr. Marsh should die, his representative, or in case of retirement or incapacity, he himself should have the power of putting a medical man properly qualified in the position in which he was himself. I am unable to give relief in the shape of damages. The difficulty, therefore, is, the uncertainty as to the course Mr. Turner will pursue; if he will not admit a partner, the value of Mr. Marsh's interest must be ascertained, and every source from which profit might have arisen must be included in the computation, and after a liberal allowance to the defendant for his time and knowledge expended in the realization of profit since the death of Mr. Marsh, the defendant must be charged with the amount. There may be difficulty in carrying the decree into effect, but that must not prevent its being made.

Abstract of the Decree.

The defendant having declined to purchase the share and interest of E. H. Marsh in the co-partnership business, let it be sold; and let the conditions of sale be settled by the Judge; and in case no *bond fide* sale of such share and interest can be effected, then
Inquire what such share and interest of E. H. Marsh was in such co-partnership business at the time of his death. And it being admitted by the plaintiff that there were no fixtures, goods, stock and things used in the said business which belonged to E. H. Marsh, let no inquiry be made as to this; but
Inquire whether there were any customers of the co-partnership firm, who had become customers

by reason of E. H. Marsh being a partner, and if so, whether any profits of the co-partnership business have been made since the death of E. H. Marsh properly attributable to or derived from such customers, and if so, take an account of such profits, and in taking such accounts all just allowances are to be made to the defendant; and let an account be taken of all dealings and transactions between E. H. Marsh and the defendant as co-partners.

The parties afterwards carried statements into the Chief Clerk's Office; and on the 29th of July 1858 he certified that the interest of E. H. Marsh in the business at the time of his death consisted of one-fifth of the net profits and gains which arose from the business; that no sale had been made, as the defendant declined to admit a purchaser as partner; that he had taken the accounts as set out in the schedule, and that a sum of 374*l.* 16*s.* 11*d.* was due from the defendant to the plaintiff.

<i>Schedule.</i>		<i>£.</i>	<i>s.</i>	<i>d.</i>
Amount of debts received by the defendant.....	2,109	13	5	
Outstanding debts admitted by the defendant as good	172	18	6	
Amount in receiver's hands after deducting disbursements and his per-centage.....	15	9	5	
	2,298	1	4	
Partnership disbursements.....	562	9	5	
	1,735	11	11	
Fifteen months' (being the period of partnership) net profits	347	2	4	
One-fifth of which is	276	4	0	
Deduct sums received by E. H. Marsh on account	70	18	4	
	555	7	10	
Add one-fifth of two years' net profits at the rate of 277 <i>l.</i> 13 <i>s.</i> 11 <i>d.</i> per annum	626	6	3	
	251	9	3	
Deduct amount of balance of purchase-money unpaid, with interest thereon to the death of E. H. Marsh	374	16	11	

The defendant took out a summons to vary the certificate, and it was adjourned into court.

Nov. 19.—*Mr. Selwyn* and *Mr. Nindale*, for the defendant. — The clerk has set no value on the share of deceased; he has assumed that two

net receipts would be the purchasing price for what was valueless, and he has done this without making any allowance to the defendant for his skill and knowledge; by this he gave an interest to Mr. Marsh without his contributing anything towards it.

Mr. R. Palmer and Mr. Macnaghten, for the plaintiff.—Is the principle upon which the account has been taken right? Everything must be presumed against the defendant; he chose neither to purchase the share, nor to allow it to be sold, but still he cannot be allowed to retain the value, which can only be ascertained by computations made on the receipts.

The MASTER OF THE ROLLS refused the application to vary the certificate, with costs; and, on further directions, he made a decree that the defendant should pay to the plaintiff what was found due, with costs.

M.R. 1858. July 16.	}	JENKINS v. GREEN.
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Lease—Reservation of Land by Quantity, not by Description—Right of Selection.

An agreement to let a farm less a stated number of acres will be supported in equity, though the lands to be excepted were not specified.

A rector agreed to let a farm, except 37 acres, with liberty to plant not more than 10 acres of land. The tenant took possession, but before the lease was executed disputes arose respecting the lands to be taken by the rector; and upon a bill filed by him against the tenant for a specific performance of the agreement,—Held, that the rector had a right to select the lands to be reserved as the lease had not been executed, but that had it been executed the rector could not have taken any lands without the concurrence of the tenant.

Held, also, that the right of selection must be exercised so as not to prevent the useful and beneficial occupation of the rest of the farm; and with these declarations a decree was made for a specific performance of the agreement.

The bill in this suit was filed, by Wil-
NEW SERIES, XXVIII.—CHANC.

liam James Jenkins, rector of Fillingham, in the county of Lincoln, against Benjamin Green, praying for the specific performance of an agreement to take a lease of "The Glebe Farm," of which the plaintiff was seised in right of his rectory, excepting thereout certain specified parts, or such other parts as the Court should think proper.

The farm had been estimated to contain 437 acres, but since the agreement with the defendant it had been ascertained to contain 445 a. 2 r. 2 p.

The agreement between the plaintiff and the defendant was dated the 24th of April 1855, and by it the plaintiff, in consideration of the rents and covenants, agreed, with the consent of the bishop of the diocese and patrons of the advowson, on or before the 1st of July then next, to grant the defendant a lease, to be prepared by the plaintiff's solicitor at the expense of the defendant, of the farm-house and farm containing 437 acres or thereabouts, called the Glebe Farm, now in the occupation of W. Glover, except 37 acres thereof, from the 6th of April then last, for fourteen years, with liberty to plough up free of any extra rent one moiety of a close called Thacker Hill Close, but with a reservation out of the demise of timber, mines and gravel, right of sporting, fishing, shooting and stocking ponds with fish; yearly rent 600*l.*, and such further sum as the lessor will have to pay annually to a drainage company or to Government for draining the said farm, or any part thereof, or for any money borrowed for that purpose; and also a further sum of 10*s.* per acre for ploughing one close, called the Third Field, and 5*s.* per acre for the other moiety of the said close called Thacker Hill Close; and also by way of penalty, a further sum of 10*l.* per acre for every acre of grass land ploughed up, except as aforesaid. Rent payable half-yearly, the first half-yearly payment to be made on the 11th of October next, with a proportionate deduction for the interval between the 6th of April instant and the 13th of May next, the latter day being the time at which the tenant will enter. The said W. J. Jenkins agrees with B. Green to obtain the consent of the said bishop of the diocese and of the patrons of the living to the

lease; also, if he is able, but this is not compulsory on him, to get the whole of the said farm, or such part thereof as is required, drained by a drainage company, or by borrowing money for that purpose, the said tenant paying the annual payment to the company or to Government for that purpose during the said term of fourteen years. The lease also to contain the following covenants, stipulations and agreements:—Liberty for the lessor to plant during the term not more than 10 acres of land. Tenant to pay all taxes and rates, except landlord's property-tax; to put in and keep the whole of the buildings, including farm-house and dove-cote inside and out, in good and substantial repair, and to paint and cleanse the same; to cleanse ditches and keep hedges well cut and plashed, and fences in good repair. Tenant to insure premises in joint names of himself and lessor in a sum not less than 1,000*l.*; also to insure stock to value of half a year's rent, and produce policy; in default landlord to insure and add premiums paid for insurance as additional rent; the money obtained from insurance office if premises burnt, &c. to be laid out in rebuilding or repairing premises, and if money insufficient tenant to make up deficiency. Course of husbandry to be the four-field system, and the usual and best improved methods thereof according to the custom of the country. Special provisions for farming during the last year of tenancy, and with full power for him or his tenant to go upon farm with horses, &c., to do all ploughing and sowing which tenant does not do; upon request the said tenant to find stable-room for horses, &c. Lessor to have full power to enter and inspect farm and buildings at any time, and also to enter upon farm and house to shew it to others, right of lessor to dig clay on any part of the said farm; power of distress and entry if rent unpaid for twenty-one days after due. Lease to become void if tenant underlet or assign lease, become insolvent, bankrupt, make an assignment for benefit of creditors, compound with creditors, or allow goods to be taken in execution, wilfully waste or not repair after one month's notice given for that purpose. Tenant to supply lessor with ten waggon loads of straw yearly. To

load from Lincoln to Fillingham, or from any place, not exceeding ten miles from lessor's residence, twenty-five tons of coal yearly to lessor's residence, upon said lessor giving to tenant a week's notice of his requiring the straw or coal, the said straw to be supplied and the coal to be had in such quantities as the lessor shall from time to time require, and in default the lessor to procure straw and get coals led, and charge same to tenant, and add it to rent. Tenant also to supply the said lessor with thirty quarters of oats or barley, in such proportions as he may require them, at market price, and load the same as required. Lessor to give the said tenant a week's notice of his requiring the said oats or barley. Lessee not to occupy any other farm without consent of lessor. Such lease also to contain the usual covenants and provisions on behalf of both lessor and lessee; costs of this agreement to be borne by the parties hereto in equal moieties.

The bishop of the diocese and the patrons of the rectory gave their consent, and on the 13th of May 1855 the tenant took possession of the whole farm, except two acres of a close, called First Close, and on that occasion it was agreed that he should hold the thirty-seven excepted acres until the plaintiff required them, paying to the plaintiff for the same a rent of 2*l.* per acre.

No special arrangement was made as to which particular thirty-seven acres were to be ultimately reserved.

The General Land Drainage and Improvement Company, incorporated under the 12 & 13 Vict. c. xci., on the 2nd of January 1857, undertook to drain the Glebe Farm, upon being repaid the sums expended, with interest thereon, by thirty-one yearly instalments, not exceeding in any year 6*l.* 13*s.* 2*d.* for every 100*l.*

Accordingly 294 acres were drained; and on the 23rd of July 1857 the Inclosure Commissioners for England and Wales (1) ordered that the inheritance of the land constituting the Glebe Farm should be absolutely charged with the sum of 2,345*l.* 14*s.*, the amount expended or incurred by the company in draining such

(1) Land Drainage Acts:—9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 12 & 13 Vict. c. 100; 13 & 14 Vict. c. 31; 14 & 15 Vict. c. 91; 19 & 20 Vict. c. 9.

parts of the Glebe Farm as had been drained, and other parts of the rectory glebe, being the Blundell and Baliol closes, containing 9a. 1r. and 9a. 2r., and with 31*l.* 12*s.* 6*d.* for other costs, charges and expenses of the company incident to the contract, amounting in the whole to 2,377*l.* 6*s.* 6*d.*, and that it should be repaid by a rent-charge of 142*l.* 19*s.* 3*d.*, to be paid for thirty-one years from the date of the order, it being computed after the rate of 6*l.* 0*s.* 3½*d.* for every 100*l.* expended or incurred, and they made it payable half-yearly, on the 23rd days of January and July in every year, the first payment to be made on the 23rd of January 1857.

A draft of a lease was accordingly prepared by the plaintiff's solicitor, who at the time acted on behalf of both parties. It excepted out of the demise, in respect of the thirty-seven acres which the plaintiff claimed a right to reserve, two fields, called the South or Third Field, and the Middle Field, which contained together 42 a. 3 r. 5 p. It also excepted 2 a., part of a close called First Close.

After some delay the defendant took the lease to his own solicitor. It was then objected, that the defendant ought to pay no more than the interest of the money expended upon so much of the farm-lands as had been drained. It was also objected that the agreement reserved to the tenant the right of ploughing the Third Field and the second half of Thacker Hill Close, and further that the lease as drawn was at variance with the agreement.

Another draft of a lease was then drawn in conformity with the agreement; but the extent of the First Close was stated at the number of acres to which it was reduced by the plaintiff having inclosed two acres for his own use. A copy was sent to the plaintiff's solicitor; but before it was returned the plaintiff stated his willingness *at once* to take the farm and relinquish the contract. This draft did not comprise the Second Close and the eastern part of Fish-pond Close, which contained together thirty-seven acres; the defendant's solicitors proposed to include the said Second Close and the whole of Fish-pond Close, and they excluded the Ox Pasture and the Home

Close, containing 35a. 2r. 21p., the first, as plaintiff alleged, being inferior land, and both being inconvenient for the occupation of the plaintiff while they adjoined the yard and buildings of the farm. This led to further correspondence, in which the plaintiff insisted that he had a right to select whatever parts of the Glebe Farm he thought proper, not exceeding thirty-seven acres and ten acres, and to have them excepted from the lease. The defendant, however, insisted that no selection could be made by the plaintiff without his concurrence; that he could not exclude the two acres of the First Close, which the plaintiff alleged he had taken, with the concurrence of the defendant, to build upon.

Mr. R. Palmer and *Mr. Beaumont*, for the plaintiff, claimed a specific performance of the agreement, with a right to select the lands to be excepted from the lease.

Mr. Selwyn and *Mr. Nalder*, for the defendant.—The terms of the agreement are indefinite and uncertain, and cannot be carried into effect.—

Wilks v. Davis, 3 Mer. 507.

Lindsay v. Lynch, 2 Sch. & Lef. 1.

Perkin's Profitable Book, sec. 62. 641, 642.

Jacques v. Chambers, 2 Coll. 435; s. c. 16 Law J. Rep. (N.S.) Chanc. 248.

Co. Lit. 145, a.

Shep. Touch. 77.

THE MASTER OF THE ROLLS.—I must consider this as an agreement to grant a lease at a future period on the obtaining certain consents, and excepting a given number of acres, the selection of which must be made by the person granting the lease before the lease is executed. I can only consider the memorandum of agreement as a legal instrument effectual in a court of law; it would then operate as a covenant under seal, as if it had been executed on the 24th of April 1855, and bind the parties so that the covenantor would agree to grant a lease on the 1st of July then next of a certain quantity of land, say 400 acres, excepting thirty-seven acres and

ten acres. The grantor, however, would have to select which of the lands he would except out of the property to be demised. This selection, no doubt, might have been made after the 1st of July 1855 if the lease had been executed in the terms of the agreement, but then the right of selecting the lands to be excepted would have rested with the tenant; he would then, no doubt, have said, "You have granted the 400 acres with a right of reserving thirty-seven acres and ten acres; if now you require these lands the right of selecting them must rest with me." The plaintiff, however, must not exercise the right of selecting the lands to be taken oppressively, or in a manner to make it impossible or difficult for the defendant usefully and advantageously to occupy the rest of the land. I do not intend to enter into the question as to what covenants the lease should contain; that must be settled in chambers; and for that purpose one party must prepare a draft of the lease and hand a copy to the other, that such alterations may be made as may be deemed necessary, and when the parties cannot agree upon any question it may be brought before me for further consideration. The plaintiff must cause an apportionment of the draining rent-charge to be made, so that the defendant may be charged for no portion of the glebe which is not comprised in his lease; that done, I propose to make a decree for a specific performance of the contract, and to declare that the right of selecting the thirty-seven acres and the ten acres belongs of right to the plaintiff, but that it must be so exercised as not to interfere with the other clauses in the contract, or with the defendant's beneficial enjoyment of the land comprised in the contract. I shall then refer it to chambers to settle the lease in case the parties differ, and I shall reserve the costs for further consideration. I think, however, that the plaintiff is entitled to the costs, so far as they have been occasioned by resisting a specific performance of the contract; but I cannot determine the extent of these costs without reading the affidavits.

M.R. }
Feb. 23. } JENKINS v. GREEN.

Lease—Rectory—Glebe.

If a farmer contracts with a rector for a lease of glebe lands, the Court will not assume that both parties had an enabling statute present in their minds, and modify the express terms of the agreement, to make it conform with the provisions of the statute.

Where an agreement had been made by a rector to grant a lease of glebe lands, at a rent to be paid half-yearly, the Court will not vary the agreement in accordance with the provisions of the 5 Vict. sess. 2. c. 27, and direct the rent to be paid quarterly.

A decree was made for the specific performance of a lease of glebe lands. The decree was duly enrolled; it was, however, subsequently found, that the agreement and the statute enabling incumbents to grant leases of their glebe did not conform:—Held, notwithstanding the previous proceedings, that the bill must be dismissed, but without costs.

This cause was again brought on upon an adjourned summons. Under the decree a lease was brought into chambers. It was between the plaintiff of the first part, the Bishop of Lincoln of the second part, the Master and Scholars of Balliol College, Oxford, of the third part, and Benjamin Green of the fourth part.

The defendant objected that it was contrary to the provisions of the 5 Vict. sess. 2. c. 27, enabling incumbents to demise the lands belonging to their benefices; that the reserved rent was made payable half-yearly instead of quarterly, as provided by the statute; and that the stipulations of the agreement, as carried out in the lease, were unusual, inconsistent and at variance with the custom of the country.

The chief clerk certified that the lease was a proper lease, having regard to the agreement.

Mr. R. Palmer and Mr. Beaumont, for the plaintiff.—The defendant knew he was contracting for a lease of ecclesiastical lands; he must, therefore, be taken to have known of the enabling statute, and the act must be considered as being imported into

and forming part of the agreement—*Kerr v. Pawson* (1).

Mr. Selwyn and *Mr. Nalder*, for the defendant.—The agreement cannot be varied. Courts cannot embody the caprices of legislation into the transactions of mankind, and make an agreement out of the provisions of a statute which the parties never contemplated. A farmer would not think of enabling and disabling statutes while considering the capabilities of a farm.

Mr. Palmer, in reply.

THE MASTER OF THE ROLLS.—The question now raised was not noticed at the hearing. The difficulty arising out of this statute, enabling incumbents to demise land belonging to their benefices, is insuperable. It certainly is the duty of the Court to be acquainted with these acts of parliament; but, really, the duty is nominal. It is quite impossible for the Court to have them present, and in mind. This illustrates the great advantage and assistance which counsel confer; they bring to the attention of the Court much that would otherwise escape notice. I certainly made a decree for specific performance of the agreement. A lease was accordingly carried into chambers; objections were taken, and upon them it has been adjourned into court, and the objection now raised is, that no decree ought to have been made, and though it has been enrolled and cannot be reheard or altered, still the objection raised is one that cannot be got over. Several objections have been taken, but I can get over them all but this one, and it is, therefore, not necessary to refer in detail to them. The most favourable way in which I can put this case for the plaintiff, is to state the grounds on which I think it necessary to dissent from the confirmation of this agreement for a lease. There is no question but that the best rent is reserved. Is, then, the statute imperative when it says that the rent shall be reserved quarterly. Or, rather, there are two questions, viz., first, whether I can force on the defendant a lease which shall reserve the rent quarterly; and, secondly, whether, notwithstanding the provision of

the act, I can allow him to have a lease which reserves the rent half-yearly. With respect to the first, I think that the act is imperative. It is impossible to get over the words. It is a permissive clause, no doubt, enabling the incumbent to let on farming leases, but with the express condition that the best rent be reserved quarterly. The agreement here is precise, that the rent shall be paid half-yearly. In *Kerr v. Pawson* I held, that where there is an act of parliament which regulates the subject-matter of a contract entered into between two persons, it must be assumed that they had that act of parliament in their minds, and, consequently, that on all those matters which are ambiguous, or which are not disposed of, it must be considered that the act of parliament becomes part, and contains the contract entered into between the parties. I should act on that doctrine undoubtedly here, in all those cases which are not mentioned in the agreement. But where the contract is precise, and is directly at variance with the act of parliament, it is impossible that I can hold that the parties had the act of parliament present to their minds, and that they intended that the act of parliament should override and control the express and direct provisions of the contract. I cannot, therefore, incorporate the act of parliament with the contract. Is this, then, the essence of the contract, or is it a mere formal matter? I do not so consider it. It may be of importance; it is not for me to judge, and the question of reserving the rent half-yearly or quarterly may be one of substance, which it is impossible for this Court to decide contrary to the express directions and terms contained in the contract. If the Court could do that, it could reserve the rent in any way it thought fit. I cannot, therefore, put into the contract that it is to be reserved quarterly. Am I then at liberty, under this act of parliament, to sanction a lease which reserves the rent half-yearly? So far as the defendant is concerned, if he had not raised the objection, and the lease had been granted *sub silentio*, and the matter had not been brought before the Court with the sanction of the patrons and ordinary, the defendant would have got a valid lease. The 5 Vict. sess. 2. c. 27. s. 4. meets this difficulty, and provides that

(1) 25 Beav. 394; s. c. 27 Law J. Rep. (N.S.) Chanc. 594.

where, through inadvertence or oversight, the act of parliament had not been expressly followed, the fact of the patrons and ordinary having executed it, gave the lessee a perfectly good and valid lease.

But the difficulty I have is this: it is for me as well as for the bishop and patrons to approve of this lease; and having come to the conclusion that the legislature has directed as an imperative condition that the rent shall be reserved quarterly, and having also come to the opinion that I have no power as a matter of equity to enforce that condition on the defendant, can I, with propriety, in that state of things, approve of a lease which reserves the rent half-yearly? And I reluctantly think I cannot, assuming that the bishop and patrons are consenting parties to the lease, because I presume that they would consent to the lease in this manner if the Court thought it fit and proper that they should execute it, and that the matter has not been brought before their attention in the same detailed and particular manner in which it was brought before me. Neither do I think that I am entitled to throw the burden of deciding the question on the bishop and the patrons. I think that I am bound to express an opinion for myself on the subject, and that I am, both morally and legally, bound to say that I cannot override that clause in the act of parliament, and say, that this is a contract which is proper to be executed, reserving the rent in a manner different from that which is made imperative by the act of parliament. That being my view of the case, it is for the parties to consider whether, in order to prevent any further expense in the matter, the better way would not be to consent to treat this matter in the same manner as if it were before me on further consideration that I might deal with the whole case. That would not prevent the opinion of another Court being taken on the subject. I had some little difficulty as to the course to be adopted, and I think that the practice of late years has been, with respect to bills for specific performance, to make a decree for specific performance where the agreement is contested, and then afterwards, if a good title cannot be made, to dismiss the bill, notwithstanding that a decree was made for specific perform-

ance. The old practice used to be a decree for a specific performance conditionally on a good title being made, but of late years the practice has been the other way. If so, that course would get rid of the difficulty in this case. I should simply dismiss the bill, and then I would allow counsel to speak to the question with respect to costs. I had determined to make the defendant pay the costs of the suit up to the hearing, so far as they related to the resistance to carry the contract into effect—practically, all the costs. But that was on the assumption that I could make a decree for specific performance. As for making the plaintiff pay costs, that is out of the question. It has frequently been discussed whether the Court will give costs where it dismisses the bill on such occasions. However, it never does give any costs. If the parties, therefore, do not contemplate an appeal, but remain satisfied with my decision, so far as jurisdiction is concerned, I shall simply dismiss the bill, without costs, as if the cause had been brought on for further consideration.

M.R. }
June 4, 11. } JENKINS v. GREEN.

Lease of Farm—Incumbents—Glebe.

Glebe lands which have been usually let on lease by incumbents are not within the 5 Vict. sess. 2. c. 27.

This case was again brought before the Court, for reconsideration of the judgment, upon the 5 Vict. sess. 2. c. 27.

Mr. R. Palmer and Mr. Beaumont insisted that the statute had reference only to lands usually occupied by incumbents, and that it had no reference to farms which had been usually demised, and from which the rector derived the greater part of his income; that the act did not interfere with or repeal previous existing statutes, and that the agreement was within them and ought to be carried into effect.

Mr. Selwyn and Mr. Nalder, for the defendant.—The 5 Vict. sess. 2. c. 27. was general; it must be read with the previous statutes; it applied to all lands belonging to benefices, and substituted

new provisions which effectually repealed all existing statutes.—

Co. Lit. 44, b, 45, a.

32 *Hen.* 8. c. 28.

13 *Eliz.* c. 10.

Bac. Abr. tit. 'Lease,' E. 6.

Doe d. Tennyson v. Yarborough, 1 Bing. 24; s. c. 7 J. B. Moore, 258.

2 *Black. Com.* 318.

Goodtitle v. Funucan, Dougl. 565.

O'Flaherty v. M'Dowell, 6 H.L. Cas. 142, 167.

The Bishop of Hereford v. Scory, Cro. Eliz. 874.

THE MASTER OF THE ROLLS.—The agreement would, no doubt, have been valid had it been made prior to the 5 Vict. sess. 2. c. 27. Its provisions were in accordance with the powers given to incumbents by the previous statutes respecting leases of lands attached to or forming part of their benefices. When the late statute is considered, it does not seem to vary the former statutes. It was contended, on behalf of the defendant, that all the statutes must be read together: but if I acceded to this argument to its full extent, I should, in fact, decide that the earlier statutes are repealed by the late statute. This statute does not contain a clause repealing the earlier statutes. I think the object of it is to give power to grant leases of land belonging to benefices where such power did not exist before. By the former acts no power was given to let land which had not been accustomed to be let. But those leases which the ecclesiastical persons had power to grant before the late statute, they may, since the statute, grant under the provisions either of the old statute, or the late statute, as they think fit. In this case the incumbent had this power. The discrepancies which the defendant has pointed out in the provisions of the different acts shew that the statutes are not to be read together. Suppose the incumbent under the 13 Eliz. c. 10. had power to let land for twenty-one years for the same rent as had been formerly reserved, payable half-yearly, if that lease since the late statute is not valid, because a portion of one glebe is not reserved out of the lease, or because it does not contain a

reservation of the rent quarterly or a covenant for insurance of the property for three-fourths of its value, or because it does not prescribe a particular mode of culture—it is clear that in all these particulars the former statutes are repealed by the 5 Vict. sess. 2. c. 27, and it would, therefore, be impossible to read them together. Suppose the incumbent had been accustomed to lease the glebe-house, then, if I am to read the statutes in the manner proposed, the incumbent would be prohibited from letting the house in future, because this statute contains a clause expressly prohibiting the letting of the glebe-house. There are many cases which by analogy lead to a different construction. The writ of *habeas corpus* might be issued at common law; but since the passing of the statute granting the right, a person may sue out the writ either at common law or under the statute. According to the invariable interpretation put upon acts of parliament by Courts of law a previous statute cannot be repealed by inference, but only by express enactment. I find, then, that the incumbent has agreed to grant a lease of these lands, which he has been accustomed to let according to the provisions of the statutes in force at the time when the late statute was passed, and which in no way affects the former acts; and I am of opinion that the agreement is perfectly good, and that the lessee must be ordered to accept the lease. The costs of the present application must be paid by the lessee.

M.R. }
March 17, } GRIMES v. HARRISON.
18, 19, 21. }

Building Society—Change of Purpose—Misapplication of Funds—Breach of Trust.

A building society was established and the rules certified under the 6 & 7 Will. 4. c. 32; the directors subsequently changed the name, and sought to convert it into a freehold land society. They made no alteration in the rules, but they applied the funds of the society towards the payment of the purchase-money of a piece of land they contracted to purchase:—Held, that the objects of the society could not be changed,

and that the rules of the original society could not be adapted to any altered purpose; that the rules did not authorize the purchase of land, and that the directors must replace the money; that the trustees were not responsible for the funds, as they only acted ministerially when they signed the cheques for payment; they were, however, refused the costs of the suit.

The Prince of Wales Mutual Benefit Building Society was established in the year 1853, and the following were among its rules:—Rule 1. stated that the object of the society “was to raise a fund by weekly subscriptions of the members in shares of 25*l.* each, out of which each member may receive the amount or value of his share for the erection or purchase of a dwelling-house or houses, or other real or leasehold estate.”

Rule 12.—“Whenever the money in hand shall in the opinion of the directors be sufficient for the purpose, it shall be employed in advancing to those members whose subscriptions are not in arrear the amount of their shares, and the members shall become entitled to such advance by seniority of membership and numerical order of their shares; but no member shall be entitled, unless upon transferred shares, to more than two advances at any one time on any of his original shares, nor until the whole of the members who shall be eligible as above stated and stand next in rotation and numerical order to his last advanced shares shall have been entitled to and been offered an advance in respect of their respective shares; and all money not so employed shall be invested by the trustees in such manner and upon such legal security as the board of directors shall deem necessary in the names of the trustees for the time being; and when any member shall become entitled to an advance, he shall have the option of accepting or declining the same.”

Rule 17.—“All securities to and investments on account of the society shall be made in the names of the trustees for the time being, and all documents shall be deposited and kept in such place as the board of directors shall direct.”

Rule 31.—“The board shall have full power to conduct the affairs of the society,

subject only to the rules thereof for the time being, and any committee to be selected and appointed shall have the same power in respect of any matter confided to them, subject to the control from time to time of the board.”

Rule 35.—“No payment above 5*l.* shall be made out of the funds of the society, except by a cheque on the bankers, which cheque must be signed by two of the trustees and countersigned by the secretary; and no such cheque shall be signed by any trustee except upon the direction of the board of directors, such direction to be entered in the minute-book of the society and verified by the signature of two directors at least, not being themselves trustees.”

Rule 39.—“No director, trustee or other officer of this society shall be responsible or liable to make good any deficiency that may arise in the funds, property or effects of the society otherwise than by reason of his wilful neglect or default, nor for the default or defalcation of any other officer; but every such director, trustee or other officer shall be answerable for the money, property and effects actually received by him on account of the society until he shall have disposed of the same in accordance with these rules, when his whole liability in that respect shall cease.”

By rule 47, such of the provisions of the 10 Geo. 4. c. 56. and the 9 & 10 Vict. c. 27. as were applicable to building societies were made applicable to this society.

The revising barrister certified the rules as approved, in pursuance of the 6 & 7 Will. 4. c. 32.

The funds of the society arising from the subscriptions of members amounted, in June 1856, to upwards of 750*l.* The society was then found to be in difficulties, and its operations were discontinued. The affairs of the society were then investigated, and it was found that the directors had made an attempt to vary the objects of the society, and that they had altered its name as follows—“The North-West London Equitable Freehold Land Society, enrolled as the Prince of Wales Mutual Benefit Building Society,” and that they had issued pass-books, containing a copy

of the rules of the society and the account of the individual members.

It was also found that, in October 1854, when the whole balance in hand was only 621*l.*, the directors, at a meeting, resolved to purchase a piece of land in West Green Lane, Tottenham, with the funds of the society. This piece of land consisted of three and a half acres, with a cottage upon it, and had then lately been purchased by Mr. Syers, for 2,360*l.* The sum to be paid by the society was to be arranged with Mr. Syers by Messrs. Haden and Bowen, two of the defendants, and they agreed to purchase the piece of land, exclusive of the cottage and garden, for 2,300*l.* A deposit of 150*l.* was then paid, and Mr. Syers acknowledged its receipt as being from "The directors of the North London Freehold Land Society," and indorsed upon the receipt was the following memorandum, which he signed:—"I agree to take payment as follows: 150*l.* already received, as per receipt annexed; 450*l.* within fourteen days of this date; 400*l.* on or before Christmas-day 1854, and the remaining 1,300*l.* by two instalments of 650*l.* each, the first on or before Christmas-day 1856, and the remainder on or before Christmas-day 1857."

On the 10th of October 1854 the directors, at a meeting of the board, ordered a cheque to be drawn for the deposit of 150*l.*, and, at a subsequent meeting, they ordered another cheque to be drawn for 450*l.* These cheques on account of the purchase-money were signed by the trustees, in pursuance of the resolutions of the directors, and this was entered on the minutes, and signed by two directors, in compliance with rule 35. Two other cheques, for 100*l.* each, were also drawn and signed on account of the purchase upon the like resolutions and with the like forms.

The trustees were cognizant of the purpose to which the several sums were to be applied.

The bill was now filed, by John Grimes and three other members of the Prince of Wales Mutual Benefit Building Society, on behalf of themselves and all other members of the society, except the defendants, against the directors and the trustees and Mr. Syers.

The bill charged that the investment was a fraud on the rules of the society, and that it was not a proper purchase, even if authorized by the rules.

The bill prayed that the defendants might be declared to be severally personally liable to replace to the funds of the society the several sums of 150*l.*, 450*l.*, 100*l.* and 100*l.*, so paid out of the funds to the defendant Syers, with interest, and for the appointment of new trustees; or that, if necessary, the said society might be dissolved and wound up under the statutes made in that behalf.

Mr. R. Palmer and Mr. Southgate, for the plaintiffs.—The directors had no power to purchase land; it was contrary to the purposes for which the society was formed. The resolutions of the directors were irregular. The land also was purchased under an idea that it might be sold to the society at an unreasonable price, with a view indirectly to the benefit of one, if not more, of the directors—*Matheson v. Ross* (1).

Mr. Selwyn and Mr. W. Morris, for the directors, Messrs. Harrison, Haden and Roberts, cited—

Armitage v. Walker, 2 Kay & J. 211.

Clough v. Ratcliffe, 1 De Gex & Sm.

164; s.c. 16 Law J. Rep. (N.S.)

Chane. 476.

The Grand Trunk Railway Company

v. Brodie, 9 Hare, 823; s.c. 3 De

Gex, M. & G. 146; 22 Law J. Rep.

(N.S.) Chanc. 514.

Williams v. Salmond, 2 Kay & J. 463.

Mr. Follett and Mr. Cracknall, for Mr. Cutt and Messrs. Smith and Hardingham, the trustees of the society.

Mr. Lloyd and Mr. C. Barker, for William Hugh Lawson Syers, referred to *Cutbill v. Kingdon* (2).

THE MASTER OF THE ROLLS.—There is a great distinction between a freehold land society and a benefit building society. A freehold land society buys land with the funds subscribed by the members, and then divides that land among them; but a

(1) 2 H.L. Cas. 286.

(2) 1 Exch. Rep. 494; s.c. 17 Law J. Rep. (N.S.) Exch. 177.

benefit building society advances to members, out of the subscriptions made by the members, sums of money to be laid out in the purchase of land or buildings, which are then mortgaged to the society. That appears to be the principal difference between these two kinds of societies. But in either case these societies must be bound by the rules by which they have been constituted. It does not lie in the mouth of any member of the society to say that the book which professes to contain the rules of the society does not contain the rules by which they are bound. In this society not only is there a rule that every member shall be furnished with a pass-book, containing his account, and a copy of the rules upon which that account is to be audited; but by the 31st rule, the board has full power to conduct the affairs of the society, subject only to the rules thereof for the time being. Therefore, the rules of the society bind all the members. I cannot accede to the argument that, as between the members of the society, the fact of putting a title-page to the pass-book, in which the society is called a freehold land society, will really alter the rules, and convert them into something other than what they purport to be upon the face of them. I make this distinction expressly as between the members of the society and as regards strangers to the society, because in that respect the case of Mr. Syers is different from that of the members of the society. It appears that the certificate of Mr. Tidd Pratt was obtained without any intimation that the words "freehold land society" constituted the title of the society, or that it was intended to be in any respect a freehold land society. It was sworn that this omission was made purposely, because it was known that Mr. Tidd Pratt would not certify the rules of the society, if called a freehold land society, to be within the provisions of the 6 & 7 Will. 4. c. 32, but would only certify it as a benefit building society. Therefore, it is impossible to adopt the argument, that the Court can mould these rules so as to make them applicable to a freehold land society, when by the suppression of the fact that this was a freehold land society, or was intended to be so, these parties have obtained from the officer appointed by the legis-

lature the benefit and advantage derived from being a benefit building society, solely because the society was not known or believed to be a freehold land society. It is therefore impossible to modify these rules so as to make them apply to a freehold land society. The real and material question is, what were the functions, duties and powers of the directors? I find from rule 31, that the duties are, to manage the affairs of the society in accordance with the rules. Rule 1. is strongly insisted upon as being beneficial to the defendants: it is said that it must be so read as to give to the society power to purchase land as they think fit. But upon reading this rule, and considering the society as a benefit building society, it does not confer any such power at all. The obvious meaning of that rule is, that "the amount or value of the share" of each member is to be applied "for the erection or purchase by him of a dwelling-house, or other real or leasehold estate." This contains no authority to the directors to purchase and divide land amongst the members; and in looking through these rules, there is not a single clause which authorizes such a course. Rule 12, no doubt, authorizes the directors to invest money in land; that is perfectly consistent with *Cutbill v. Kingdon*. The first part of the rule authorizes the directors, when they think proper, to make advances to members. This is in accordance with the objects of a benefit building society, and with the 1st rule of this society. The rule then goes on to direct "that all money not so employed shall be invested by the trustees in such manner and on such legal security as the board shall deem necessary; and when any member shall become entitled to an advance, he shall have the option of accepting or declining the same." The power given by this rule of investing the money not advanced to members authorizes (and I state this as being so far in favour of the defendants) the purchase of land as a mode of investment of the unemployed funds of the society. The argument of the directors is, that at this time no loans were made; that nobody had applied for loans; that the directors intended to treat this society as a freehold land society; and that there was a sum of

621*l.* in hand. But that can hardly be treated as money not required; for if any member had applied for a loan the directors would have been bound to make it. If then this rule gave the directors authority to invest the 621*l.*, it could not be said that they had sufficient funds for the purpose of making loans, and at the same time that there was surplus money which they could invest. Then, what is the contract which was entered into on this occasion? It was not an investment of 600*l.*, but a laying out or incurring liabilities upon a contract, which made the society liable for a purchase to the extent of 2,300*l.* under a power which only authorized the society to purchase in case they should have monies not required for the purpose of loans to members, every one of whom was entitled to have a loan to the amount of his share; and it was under the pretence of investing the surplus money that the directors, with 621*l.* only in hand, made the society incur this liability. On what grounds can this be held a valid and proper discharge of the duties of the directors of this society? Under the contract the sum of 600*l.* was to be paid at once, and 400*l.* more before the Christmas following. According to the regular rate of payment of subscriptions, the society would not receive a sufficient amount of subscriptions to meet this payment; much less the further sum of 1,300*l.*, which was to be paid by two equal instalments, at Christmas 1856 and Christmas 1857. It is impossible to say, upon the rules of the society, that this was a *bond fide* investment of the surplus funds of the society. It was nothing else than laying out the money of the society in the purchase of an estate, which the directors might think fit to divide again if they pleased. That may be the function of a freehold land society, but it is not the function of a building society. It is not within these rules; and every member is entitled to say to the directors, "You shall not go out of these rules;" and the fact of the society being entitled a Freehold Land Society, or of the pass-book being an account of a freehold land society, or of the minutes being kept as the minutes of the proceedings of a freehold land society, does not entitle the directors so to act, or

preclude any one of the members who may think fit from taking the objection to their acting in disobedience of rules to which they are bound to conform. The result is, that the directors were guilty of a breach of trust, and that they had no authority to lay out the money of the society in this contract. What, then, would be the consequence if this were a contract which bound the society? Mr. Syers might file his bill for the specific performance of the contract. How is he to be paid his purchase-money? Is each of the members liable to contribute, or liable to pay the whole amount? Upon the construction of these rules, the members would be at liberty to say, that these were not the terms and conditions on which they joined the society, and that they were not liable to have this contract specifically performed against them; so they are entitled in the same way to say to the directors, "You have exceeded your powers; you have not acted within the scope of that trust which has been committed to you in entering into this contract." The consequence is, that all the directors who authorized the payment of the money must be held liable to repay the amount. It may be very hard upon some of them, who may have had nothing to do with it, beyond assenting to the wishes of others; yet, as they were directors, and were under the obligation to make themselves acquainted with their duties, they must be held liable for what has taken place, and therefore liable to repay this amount. If the transaction were not upon the face of it invalid, I should require further evidence before I could sanction it; it certainly appears singular. As, however, the directors were not authorized to enter into the contract, it becomes unnecessary further to investigate the transaction. I do not see how I can affect the trustees of the society personally. They have not the same character and functions as the directors. They are mere ministerial officers, and hold the money of the society, and are bound to dispose of it as the directors order. The 39th rule may make a difference, but my present impression is, that the trustees only acted ministerially and in compliance with the resolution of the directors, and that they

ought to be kept harmless; but I cannot give them the costs of the suit. I cannot see what claims the society has against Mr. Syers; he was dealing with a freehold land society, or what he supposed to be such. These societies, I assume, have powers to buy land and divide it among their members. Mr. Syers was not bound to look at the rules of the society with which he dealt; he could not ascertain that this was not a freehold land society, or that it was entitled to act only as a building society. There is, therefore, no reason for saying that Mr. Syers is liable to replace the money. If the contract is not valid and is set aside, the parties who paid the money to Mr. Syers may or may not have an action at law against Mr. Syers to have the money restored. As to this I express no opinion. If the transaction had been free from suspicion, I should have considered Mr. Syers entitled to costs; but on the circumstances of the case, the bill must be dismissed against Mr. Syers, without costs. With respect to the directors, the plaintiffs are entitled to a declaration that this was a breach of trust, and that they are liable to replace the money, and they must pay the plaintiffs' costs if they ask for them. There will be no order against the trustees, but they must bear their own costs. The rule which provides that they were merely to sign receipts must mean that they were to have no hand or voice in the management of the society, and that they were to sign the receipts presented to them by the directors of the society after they had ascertained that the proper forms had been observed. Had they done no more, they might have been entitled to their costs; but on looking through the answer of the trustees, they do not content themselves with saying that they acted merely as ministerial officers, but they support and justify the allegations made by the other defendants, and insist that this is not a building society, but a freehold land society. This course they ought not to have taken, and it must deprive them of their costs.

M.R. }
June 16. } GRIMES v. HARRISON.

Costs — Taxation — Higher or Lower Scale.

The allowance of the higher scale of fees does not depend upon the amount to be recovered, but upon the questions raised in the suit, and whether the suit is one which affects the entire property involved.

The 2nd Order of the 2nd of January 1857, rule 7, provides that solicitors are to be entitled to charge and be allowed the fees according to the lower scale in all proceedings by special case, and in all proceedings relating to funds carried to separate accounts, and in all proceedings under any railway or private act of parliament, or any other statutory or summary jurisdiction, and generally in all other cases where the estate or fund to be dealt with shall be under the amount or value of 1,000*l*.

Mr. Follett and Mr. Southgate, for the plaintiff in this case (reported *ante*, p. 823), claimed the costs on the higher scale.

Mr. Cracknall and Mr. W. Morris, for the defendants.—The suit sought to have a sum of 800*l*. replaced. That was the principal object of the suit. The question on the appointment of new trustees, and the winding up the society, had not been brought forward at the hearing. The costs should be paid on the lower scale.—

Gibbs v. Gibbs, 27 Law J. Rep. (N.S.) Chanc. 577.

Reade v. Beniley, 3 Kay & J. 271; s. c. 27 Law J. Rep. (N.S.) Chanc. 254.

THE MASTER OF THE ROLLS.—The order referred to does not apply to this case. Whether the costs are to be allowed on the higher or lower scale does not depend upon the amount actually recovered, but whether the whole estate or fund is to be dealt with, though it is under the value of 1,000*l*. It is true that the fund sought to be replaced does not amount to 1,000*l*., but the suit seeks other and material relief, viz., the appointment of new trustees and the dissolution of the society; in fact, the estate

is sought to be dealt with as the whole property of the society. In *Gibbs v. Gibbs* the only question was, who was entitled to the specific sum of 400*l*.? The case, therefore, does not fall within the rule, and the costs must be allowed on the higher scale.

M.R. }
June 2. } THOMAS v. RAWLINGS.

Solicitor and Client—Privilege—Answer—Exceptions.

A solicitor who obtained possession of a lease from a client, which was claimed by a third party, cannot refuse to answer a bill filed against him upon an allegation that the information respecting the matters inquired into was obtained either in the character of solicitor or as a creditor of his client, neither will his claim to be a purchaser for value without notice, in respect of a lien claimed upon the lease for a debt incurred by his client, prevent his being required to answer the bill.

The bill in this case was filed by Frederick Richard Thomas, against William Harris Rawlings and Thomas James Stubbs, praying, *inter alia*, for a declaration that W. H. Rawlings was a trustee for the plaintiff of a lease, dated the 23rd of June 1854, and that T. J. Stubbs had as against the plaintiff no valid or subsisting charge or lien on the lease either for professional services or otherwise.

The plaintiff set out in his bill various deeds and memoranda of agreement, deducing his title to the lease.

T. J. Stubbs had acted as the solicitor of W. H. Rawlings; the lease was in his possession, and he claimed a lien upon it, on the ground that it came into his hands as a deposit, and that the money due to him was a debt incurred by his client for costs on the faith of the deposit, without notice of the plaintiff's title.

The plaintiff interrogated T. J. Stubbs in respect of the deeds and memorandum of agreement. T. J. Stubbs, in the first paragraph of his answer, said, "All the information I possess as to the matter to which I am interrogated in the suit I have derived either as a creditor of W. H.

Rawlings or as his solicitor. I am advised that the plaintiff does not by his bill offer to pay me the amount which is due from the defendant W. H. Rawlings to me, and in respect of which I hold the lease; and I submit and I hereby insist that I am not bound to make any answer to such part of the interrogatories exhibited in this suit on behalf of the plaintiff as will lead to a disclosure of any claim against the defendant W. H. Rawlings or of the matter which came to my knowledge whilst I acted as the professional adviser of the said defendant; and I claim the benefit of this defence to so much of the bill as I have not hereby fully answered, to the same extent as if I had pleaded to the same."

In answer to the various interrogatories in detail, he declined to give the discovery upon the same grounds or one of them.

The plaintiff excepted to the answer.

Mr. R. Palmer and *Mr. Swanston*, for the plaintiff, in support of the exception.

Mr. Selwyn and *Mr. Cottrell*, for T. J. Stubbs, claimed his privilege from further answering, as the communications came to the defendant in his confidential capacity, and his lien was obtained in his character of purchaser without notice.—

Greenough v. Gaskell, 3 Myl. & K. 98.

Jones v. Pugh, 1 Phill. 96; s. c. 11 Law J. Rep. (n.s.) Chanc. 323; 12 Sim. 470.

Carpmael v. Powis, Ibid. 687; s. c. 9 Beav. 16; 15 Law J. Rep. (n.s.) Chanc. 275.

Jerrard v. Saunders, 2 Ves. jun. 454; s. c. 4 Bro. C.C. 322.

Ovey v. Leighton, 2 Sim. & S. 234.

Browne v. Lockhart, 10 Sim. 420; s. c. 11 Law J. Rep. (n.s.) Chanc. 167.

Crisp v. Platel, 8 Beav. 62.

Calley v. Richards, 19 Ibid. 401.

Sugden's Vendors and Purchasers, 607, 609, 643, 13th ed.

Herring v. Cloberry, 1 Phill. 91; s. c. 11 Law J. Rep. (n.s.) Chanc. 149.

Blenkinsopp v. Blenkinsopp, 2 Phill. 607; s. c. 17 Law J. Rep. (n.s.) Chanc. 343; reversing 10 Beav. 143; 16 Law J. Rep. (n.s.) Chanc. 88.

Wallwyn v. Lee, 9 Ves. 24.

Portarlington v. Soulby, 7 Sim. 28 ;
s. c. 6 Sim. 356.

Adams v. Fisher, 2 Keen, 754 ; s. c.
3 Myl. & Cr. 526 ; 7 Law J. Rep.
Chanc. 289.

Swinborne v. Nelson, 16 Beav. 416 ;
s. c. 22 Law J. Rep. (N.S.) Chanc.
331.

THE MASTER OF THE ROLLS.—While I admit the proposition that communications between solicitor and client are privileged, it does not affect this case. The privilege, being that of the client, is confined to communications made by him to the solicitor. All questions relating to privilege are considered in *Lord Walsingham v. Goodrich* (1). The defendant does not say that the matters in respect of which he refuses discovery were communicated to him by his client, but simply that he obtained the knowledge while he was acting as the solicitor of W. H. Rawlings. If this were a ground of privilege, it would be difficult to obtain any discovery from a solicitor, because he might have acted as solicitor for a great number of clients during a long period of time. He is not bound to disclose communications made by the client to himself, provided those communications have some reference to the *lis mota* either before and in anticipation of, or subsequent to, the institution of proceedings. The defendant, however, throughout his answer grounds his right to refuse discovery on the fact of his having obtained the information whilst acting professionally for the defendant W. H. Rawlings. All the exceptions which proceed upon this ground of refusal must be allowed. The defendant further says that he obtained the information as a creditor of W. H. Rawlings, or as his legal adviser. This must be taken most strongly against the pleader, and it must be assumed that all the information was obtained in his character of creditor. As such, he is bound to disclose it. It is unnecessary to consider the principle, which is now well established, that if a defendant answers he must answer fully. All the exceptions must be allowed.

LOKDS JUSTICES. { *Ex parte* HAWKINS, in
re THE METROPOLITAN
JULY 4, 8. SALOON OMNIBUS COM-
PANY, LIMITED.

*Joint-Stock Company—Winding up—
Loss of Three-fourths of Capital—Sections
67. and 72. of the Joint-Stock Companies
Act, 1856.*

A shareholder in a joint-stock company presented a petition (against the approval of the majority of the shareholders) for the winding up of the company, alleging the loss of three-fourths of its capital (under section 67. of the act 19 & 20 Vict. c. 47); but the Court, being satisfied of the bad faith of the petitioner, and not being satisfied of the loss of capital as alleged, dismissed the petition. Under the 72nd section of the above-named act, the order to be made upon a petition to wind up is entirely in the discretion of the Court.

This was the petition of appeal of Thomas Hawkins, a shareholder in the above-named company, for 150 fully paid-up shares, from a decision of Mr. Commissioner Evans, dismissing, with costs, his petition presented to the Court of Bankruptcy on the 29th of April, praying the dissolution and winding up of the company, on the grounds that the same was insolvent and unable to meet its engagements, and that three-fourths of its capital had been lost or had become unavailable. The allegations of the petition (which, however, were in many particulars denied) were that, out of the 20,000 *l.* shares into which the capital of the company was divided, 15,000 or thereabouts had been subscribed for, and nearly 15,000*l.* paid thereon, and that that was the whole amount which the company had ever received in respect of shares; that by a balance-sheet made up to the 31st of August 1857, and laid before the shareholders at a general meeting of the company held on the 26th of September 1857, there was shewn to be a deficiency of 2,429*l.* 14*s.* 9*d.*, which was accounted for by the following entry:—
“Profit and loss. For balance proposed to be carried to preliminary expenses, 2,429*l.* 14*s.* 9*d.*,” but no detailed statement in explanation accompanied the entry;

(1) 3 Hare, 122.

that on the 9th of March 1858 it was resolved, at an extraordinary meeting of the company, that the directors should be empowered to raise a sum not exceeding 5,000*l.* by way of loan, to be secured by debentures bearing interest, for the service of the company; that the above resolution was confirmed at a second meeting, held on the 22nd of April then following, and at the second meeting a Report of the directors was read, wherein it was stated that the company had incurred a loss of 823*l.* in the half-year's working previous to the date of the balance-sheet; that the stock of horses and omnibuses belonging to the company had materially decreased in value; that the company's engagements and debts had increased to upwards of 7,000*l.*, and that it had no money or means of paying them, excepting by a sale of the horses and omnibuses; that the patent purchased and held by the company was of no value whatever; that this company alone, and no other person, had attempted to work omnibuses built under it, and had wholly failed in working the same to a profit, because of the excessive weight of the vehicles so constructed, and the great outlay required in order to keep them in working order; that the company was insolvent, and that three-fourths of its capital had been lost or become unavailable. The petition, therefore, prayed that the company might be wound up in bankruptcy.

The allegations of the petition were supported by affidavits of the petitioner and others, by which it was stated that, since the month of April 1858, the business of the company had become from bad to worse, and that the whole assets, including horses, omnibuses, plant and stock, stables, offices and furniture, together with the balance at the company's bankers, amounted to less than 3,000*l.* The petitioner also swore that in this petition he was acting wholly independently, and not in collusion with any other person or persons; but it appeared that this was the third petition which had been presented within a twelvemonth, for the purpose of obtaining a winding-up order against this company, the first of which was presented in April 1858 by Mr. Hawkins himself, and was almost identical in its allegations with the present, and was dismissed with

costs, Mr. Commissioner Fane being then of opinion that the petitioner had failed to shew that three-fourths of the capital had been lost or had become unavailable. On that occasion his Honour said, upon being pressed to give further time:—"No; certainly not. This is a case in which I shall give no further time. When people begin these things they ought to be fully prepared. You must bring a material fact. There is more than a fourth part of the capital of the company left, even according to your own evidence, and that is without taking the patent into account, which, as I understand, was paid for in shares, and forms part of the capital of the company."

A second petition was presented in the early part of the present year by a Mr. Borsley, a harness-maker, who represented that the company owed him upwards of 400*l.*; but the company, having discharged this debt, his petition was dismissed by consent.

Mr. Pope, the secretary of the company, and others, deposed that the whole number of shares issued was 14,869, of which 3,000, fully paid up, were given to the patentee of the saloon omnibus, together with 200*l.* in money, for the purchase of his patent; and 884 shares had been forfeited for non-payment of calls. Mr. Pope, in his evidence, estimated the assets of the company at 9,689*l.* 5*s.*, and its liabilities at between 3,000*l.* and 4,000*l.*; and also stated that the company had commenced an action against the London General Omnibus Company, in which the damages were laid at 10,000*l.*; that that action was referred to Mr. Barstow, of the common-law bar, as arbitrator, and the reference, which had already occupied thirty days, and in which 100 witnesses had been examined, was still pending; and that, although the costs of Mr. Hawkins's dismissed petition had been paid, yet that Mr. Hawkins had been a co-plaintiff in the suit of *Bryon v. the Metropolitan Saloon Omnibus Company, Limited* (1), in which a motion for an injunction had been refused with costs, which had been taxed at 15*l.* 19*s.* 11*d.*, no part of which had been paid by the petitioner, for which he was in contempt.

(1) 27 Law J. Rep. (N.S.) Chanc. 685.

The proper order would, to refuse the motion, without order, and to direct the fund to the plaintiff.

SAVELAND.

Personal

or,

of

Personal

share alike. One

decided in his lifetime,

and, affirming the decision

of the Rolls, that the fund

was divisible among the nephews and nieces

whether surviving the tenant for life or not, and that the share of the deceased niece devolved upon her next-of-kin, and not upon her administrator.

This was an appeal from the decision of the Master of the Rolls (reported *ante*, p. 76). Samuel Cleaveland, by his will, dated the 3rd of August 1841, gave to trustees a sum of stock, upon trust for his brother R. F. Cleaveland and his wife Eliza, and the survivor of them for his and her natural lives; and after the decease of his said brother and his said wife, "then in trust to pay and apply the said sum of stock equally amongst his (the testator's) nephews and nieces, children of his said brother R. F. Cleaveland and his said wife, then living, or their legal personal representatives, share and share alike." The testator died in March 1844, and one of his nieces, Henrietta Maria, the wife of George Foster St. Barbe, died on the 15th of December 1853, without issue. The wife of R. F. Cleaveland survived him, and died in August 1857. G. F. St. Barbe took out letters of administration to his wife; and the Master of the Rolls having decided against his claim to the share of his deceased wife, and in favour of her next-of-kin, he appealed. The other ques-

tion decided by the Master of the Rolls (*ante*, 74) as to the fund being divisible among all the nephews and nieces whether surviving the tenant for life or not, was also argued on this appeal.

Mr. Selwyn and *Mr. Hobhouse*, in support of the appeal.—The first question was, whether the words "legal personal representatives" were words of limitation or of substitution. If the words "share and share alike," which were, however, conclusive on the subject, had not been used, it was clear that the word "or" meant an alteration or substitution, not an addition. The words "legal personal representatives" were not those generally used to give an absolute interest; and the testator in the present case had used the words "executors and administrators" where he intended to imply an absolute gift. There were cases which established that a gift to one or his representatives after a gift for life conferred an absolute interest. *Tidwell v. Ariel* (1) was, however, overruled in *Re Porter's Trusts* (2). In *Bone v. Cook* (3) the words were "executors or administrators"; but in *Corbyn v. French* (4) the words were "their representatives or representative." In this case, however, the reason for holding such words to be words of limitation failed, as they were merely introduced, by way of caution on the testator's part, to shew that the legacy was a transmissible one, and was not to fail by reason of the legatee's death before the period of distribution. This could not apply where the gift was only to those living at the period of distribution, as in such a case the words must be substitutionary or they must mean nothing. Such words could not be construed otherwise than substitutionary in the case of immediate legacies, as they were clearly used with regard to such in this will to prevent lapse. The same sense must, therefore, be attributed to these words when applied to deferred legacies. But supposing the words to import an alternative gift, the question then arose, who

- (1) 3 Madd. 403.
- (2) 4 Kay & J. 188; s. c. 27 Law J. Rep. (N.S.) Chanc. 196.
- (3) M'Cle. 168.
- (4) 4 Ves. 418.

ordered the rest of the motion to stand over until this day. The money was accordingly paid into court.

The case now came on again upon motion.

Mr. Craig and *Mr. C. Swanston*, for the plaintiff, in support of the motion.—The plaintiff in this case must be taken to have had full notice of the settlement and its contents, of which Lord Rosslyn is the surviving trustee, and under which Mr. Walrond exercised his power. Having, therefore, full notice of Lord Rosslyn's title, although a mere equitable title, the plaintiff, as he has been applied to both by Lord Rosslyn and by Mr. Walrond for payment of the rent, has a right to file a bill of interpleader in this court to have the question of title determined—*Suart v. Welch* (1).

Mr. Bacon and *Mr. Jolliffe*, for the defendant Walrond; and *Mr. Jones Bateman*, for the Earl of Rosslyn, objected that there was no case for the exercise of the Court's jurisdiction of interpleader. Mr. Walrond was the landlord of the plaintiff, and, as a general rule, a tenant was not entitled to maintain a bill of interpleader against his landlord. The only exception to that rule was where the landlord had done some act himself to embarrass the tenant—

Dungey v. Angove, 2 Ves. jun. 304.

Jew v. Wood, Cr. & Ph. 185; s. c. 10 Law J. Rep. (n.s.) Chanc. 262; 3 Beav. 579.

That, however, was not so here, for Lord Rosslyn's claim was made, not under any act done by Mr. Walrond, but under a title alleged to be paramount to his. They cited also *Crawshay v. Thornton* (2).

STUART, V.C. said, that as a general rule a tenant had no right to file a bill of interpleader against his landlord, and that the only exception to that rule was where, by some act of the landlord, subsequent to the granting of the lease, a difficulty was occasioned by a demand made against the tenant under that subsequent dealing

with the landlord. The rule was expressly so laid down by Lord Rosslyn in *Dungey v. Angove*, and subsequently by Lord Eldon in *Cowtan v. Williams* (3). The present case was clearly not within the exception, but was governed by the general rule. The tenant, Mr. Cook, with notice of the state of the title, had taken and held possession of the demised premises under those who had the legal estate, upon a covenant assented to by them and Mr. Walrond, the donee of the power, to pay the rent to Mr. Walrond, until they, the owners of the legal estate, should otherwise direct. It had been argued, however, that it was now too late to say that the plaintiff was not entitled to an order to interplead as against the defendants, since both the defendants, by urging their claims upon the Court, had, in fact, submitted to interplead; and that the order which had been made, directing payment of the fund into court, and reserving the rest of the motion until this day, was, in effect, a reservation of every question involved in the case. No doubt that was, in a sense, so; but that, nevertheless, did not appear to be the proper way in which either of the defendants should have met the claim set up by the bill. The bill was clearly open to demurrer, and by taking that course, the defendants might have had the matter disposed of at little or no expense. The Court, however, was now in possession of the fund, and had heard the counter claims of the two defendants. The result was, that it now appeared that one of the defendants was no party to the contract for payment of the rent, and that his receipt could not relieve the plaintiff in this court from a right of action upon the covenant on the part of Mr. Walrond. The case was not, therefore, of a character to admit of the exercise of the jurisdiction of interpleader; and the consequence was, that the motion must be refused. As to the costs, it was impossible justly to throw them upon the plaintiff. All the parties had acted under a mistake. The plaintiff had proceeded by interpleader in a case in which he had no title to do so according to the rule of the Court, and the defendants, instead of demurring to the bill, had come in to

(1) 4 Myl. & Cr. 305.

(2) 2 Ibid. 1; s. c. 2 Law J. Rep. (n.s.) Chanc. 179.

(3) 9 Ves. 107.

interplead. The proper order would, therefore, be to refuse the motion, without costs on either side, and to direct the fund to be paid out to the plaintiff.

FULL COURT
OF
APPEAL.
June 24;
July 2.

KING v. CLEVELAND.

Legacy—Substitution—"Legal Personal Representatives."

A legacy of stock in trust for A.B. for life, and afterwards to divide the same amongst the testator's nephews and nieces, children of A. B, then living, or their legal personal representatives, share and share alike. One of the testator's nieces died in his lifetime, without issue:—Held, affirming the decision of the Master of the Rolls, that the fund was divisible among the nephews and nieces whether surviving the tenant for life or not, and that the share of the deceased niece devolved upon her next-of-kin, and not upon her administrator.

This was an appeal from the decision of the Master of the Rolls (reported *ante*, p. 76). Samuel Cleaveland, by his will, dated the 3rd of August 1841, gave to trustees a sum of stock, upon trust for his brother R. F. Cleaveland and his wife Eliza, and the survivor of them for his and her natural lives; and after the decease of his said brother and his said wife, "then in trust to pay and apply the said sum of stock equally amongst his (the testator's) nephews and nieces, children of his said brother R. F. Cleaveland and his said wife, then living, or their legal personal representatives, share and share alike." The testator died in March 1844, and one of his nieces, Henrietta Maria, the wife of George Foster St. Barbe, died on the 15th of December 1853, without issue. The wife of R. F. Cleaveland survived him, and died in August 1857. G. F. St. Barbe took out letters of administration to his wife; and the Master of the Rolls having decided against his claim to the share of his deceased wife, and in favour of her next-of-kin, he appealed. The other ques-

tion decided by the Master of the Rolls (*ante*, 74) as to the fund being divisible among all the nephews and nieces whether surviving the tenant for life or not, was also argued on this appeal.

Mr. Selwyn and Mr. Hobhouse, in support of the appeal.—The first question was, whether the words "legal personal representatives" were words of limitation or of substitution. If the words "share and share alike," which were, however, conclusive on the subject, had not been used, it was clear that the word "or" meant an alteration or substitution, not an addition. The words "legal personal representatives" were not those generally used to give an absolute interest; and the testator in the present case had used the words "executors and administrators" where he intended to imply an absolute gift. There were cases which established that a gift to one or his representatives after a gift for life conferred an absolute interest. *Tidwell v. Ariel* (1) was, however, overruled in *Re Porter's Trusts* (2). In *Bone v. Cook* (3) the words were "executors or administrators"; but in *Corbyn v. French* (4) the words were "their representatives or representative." In this case, however, the reason for holding such words to be words of limitation failed, as they were merely introduced, by way of caution on the testator's part, to shew that the legacy was a transmissible one, and was not to fail by reason of the legatee's death before the period of distribution. This could not apply where the gift was only to those living at the period of distribution, as in such a case the words must be substitutionary or they must mean nothing. Such words could not be construed otherwise than substitutionary in the case of immediate legacies, as they were clearly used with regard to such in this will to prevent lapse. The same sense must, therefore, be attributed to these words when applied to deferred legacies. But supposing the words to import an alternative gift, the question then arose, who

(1) 3 Madd. 403.

(2) 4 Kay & J. 188; s. c. 27 Law J. Rep. (N.S.) Chanc. 196.

(3) M'Cle. 168.

(4) 4 Ves. 418.

were the persons for whom the substitution was to be made? Upon this question the cases of *Coulthurst v. Carter* (5), *Christopherson v. Naylor* (6), *Tytherleigh v. Harbin* (7) and *Jarvis v. Pond* (8), were applicable; but the terms of the present gift might be amplified, according to the more natural construction of the words, into language falling precisely within the decision in *Tytherleigh v. Harbin*. The term "legal personal representatives" clearly pointed to those upon whom the law conferred the personal property; and in this case, whether you look to the legal or the beneficial interest, the husband was the person to take—*Dixon v. Dixon* (9). The only authority the other way was that of *Doody v. Higgins* (10). There was, however, no reported case which decided that the words here used meant "next-of-kin." They also cited *Re Crawford's Trusts* (11).

Mr. Amphlett and *Mr. C. Hall* appeared for the executors of the father of *Mrs. St. Barbe*, who was her next-of-kin.—The words "legal personal representatives" could not be taken in their strict ordinary sense, but as a designation of the next-of-kin. The words "share and share alike" took the case out of the decision in *Corbyn v. French*, and the Master of the Rolls came to the conclusion that the words "legal personal representatives" did not mean administrators, but were used in some other sense. Whenever the words were taken in the secondary sense, it was as "next-of-kin," and no otherwise. The discussion in most of the cases was, whether the words meant "next-of-kin" literally or according to the Statute of Distributions, and nothing was said about the husband—

Cotton v. Cotton, 2 Beav. 47; s. c.

8 Law J. Rep. (N.S.) Chanc. 349.

Smith v. Palmer, 7 Hare, 225.

(5) 15 Beav. 421; s. c. 21 Law J. Rep. (N.S.) Chanc. 555.

(6) 1 Mer. 320.

(7) 6 Sim. 329.

(8) 9 Ibid. 549; s. c. 8 Law J. Rep. (N.S.) Chanc. 167.

(9) 24 Beav. 129.

(10) 2 Kay & J. 729; s. c. 25 Law J. Rep. (N.S.) Chanc. 773.

(11) 2 Drew. 280; s. c. 23 Law J. Rep. (N.S.) Chanc. 625.

The cases in which the husband was claimant were distinguishable from the present, and especially as here the wife never had this property—

Robinson v. Smith, 6 Sim. 47.

Re Walton's Estate, 25 Law J. Rep. (N.S.) Chanc. 569.

Doody v. Higgins.

If the appellant's argument were correct, viz., that these words, taken in their secondary sense, must mean the persons entitled to the beneficial interest in the property, then, if the person were illegitimate, the Crown would take; and, therefore, they must say that the Crown was *persona designata*.

[LORD JUSTICE KNIGHT BRUCE.—The question seems to be, whether the words "or their legal personal representatives" have any meaning, force or effect whatever.]

Mr. Amphlett.—At all events, if used in a secondary sense, they could not benefit the appellant, for they must mean "next-of-kin"—*Re Porter's Trusts*. The question whether the husband could take under the Statute of Distributions in any sense was much argued in *Milne v. Gilbert* (12). They referred also to *Hinchliffe v. Westwood* (13).

Mr. Lloyd, *Mr. Martelli*, *Mr. Teed* and *Mr. Osborne* appeared for other defendants; and

Mr. Wickens, for the plaintiff.

July 2.—The LORD CHANCELLOR said, that although the appellant appealed against that part only of the decree by which he was excluded from the one-seventh share, yet the Court was bound to say whether they agreed with the Master of the Rolls when he decided that the fund was divisible into seven shares. During the argument it was suggested that the four nephews and nieces who survived the tenant for life were entitled to the whole. This depended on the construction of the sentence "and after the decease of my said brother and his said wife, then in trust to pay and apply the said sum, &c. equally amongst my nephews and nieces, children of my said brother

(12) 2 De Gex, M. & G. 715; s. c. 5 Ibid. 510; 23 Law J. Rep. (N.S.) Chanc. 828.

(13) 2 De Gex & Sm. 216; s. c. 17 Law J. Rep. (N.S.) Chanc. 167.

R. F. Cleaveland and his said wife then living, or their legal personal representatives, share and share alike." Looking at the whole will, the testator designated two classes, neither of whom took in substitution: first, those nephews and nieces who were living at the death of the tenant for life; and, secondly, the legal personal representatives of those nephews and nieces who were then dead. There was no antecedent to which the word "their" could grammatically be referred. To construe the words "legal personal representatives" as words of representation would be to deprive them of all force. The testator could hardly mean that a nephew or niece dying and leaving children, those children should take nothing, or that the legal personal representatives should take beneficially. The construction, then, by which it was held, that the testator created two classes was fully supported by the authorities referred to by the Master of the Rolls. Thus being of opinion that one-seventh was properly directed to go to the legal personal representatives of such of the nephews or nieces as were dead at the death of the tenant for life, the question arose whether the appellant was the legal personal representative of his deceased wife. His claim must prevail, unless from the whole language of the will the words appeared to have been used in another than the primary sense. To say that the person who happened to be the executor or administrator must take, and must take beneficially, would be clearly contradictory to the testator's intention, for a stranger might be nominated executor, or a creditor might take out administration. After reviewing the various cases cited, and stating that the only case which had raised a doubt in his mind was *Hinchliffe v. Westwood*, his Lordship said that, both according to the probable intention of the testator and the weight of authority, he considered that the Court ought to decide in favour of the next-of-kin and against the husband, and to dismiss his appeal.

LORD JUSTICE KNIGHT BRUCE said, that he was not satisfied that the will should not be interpreted as if the whole phrase upon which the discussion had arisen had been omitted. Did "legal personal representatives" point to consanguinity? He was

not satisfied that it did. Although, therefore, the appellant was, according to the correct use of language, the "legal personal representative" whatever the testator meant by the words, his Lordship was not disposed to give him more than the Lord Chancellor and Lord Justice Turner were disposed to give. There was no difference in opinion as to there being no costs of the appeal.

LORD JUSTICE TURNER said, that in determining the question the point to be considered was, what was the effect of the word "or," and what effect was to be given to the words "share and share alike,"—whether the latter words constituted a separate and independent gift? It would be absurd to suppose that the testator intended to give to executors "share and share alike." The word "or" also seemed the proper commencement of an independent gift; "or" in contradiction to "then living." Every word, if possible, ought to have effect given to it; and the word "equally," at the commencement of the clause, seemed to override the whole. Assuming the gift to "legal personal representatives" to be an independent gift, his Lordship saw nothing to limit its operation. It had been observed that there was no proper antecedent to "their"; but the gift was an independent one. That the testator did not intend to use the words "legal personal representatives" in their ordinary sense appeared from the context, where he had used the words "executors and administrators" several times.

Appeal dismissed, without costs.

LORDS JUSTICES. }
July 25, 26. } BRIGHT & LARCHER.

Legacy—Charge on Real Estate—Statute of Limitations.

A testator, who died in 1822, by his will, gave to his brother J. B. a legacy of 100l., to be paid "as soon as conveniently may be after my decease." He then gave an annuity of 50l. to H. H., to be payable out of his real estate until one of the testator's nephews should attain twenty-one, and on the happening of that event he directed his real estate to be exonerated from the annuity of 50l. and his real and personal estate to be sold, and

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8
 he annuity paid out of the income of the produce. He declared that after the nephew attained twenty-one the annuity should be a charge only on his personal estate. In 1839 the nephew came of age and the real estate was sold, and the whole income paid to H. H. in part of her annuity until 1856, when she died. In 1858 J. B., the legatee, filed a bill for payment out of the trust fund, alleging that the personally was not sufficient, but no personal representative of the testator was made a party. The Master of the Rolls dismissed the bill on the grounds that the legacy was not charged on real estate, and that it was barred by the Statute of Limitations (3 & 4 Will. 4. c. 27). On appeal to the Lords Justices,—Held, that the personal estate was the primary fund, which there was no evidence was insufficient; that there was no personal representative of the testator before the Court, and that by lapse of time the bill came too late. The appeal was dismissed, and leave to amend refused.

This was an appeal from a decision of the Master of the Rolls, dismissing the plaintiff's bill, with costs.

The suit was instituted, by Josias Bright, for payment of a legacy of 100*l.* out of a fund produced by the sale of real estate. The facts were, that Mr. William Bright, of Woodham Ferris, in Essex, by will, dated the 7th of January 1822, after appointing executors, gave to his brother, Josias Bright, the sum of 100*l.* to be paid to him as soon as conveniently might be after his decease, and also to his brother, John Bright, the sum of 150*l.*, to be paid to him within twelve months after his decease. He then bequeathed articles of furniture to his housekeeper, Harriet Hinson, and gave the sum of 150*l.* to such person or persons as the said Harriet Hinson should by her last will appoint, to be paid to such person or persons within three months after Harriet Hinson's decease; and he gave to the said Harriet Hinson and her assigns during her life, in case she should so long remain unmarried, an annuity of 50*l.*, to be issuing and payable out of all his messuages, lands and hereditaments, whether freehold or copyhold, until one of the children of his said brothers Josias Bright and John Bright

should attain the age of twenty-one years, and he declared that when and so soon as any one of the children of either of his said brothers should attain the age of twenty-one years, all his said real estate should be exonerated and discharged from the payment of the said annuity to the said Harriet Hinson, it being his will and desire, that from and after that time the said annuity should be paid and payable out of his personal estate only, as thereafter mentioned. He then gave all his real estates to his executors, their heirs and assigns (subject and charged nevertheless, and the testator did thereby subject and charge the same to and with the payment of the aforesaid annuity of 50*l.* to the said Harriet Hinson, during her life, or until her marriage, until one of the children of his said brothers should attain his or her age of twenty-one years), upon trust, as soon as any one of the children of his brothers should attain his or her age of twenty-one years, absolutely to sell and dispose of the same. And the testator gave the residue of his personal estate to the same trustees, upon trust, to convert the same into money; and he directed that the trustees should stand possessed of the produce of his personal estate, upon trust, thereout to pay his debts, legacies and funeral expenses, and the charges of proving his will, and should invest the residue, and also the proceeds of the sale of his real estates in manner therein mentioned, and should stand possessed of the said several monies, stocks, funds and securities, upon trust, to continue invested such part thereof as should by the said trustees be thought adequate and sufficient to answer the payment of the said annuity of 50*l.* to Harriet Hinson, in manner thereinbefore directed, and from and immediately after her decease or marriage, upon trust to pay and apply the same in such manner and the same manner as he had directed the residue of his personal estate to be paid and applied; and as to all the residue of the said trust monies, funds and securities, and the accumulations thereof, upon the trusts therein declared for the benefit of the children of his said two brothers Josias and John Bright, that should be born at the time any one of such children should attain the age of twenty-one years

William Bright, the testator, died in the same year, leaving his two brothers surviving. Joseph Bright, the son of John, came of age on the 10th of January 1839, and was the first grandchild of the testator who did so. Soon afterwards the trustees sold the testator's real estate, and invested part of the proceeds in the sum of 1,472*l.* 4*s.* 2*d.* reduced 3*l.* per cent. annuities, and paid the dividends to Harriet Hinson, towards her annuity of 50*l.* until she died, on the 15th of October 1856. In 1858, Joseph Bright filed a bill against the personal representatives of Robert Woolsey Larcher, the surviving trustee under the will, for the administration of the trusts. The Master of the Rolls made a decree in that suit on the 6th of May 1858, whereby he declared that the legacies of 150*l.*, 100*l.* and 150*l.* given respectively to John Bright, Josias Bright, and the appointees of Harriet Hinson, were not charged upon the produce of the real estate, and directed that the sum of 1,472*l.* 4*s.* 2*d.* reduced 3*l.* per cent. annuities should be divided according to the residuary gift in the testator's will. On appeal to the Lords Justices, on the 27th of July 1858, their Lordships varied the decree only by declaring that the legacy of 150*l.* to the appointees of Harriet Hinson was charged on and payable out of the sum of 1,472*l.* 4*s.* 2*d.* reduced 3*l.* per cent. annuities.

The present bill alleged that Josias Bright, the plaintiff, though not a party to the former suit, was entitled to the benefit of it as respected his legacy of 100*l.*, and prayed a declaration that his legacy was payable out of the residuary real and personal estate, and that his and the other legacies given by the will might be paid out of the sum of 1,472*l.* 4*s.* 2*d.* reduced 3*l.* per cent. annuities. The bill alleged that the personal estate had been entirely exhausted in payment of the testator's debts and funeral and testamentary expenses. The evidence did not satisfactorily prove this, nor was there any legal personal representative of the testator made a party to the suit, there being none in existence. The defendants, by their answer, objected to the suit, on the ground of the absence of such representative, and the Master of the Rolls held, that the legacy of 100*l.* given to the plaintiff was

not charged upon the real estate; and also, that if it had been, the plaintiff was barred by the Statute of Limitations. The plaintiff appealed, and for him it was argued, that the produce of the real and personal estates was blended and charged with the payment of the legacies, and that the decree in the former suit had sufficiently established that the personal estate was insufficient, even if it were held not to be conclusive as to this legacy. As to the Statute of Limitations, they insisted that there being a deficiency of the personal estate, the right of the legatee was kept alive until the death of the annuitant, Harriet Hinson, set the fund free from the payment of her and other claimants. They contended that there was no necessity for a personal representative of the testator; but even if the Court should think otherwise, leave ought to be given to the plaintiff to amend his bill. For the plaintiff, the following authorities were referred to:—

Kidney v. Coussmaker, 1 Ves. jun. 436; s. c. 2 Ibid. 267.

Bench v. Biles, 4 Madd. 187.

Sugden's Real Property Statutes, p. 126.

Adams v. Barry, 2 Coll. 290.

Ravenscroft v. Frisby, 1 Ibid. 16; s. c.

13 Law J. Rep. (N.S.) Chanc. 153.

Faulkner v. Daniel, 3 Hare, 221.

Burrell v. Lord Egremont, 7 Beav.

205; s. c. 13 Law J. Rep. (N.S.)

Chanc. 309.

Wheeler v. Howell, 3 K. & Jo. 198.

Snow v. Booth, 2 Ibid. 132; s. c. 25

Law J. Rep. (N.S.) Chanc. 417.

Davies v. Nicholson, 27 Law J. Rep.

(N.S.) Chanc. 719.

Mr. Selwyn and *Mr. J. T. Humphry*, for the appellant.

Mr. G. L. Russell, *Mr. Nalder* and *Mr. W. H. Bagshawe*, for the respondents (by desire of the Court), confined their argument to the question of the absence of a personal representative.

Mr. Toller appeared for the trustee.

LORD JUSTICE KNIGHT BRUCE. — The bill in this case, which was filed in 1858, is for obtaining payment of a legacy of 100*l.*, given by the will of a testator, who died in 1822. The legacy was payable in 1822 or 1823, if there were funds to pay

it. If it was payable out of the personal estate alone, of course the bill fails from lapse of time. But it is said that the legacy is charged on the testator's real estate, and at a postponed period; that is, that it is to be paid out of the proceeds of the sale of the real estates, which sale was to be deferred till the death of an annuitant, who died a few months ago. Without giving an opinion whether this is the case, assume it to be so; still the personal estate is the first fund in every sense, if not the only fund. There is no personal representative of the testator before the Court; but there is evidence of the amount of the personal estate from which it is impossible to come to the conclusion that the personal estate, if properly administered, is not sufficient to pay, at least, a part of this legacy. In such a state of circumstances, the bill comes too late, even if the real estate was, in any sense, chargeable, because the personal estate is the first fund. In every possible view the suit fails. I am not for giving the plaintiff leave to amend. The dismissal of the bill must stand, and with costs.

LORD JUSTICE TURNER.—The plaintiff's case rests on the assumption, that all the legacies are on the same footing as the legacy of 150*l.*, and are to be paid out of the same fund. This is not my view, nor was it the view of the Court at the time of the decision in the former suit. To the best of my remembrance, the ground of that decision was, that the legacy of 150*l.* was not payable till after the death of the annuitant; and that it was plain from the will that the whole of the fund produced by the sale of the real and personal estate, except that portion set apart to answer her annuity, was divisible before her death; and therefore the Court held, that the testator intended that that legacy should be payable out of the fund reserved for the annuity. But this is not the case with the other legacies, which are payable immediately out of the personal estate. Then the question arises, whether after this lapse of time, the plaintiff having brought the suit to a hearing in an imperfect state, the Court ought to give leave to amend the bill. I do not think it ought. I never knew a case in which the plaintiff was less entitled to this indulgence. The plaintiff

had notice of the objection in the answer of the defendants. The appeal must be dismissed, with costs.

LORDS JUSTICES. } *In re BURDIN'S WILL.*
Aug. 4.

Settled Estates Act.

Real estate was given by will to trustees, upon trust, to pay an annuity; and after the death of the annuitant, upon trust for all her children who should attain twenty-one. Some of the children attained twenty-one, and the others were infants. Part of the property was contracted to be purchased, and a petition was presented by the infant children for an order authorizing the sale, under the Act to facilitate Leases and Sales of Settled Estates (19 & 20 Vict. c. 120); but one of the Vice Chancellors refused to make the order, and his decision was affirmed.

This was a petition, presented under the Act to facilitate Leases and Sales of Settled Estates (19 & 20 Vict. c. 120), raising the question whether certain limitations in a will constituted a settlement within the meaning of the statute.

The will in question was made by a gentleman named Burdin, whereby he left his whole property, real and personal, to trustees, upon trust, to pay three annuities, to his mother, wife and daughter; and after the death of his daughter, in trust for all the children of his daughter who should live to attain twenty-one, their heirs, executors, administrators and assigns, equally; and in case there should be only one who should live to attain twenty-one, the whole to such one child. There were six children, four of whom had attained twenty-one, and two were infants. A house, part of the property, had been contracted to be purchased by the Church Missionary Society, and was alleged to be a most advantageous purchase; and the two infant children, who were entitled to two-sixths of the house, now presented a petition under the above-named act, raising the question whether this limitation of the property could be considered as a "settlement" as used in the statute.

Vice Chancellor Kindersley was of opinion that the case was not within the act;

but gave leave to apply at once to the Lords Justices, observing that he was not only willing, but desirous that that course should be taken, and that the petition must be taken as heard primarily before their Lordships.

Mr. Bagshawe, jun., supported the prayer of the petition, appearing also for the adult children.

Mr. Pearson, for the purchasers, said that his clients only wished for the opinion of the Court, whether they would have a safe title.

LORD JUSTICE KNIGHT BRUCE.—I am unwilling to say that the purchaser would be safe if we made the order. If the case were carried before the full Court, and the Lord Chancellor and my learned Brother were both of opinion that it came within the Settled Estates Act, I would not dissent. For myself, however, I cannot at present say that I consider the case to be within the act; on the contrary, I think the point exceedingly doubtful.

LORD JUSTICE TURNER.—At present, I confess my opinion to be that the point is very doubtful; and so far from thinking favourably of the petitioners' case, I own my impression is the other way.

The application was refused; but leave was given to amend the petition.

Wood, V.C. }
March 16, 17. } **CHURTON v. DOUGLAS.**

*Vendor and Purchaser — Goodwill —
Name of Firm—Fraud.*

The goodwill of a business comprises all the advantages that may be derived from the purchasers holding themselves out to the public as the persons interested in that business which has been identified with the name of a particular firm. Therefore, though it is well settled that the sale of a goodwill does not imply a contract on the part of the vendor not to set up again in a similar business, he is not at liberty to hold out to the public that he is continuing the same business by using the name of the old firm, even though his

own name may be the only one that appeared in that firm.

For some years previously to July 1857 the defendant, John Douglas, together with the plaintiffs, Churton and Bankart, and one Booker, carried on the business of stuff-merchants at Bradford in co-partnership, under the firm or style of "John Douglas & Co." A notice of dissolution had, however, been given by the plaintiff Churton, and would expire on the 1st of January 1858. In July 1857 the defendant, John Douglas, who was also a partner in the firm of John Muir & Co., of Manchester, wished to retire from the firm of John Douglas & Co., and the plaintiffs entered into a negotiation with him for the purchase of his interest in the business. The plaintiffs alleged that in the course of that negotiation some discussion arose between the plaintiffs and the defendant, John Douglas, as to any resumption by the latter of the business of a stuff-merchant at Bradford, and that the defendant repeatedly and positively declared to the plaintiffs that he had not the remotest intention of resuming that or any other trade at Bradford; but that he would not enter into any written agreement on the subject. These allegations were denied by the defendant, who deposed that, upon the execution of the articles of agreement of July 1857 hereafter mentioned, a suggestion was made to him that such articles should contain a stipulation on his part not to resume the business of a stuff-merchant at Bradford, but that he refused to agree to any provision of that nature, and that, in fact, he had previously informed the plaintiffs of his intention to leave it open to himself to resume such business. Ultimately, articles of agreement were entered into, on the 13th of July 1857, by which the defendant, in consideration of 15,337*l.* 10*s.* 5*d.* (being the estimated amount of his share in the business taken as it then stood in the partnership books, together with a bonus or profit of 1,500*l.*), agreed to sell, and the plaintiffs agreed to purchase, upon the terms and conditions therein expressed, all his shares, rights and interest in the trade or business then carried on by him and the said G. Bank-

art, A. C. Churton and W. H. Booker, at Bradford aforesaid, in copartnership and under the firm of John Douglas & Co., and the goodwill thereof; and in all and singular the book and other debts of the same copartnership and the securities for the said debts respectively; and in all the contracts and engagements entered into with, and orders given to the same copartnership; and in all and singular the monies, goods, wares, merchandise, stock-in-trade, fixtures, furniture, articles and effects, matters and things belonging to the said copartnership, or in anywise used in or appertaining or belonging to the said trade or business. It was also provided that if the consent of Booker should be obtained, the sale was to be considered as taking effect immediately; but if such consent should not be obtained, it was to be considered as taking effect from the 1st of January 1858, when the old partnership would determine under Churton's notice already mentioned; and the plaintiffs were to be entitled to all profits which had accrued or might accrue from the shares, right and interest thereby agreed to be sold, and were to be bound by and have the advantage of certain arrangements entered into by the defendant with Booker; and the dissolution of the partnership was to be gazetted on the 1st of January 1858, or so soon before as the consent of Booker could be obtained. And after making provisions for the payment of the consideration-money (which provisions were duly performed by the plaintiffs), it was agreed that the defendant should let to the plaintiffs the warehouses and buildings situate in Hall Ings in Bradford, in which the business of the firm of John Douglas & Co. had theretofore been carried on, for seven years from the 1st of January 1858, at a rent of 550*l*.

Shortly after the execution of the agreement, the plaintiffs purchased Booker's interest; and in the month of August 1857 the following notice and circular was forwarded to the customers of the firm of John Douglas & Co.:—

"Notice is hereby given, that the partnership heretofore subsisting between us, the undersigned, carrying on business as stuff-merchants in Bradford, in the county

of York, under the firm of John Douglas & Co., was dissolved by general consent on the 13th day of July last.

"John Douglas, Geo. Bankart,
"A. C. Churton, W. H. Booker."

"Bradford, August 18, 1857.

"Gentlemen,—Referring to the notice above, we beg to inform you that the business will be carried on in all respects as heretofore, under the style or firm of Churton, Bankart & Hirst (late John Douglas & Co.); and all debts due to and owing by the late firm will be received and discharged by us.

"We are yours, most respectfully,
"A. C. Churton, Geo. Bankart,
"M. S. Hirst."

On the 30th of June 1858 the defendant executed a lease of the premises referred to in the agreement, in pursuance of the stipulations therein contained. The defendant was the owner of the premises (consisting also of a warehouse) which immediately adjoined the premises let to the plaintiffs. After the dissolution of the old firm of Douglas & Co., the plaintiffs, as partners together under agreement between themselves, continued to carry on the business formerly carried on by that firm in the premises occupied by that firm, over which they placed a large sign extending over the adjoining warehouse (above mentioned as the defendant's property), and which sign bore the inscription "Churton, Bankart & Hirst, late John Douglas & Co." In the early part of January 1859 the plaintiffs for the first time discovered that the defendant had been for some months in communication with a Mr. Liversedge, the cashier both of the old firm and the new, and that Mr. Liversedge had been the medium of communication with Mr. Parker, who was also in the service of the firm. The substance of these communications was, that the defendant intended to recommence business at Bradford, as a 'stuff-merchant, and that, if the parties communicated with would enter his service, they should have an interest in the business in addition to their salaries. The result was, that Mr. Liversedge and two other persons left the service of the plaintiffs and entered that of the defendant, and on the 15th of January the defendant

issued the following circular to the manufacturers of Bradford :—

"Sir,—Finding that I have not convenience for conducting the stuff-trade in Manchester, I beg to inform you that this department will be transferred to Bradford in February next, when the business will be conducted under the firm of John Douglas & Co. upon my premises in Hall Ings. —I remain, your obedient servant,

"John Douglas."

On the 3rd of February the defendant issued the following circular to the customers of the plaintiffs :—

"Bradford, February 3rd, 1859.

"Gentlemen,—I beg to inform you that the premises belonging to me in Hall Ings will be opened for business about the 15th inst., by Messrs. Liversedge, Parker & Shepherd, in connexion with myself, as stuff-merchants, to be carried on under the firm of John Douglas & Co. These gentlemen were a long time in my employment, the two former upwards of fifteen years, during which they had every opportunity for acquiring a thorough knowledge of the manufactures of this district; and their application to business is so well known, it is unnecessary for me to say more than that I have every confidence that all orders with which you may be pleased to favour the firm will be properly executed. —I remain, your obedient servant,

"John Douglas."

This circular the defendant caused to be widely distributed among the plaintiffs' customers.

On the 1st of February 1859 Mr. Thomas Shepherd, one of the men who had left the plaintiffs and gone over to the defendant, issued the following circular :—

"Bradford, February 1st, 1859.

"Having ceased to represent the firm of Messrs. Churton, Bankart & Hirst, of this town, and having joined Messrs. John Douglas & Co., I beg to thank you for all past favours, and trust I shall be in the position to merit that confidence which I have enjoyed so long. Should you be pleased to send me any orders prior to my visiting you personally, if addressed to Messrs. John Douglas & Co., Bradford, they will receive the best attention of yours, very respectfully,

"Thomas Shepherd."

None of the three last-mentioned circulars came to the knowledge of the plaintiffs, or any of them, until some days after they were respectively issued.

On the 14th of February 1859 the warehouse referred to in the defendant's circular, which is that already mentioned as being the defendant's property, and next door to that demised by him to the plaintiffs, was placarded with the name of John Douglas & Co., and since then large door-plates had been put up with the name of John Douglas & Co. engraved upon them.

On the 26th of February 1859 the plaintiffs filed the present bill against the defendant, and, after stating the facts, charged that the defendant intended to carry on the business of a stuff-merchant at the premises placarded as above mentioned; that his design was, as the plaintiffs believed, to represent his business as a continuance of that carried on by the old firm of John Douglas & Co.; that his proceedings were calculated to create, and unless restrained would create, an impression to that effect amongst the customers of the plaintiffs and the public generally. The bill prayed for an injunction to restrain the defendant from resuming or carrying on the business of a stuff-merchant at the warehouse in the bill mentioned as being next door to that of the plaintiffs, or elsewhere in or in the immediate neighbourhood of Bradford, either alone or in partnership with any other person or persons whatsoever, and either under the style or firm of John Douglas & Co. or under any other style or firm.

Mr. Amphlett and *Mr. Wickens* now moved for an injunction in the terms of the prayer.

The Solicitor General and *Mr. Pemberton* appeared for the defendant.

The arguments on both sides are fully considered in the judgment.

The cases cited were :—

Cruttwell v. Lye, 17 Ves. 335.

Shackle v. Baker, 14 Ibid. 468.

Harrison v. Gardner, 2 Madd. 198.

Kennedy v. Lee, 3 Mer. 441.

Lewis v. Langdon, 7 Sim. 421; s. c. 4

Law J. Rep. (N.S.) Chanc. 258.

Burgess v. Burgess, 1 De Gex, M. & G. 896; s. c. 22 Law J. Rep. (N.S.) Chanc. 675.

Wood, V.C.—I will tell you, Mr. Amphlett, what I think you are entitled to, and, if you ask for anything more, I will hear you in reply. It strikes me you are entitled to an injunction restraining the defendant, John Douglas, from carrying on the business of a stuff-merchant, either alone or in partnership with any other person or persons whomsoever, under the style or firm of John Douglas & Co., or in any other manner holding out that he is carrying on the business of a stuff-merchant, in continuation of or in succession to the business carried on by the said late firm of John Douglas & Co.

Mr. Amphlett having waived the right to reply,

Wood, V.C. delivered judgment as follows:—It seems to me that the case, to the extent to which I propose to award the injunction, is an extremely plain one. The Solicitor General argued that the case now set up was an afterthought, and not any part of the case made by the bill; but it appears to me that the injunction, to the extent to which I think it right it should be awarded, is an injunction that is completely in pursuance of the twenty-ninth paragraph of the bill. The twenty-ninth paragraph is this:—"The defendant's intention and design, as the plaintiffs verily believe, is to represent his business as a continuation of, and, in fact, identical with that carried on by the firm of John Douglas & Co., dissolved in July 1857, and his proceedings are calculated to create, and unless restrained will, as the plaintiffs believe and have no doubt, create an impression to that effect among customers of the plaintiff as well as the merchants and manufacturers of Bradford and the public generally." That statement, I think, is clearly established upon the evidence before me. The facts of the case are these: that the business was carried on under the firm of John Douglas & Co. apparently for some considerable time. The exact time is not stated in the bill, but I see in the circular which Mr. Douglas, the defendant,

issued upon commencing business with Liversedge, Parker & Shepherd this expression, "these gentlemen were a long time in my employment; the two former upwards of fifteen years." It is certain, therefore, that the firm had been established a considerable time, and the firm being so established, negotiations took place in the spring of 1857, which were not concluded until July. The arrangement ultimately agreed to, and which differed from that which was at first proposed to be made, was, that the defendant should retire from the business and the plaintiff Hirst come in his place. And it was then agreed that the price to be paid to the defendant should be this: that his share in the business should be taken as it stood in the partnership books, and that he should have a bonus or profit, as it is called, of 1,500*l*. The Solicitor General contended, not putting it very forward however, that the goodwill of the business was never meant to be included at all, and that in truth nothing was paid for goodwill. I apprehend that when a man is paid for his share as it stands in the books, he sells his share as in a going concern, and is in a very different position from that of a person at the dissolution of a partnership, when the whole affair has to be wound up, and will only get what it will produce. It is in evidence (though I ought not to rely very much upon it, because it is evidence in reply, and there has not been an opportunity of answering it, but it is sworn to, and I do not think it is suggested that it is erroneously sworn to), that the debts were taken as they stood in the books. I think the affidavit says that all debts were treated as good. We all know, when a partnership is dissolved, the number of debts thrown off as bad is considerably greater than the number which are kept on the list in the current course of business. He gets, therefore, the benefit of his share in the business as a going concern, and, looking at it in that way only, it seems to me it was clearly intended that the goodwill should be disposed of. But I find the goodwill included in the agreement. That agreement was carefully settled by Mr. Douglas's solicitor, and I give him the benefit of that careful preparation with

reference to the exclusion of anything which I do not find there. I think also that I cannot do less than hold him most distinctly to everything I do find there. I take everything inserted there to have been inserted carefully. In that agreement I find he assigns his share, right and interest in the business "and the goodwill thereof;" and the question which then comes to be considered is this: what is included in the word "goodwill"? The authorities, I think, are conclusive upon this point, that the mere expression of parting with and selling the goodwill, does not imply a contract on the part of the person parting with that goodwill not to set up again in a similar business. I use the expression "similar" to avoid, at present, including the case (which I think has a material bearing on this) of a vendor seeking to carry on the *identical* business. He does not contract that he will not carry on an exactly similar business with all the advantages which he might acquire from his industry and labour, and from the regard people may have for him, and that in a place next door if he likes to the very place where the former business was carried on; and upon the authorities it is settled that it is the fault of those who wish for any protection against such a course, if they do not take care to insert provisions to that effect in the deed, namely, that the business shall not be carried on in the district by the vendor. Further than that, I think the defendant is fully entitled to the benefit of the observation that it was proposed to him to insert such a provision, and that he refused it. Therefore, I think this case goes a step higher than the authorities, and that the defendant is entitled to put his case in the highest possible form with regard to his right to carry on the business, provided he does not interfere with what he had sold, namely, the "goodwill," whatever that may mean.

It is said that Lord Eldon has plainly laid down in the case of *Shackle v. Baker*, and afterwards in *Crutwell v. Lye*, and again in *Kennedy v. Lee*, this principle, that goodwill *simpliciter* carries no more with it than the advantage which is possessed by occupying the premises which were occupied by the former firm,

and the chance which is thereby given of the customers being attracted to those premises. It is rather too narrow a view of what is laid down by Lord Eldon there, to say that it is confined to that. Goodwill, I apprehend, must mean every advantage—affirmative advantage, if I may so express it, as contrasted with the negative advantage of the vendor not carrying on the business himself,—that has been acquired by the old firm by carrying on its business, everything connected with the premises, or the name of the firm, and everything connected with or carrying with it the benefit of the business. When Lord Eldon is speaking of a nursery-garden which the customers must frequent to look at the plants, and when Sir Thomas Plumer, in another case, is speaking of a retail shop which a person must enter in order to buy the goods there exposed, they are only, as it appears to me, giving these as illustrations of what goodwill is. But it would be absurd, as it seems to me, to say that when a large wholesale business is conducted, the public are mindful whether it is carried on at one end of the Strand or the other, or in Fleet Street or in the Strand, or any place adjoining, and that they regard that, and do not regard the identity of the house of business, namely, the firm. The word "firm," I believe, like many mercantile terms, is derived from an Italian word, which means simply "signature," and it is as much the name of the house of business, as John Nokes or Thomas Stiles is the name of an individual. The name of a firm is a very important part of the goodwill. A person says, "I have always bought good articles at such a house of business; I knew it by that name, and I send to that house of business for that purpose." There are cases every day in this court with regard to the use of the name of a particular firm, connected generally, no doubt, with the question of trade-marks. But the question of trade-marks is, in fact, the same question. The firm stamps its name on the articles. It stamps the name of the firm which is carrying on its business on its articles as a proof that they emanate from that firm, and it becomes the known firm, to which applications are made. And when a person parts with

the goodwill of a business, he means to part with all that good disposition which customers entertain towards his particular shop or house of business, and which may induce them to continue their custom with it. It cannot be put at anything short of that. Surely the name that is there used is an important part of the goodwill. Indeed, we know at this moment that there are large banking firms and brewing firms and others in this metropolis which have not a single member in them of the individual name which is exposed in the firm. That being so, it appears to me that, when the defendant parted with the goodwill to the plaintiffs, he handed over to them all the benefit that might be derived from holding themselves out as the persons interested in that business which had been identified as being carried on by the particular firm.

It does not follow, I admit, from that (and this is a point which the Solicitor General much insisted upon) that there is a right to use the name of that firm *simpliciter*, especially as it contained an individual and only name—the name of the defendant. It may be that the goodwill of a business is parted with, together with the right of representing the vendor to the world as carrying on that very business. But it may also be that the licence of using the single name of the vendor used in the firm is not sold. Inconvenience might naturally result to Mr. John Douglas from having his name so exposed; and therefore it was very reasonable, and not in the least inconsistent with their case, that the plaintiffs should apply to him for leave to call themselves “John Douglas & Co.” *simpliciter*. That, it is said, he declined. But he was aware of their calling themselves “Successors to John Douglas & Company,” or “Late John Douglas & Company”; that is to say, that they identified their house of business as the house of business formerly carried on by John Douglas & Co. That, I apprehend, they were entitled to under the sale of the goodwill; and after the sale of the goodwill no one else had a right to do so. Certainly, the defendant had not the right. The name had become a known name, and the defendant himself, having assigned over the goodwill, was not entitled to represent himself to the world as carrying on that

business which had been carried on by John Douglas & Co. He had parted with all right to represent himself as carrying on that business when he sold the goodwill. If it were otherwise, he would be attracting to himself the custom, not merely by his own ability, not by the simple fact of calling himself John Douglas alone, but by representing himself as carrying on that same business which he had disposed of, by which he would be obtaining the custom of that business, which emphatically must be meant by the term “goodwill,” namely, that custom which is drawn by the business in the belief that it is the long-continued business. One sees constantly advertised in the shops “Old-established business” and the like, and there is a considerable degree of attraction apparently from the constant repetition of these words. “Late John Douglas & Co.” imports this:—“We are the people who carry on the business formerly the business of John Douglas & Co.” The Solicitor General has argued that he had a right to put the case higher, and to call upon the Court to restrain the plaintiffs from making any use of the name “John Douglas & Co.,” because he says the evidence establishes that the defendant told the plaintiffs that he intended to carry on the business of a stuff-merchant (of which I give him the benefit), and that he might carry it on under the firm of John Douglas & Co. But it seems to me that there is a complete denial of that portion of the defendant's case. Looking at the likelihood of the case, I would ask any one to consider, if it had been put before these gentlemen, at the time of signing their agreement, that the defendant would move his business in the way he has moved it, using the identical name which the old firm bore, whether they would not have hesitated in paying down a sum of money as a price for the goodwill or the connexion of the old firm, which had been trading under the name of John Douglas & Co.

I must next look to what the conduct of the defendant is. I must say I regret extremely to see conduct of this description on the part of a gentleman of activity and energy in business, and anything in the shape of justification for such conduct I have not heard. He sells in July the goodwill of this business. He is at that

time in a state of health which his partners believed, and he thought, rendered it unlikely that he could continue in business on so extensive a scale as he had formerly done. I find him, according to his own statement, (and really one is at liberty, in a case where the transactions have been carried on as they have been by this gentleman, to think that his own statements go to the very verge of what is favourable to his case), as early as May 1858, in communication with the principal officer of the late firm, and through that officer endeavouring to influence the other two managing men, in order to carry off the whole managing force of the business, the goodwill of which he had sold to the plaintiffs, and to set up another business under the identical firm next door and in his own name. It is all very well to say this was out of affection for Mr. Liversedge and a feeling that he was ill treated. He was in no way ill treated by those gentlemen, who paid him in cash fully for everything. All this, too, is done clandestinely. There is not the slightest trace of a communication by any one of those men to their employers of what was going on behind the backs of those employers whose interests they were about to betray. I do not want to make strong observations upon those gentlemen, because they are not parties,—they are only witnesses, and are not here. If I did so, my observations would redound much more to Mr. Douglas's discredit than theirs. I find Mr. Douglas, who has sold the goodwill of the business, within a very few months after he has sold it and has been paid for it, endeavouring to withdraw the three managing men of that business in order that he may have them in his employment, and set up the same business, under the same name or firm, and next door to those to whom he had parted with his interest in the business for a pecuniary consideration. That, I think, is an ingredient of fraud in the case which cannot possibly be lost sight of, inasmuch as what I have to try is, whether he is setting up the identical business that he sold.

Now, *Cruttwell v. Lye*, which is one of the authorities I have been referred to, distinctly admits this, that, although a man

may set up a similar business, he is not entitled, when he has sold the goodwill of a business, to represent that he is continuing the same identical business; that he is not to say, in fact, "I am the owner of that which I have sold." Now, what does this defendant here do? Having obtained at last the withdrawal from those to whom he had sold the business, of their three principal managing men, he sets up his shop next door, and he first does this:—(I agree with his counsel that it was guardedly done; he has endeavoured to keep himself clear of actually representing that the business he is about to carry on is the same business as that which he has sold).—He issues two letters; first, a letter from Manchester, saying, "Finding that I have not convenience for conducting the stuff-trade in Manchester, I beg to inform you that this department will be transferred to Bradford in February next, when the business will be conducted under the firm of John Douglas & Co. upon my premises in Hall Ings;" then, in the next letter, "Manchester" is dropped altogether. He takes great care not to represent that he is now going to set up the business in Bradford that was formerly conducted in Manchester. The previous letter prepared the Manchester world, as well as the Bradford world, for the statement that the business was going to be transferred; but the next letter drops "Manchester" altogether, and runs thus:—

"Bradford, February 3rd, 1859.

"Gentlemen,—I beg to inform you that the premises belonging to me in Hall Ings will be opened for business about the 15th inst., by Messrs. Liversedge, Parker & Shepherd, in connexion with myself, as stuff-merchants, to be carried on under the firm of John Douglas & Co. These gentlemen were a long time in my employment, the two former upwards of fifteen years, during which they had every opportunity for acquiring a thorough knowledge of the manufactures of this district, and their application to business is so well known, it is unnecessary for me to say more than that I have every confidence that all orders with which you may be pleased to favour the firm will be properly executed." Now, who were these three men? Why, the three men whom

the public had always seen in the old house. He tells the persons he addresses, there are the three men who have been for fifteen years with me, whom you have known so long engaged in the old business, who have managed John Douglas & Co.'s business so well; they have had every opportunity of acquiring a knowledge of the business, and their application to business is so well known that it is unnecessary for me to say anything more; there being not a single indication in that letter of the firm of John Douglas & Co. being different from the old firm, or anything about those gentlemen having done that act which I think would not impress the public very favourably in their behalf, namely, having left the employer to whom their present employer had sold the business, in order that they might come to assist him in setting up an opposition business. It appears to me that the defendant has not contracted against setting up in opposition to the business he has sold, but he must set it up fairly and distinctly as a separate business, not as the business he sold, not as the old-established business that must be known to all the world, but as a new business which he has commenced with the assistance of these gentlemen. It seems to me that this last letter, though attempted to be guarded, is so framed as purposely to convey, and I think it was intended to convey, the impression that it was the old firm going on with the old business, and he was conducting it with a new set of partners. That, it seems to me clearly, he is not at liberty to do after having parted with the goodwill, and I think he ought to be restrained from so doing.

There is another circumstance in the case, a letter, of which the defendant says he knew nothing, but which appears to me to lead to one only necessary result—so necessary, indeed, that one must impute to the defendant the intention of causing the result. It appears to me, that when a result is inevitable, and underhand steps have been taken to bring about that inevitable result, I must take it that the man whose acts have produced that result intended it as a necessary consequence. It is a letter from one of the persons he has so carried off. "Having ceased to

represent the firm of Messrs. Churton, Bankart & Hirst, of this town, and having joined Messrs. John Douglas & Co., I beg to thank you for all *past favours*, and trust I shall be in the position to merit that confidence which I have enjoyed so long." Past favours were only favours to the old house, nothing else. The defendant says, he knew nothing of this, but what must be the consequence—what his intention in taking the three managing men of the old business, but that they should represent to all the world, "we are the persons who have had your past favours: we are the persons who have had that old business, and we are the persons who have established the old connexion"? It was intended, as it appears to me, that it should be so done. I think the whole thing excessively discreditable, though it is happily a case which the Court can reach.

Then, it was said, if the Court cannot restrain a man from setting up business again in competition with the old business under a contract for the sale of the goodwill, how can it stop him from using his own name? My answer first of all is this. The defendant is not using his name—John Douglas—alone, but that of John Douglas & Company. He has joined others with himself. That is the case of *Rodgers v. Nowell* (1), and also of *Johan Maria Farina* (2), where people went about and caught a person having a similar name to represent the firm, so that they might introduce the name of J. M. Farina as the chief name of the firm. So here it appears to me plain that had Liversedge, Parker and Shepherd themselves left the new firm which had bought the business of John Douglas & Co. they might be restrained from setting up the business of John Douglas & Co.; and it would be no answer to say, We have brought in a Mr. John Douglas. Does it make any difference that they have introduced the real John Douglas, who had so parted with the goodwill, which it appears to me must clearly include the firm or style of the concern? How the Court would deal with the case if

(1) 3 De Gex, M. & G. 614; 22 Law J. Rep. (N.S.) Chanc. 404.

(2) See *Farina v. Silverlock*, 1 Kay & Jo. 509; 24 Law J. Rep. (N.S.) Chanc. 632; 26 *Ibid.* 11.

the business had acquired its reputation under the single name of John Douglas, it is not necessary for me to inquire. I apprehend I should not find it necessary in such a case to rely on that fact alone, as I do not here rely on the fact alone of the use of the name of John Douglas & Co. being the only ingredient in the case. But if it had been John Douglas alone, and if I had found there, as I find in this case, that he had taken away the three managing men in the former business, and was going, as here, to set up the old firm with those three managing men, and was sending out circulars to the world, telling the world that they were so well known that it was not necessary to say anything about them, I should have held then, as I hold now, that he was not at liberty to trade under such a misrepresentation. I consider the name of John Douglas & Co. to be an important ingredient, but only an ingredient with many others; and, therefore, looking to all the facts of the case, as establishing plainly an intention or endeavour to represent to the world that he is continuing the old-established business which he had sold, he ought to be enjoined in the terms I have mentioned.

Mr. Pemberton.—Your Honour will see that this is a case in which there may be some doubt; here the business is to be carried on in future, and therefore I do not know whether you will say how it is to be done.

The VICE CHANCELLOR.—One can never do that *à priori*. All that is wanted is, a fair representation on his part, that it is a totally different business. The order will be: restrain the defendant until the hearing from resuming or carrying on the business of a stuff-merchant at or in the immediate neighbourhood of Bradford, either alone or in partnership with any other person or persons whatsoever under the style or firm of John Douglas & Co., or in any other manner holding out that he is carrying on the business of a stuff-merchant in continuation of or in succession to the business carried on by the late firm of John Douglas & Co.

M.R.	}	SWINFEN v. SWINFEN.
1858.		
Nov. 22, 23,		
25, 26;		
Dec. 6.		
1859.		
Jan. 12.		

New Trial—Issue—Devisavit vel non—Heir-at-Law.

After the trial of an issue devisavit vel non, if the verdict given satisfies the conscience of the Court that the capacity of the testator was competent to enable him to execute a will, a new trial will not be granted, at the request of the heir-at-law, though there were discrepancies in the evidence which were not satisfactorily explained.

This was a motion for a new trial of an issue *devisavit vel non* directed by this Court.

The testator, Samuel Swinfen, was eighty years of age when he made his will. Upon the death of his father, he, as tenant for life, succeeded to the Swinfen Hall estates in the county of Stafford. He went to reside there with his wife. He was altogether overlooked in his father's will; and being left without resources, he confined himself to two rooms at one corner of the mansion, and lived almost secluded, and kept up no intercourse with the neighbouring gentry. He complained that he found the house dilapidated and unfurnished, and the farms and lands impoverished, and he used to say that the cellar alone contained half a barrel of sour beer; he also used to attribute his impoverished means to the extravagance of Francis Swinfen, his half-brother, the father of the plaintiff.

Henry John Swinfen was the only child of the marriage of Samuel Swinfen and Susannah his wife; and in November 1830 the father and son joined in disentailing the Swinfen estates, and resettling them to S. Swinfen for life, with remainder to H. J. Swinfen for life, with an ultimate remainder to the survivor of S. Swinfen and H. J. Swinfen, and the heirs of such survivor. In 1831 H. J. Swinfen married the defendant Patience Swinfen; it was distasteful to his parents, and they were dissatisfied; but finally they were

reconciled, and Mr. and Mrs. Henry Swinfen were invited to visit Swinfen Hall, but the visit was postponed, as there was no accommodation for them.

In January 1848 Mrs. S. Swinfen died. Mr. and Mrs. Henry Swinfen were immediately summoned to Swinfen Hall; they were forced, however to go every night to Lichfield to sleep, as there were no furnished apartments for them in Swinfen Hall, and return in the morning. Mr. S. Swinfen requested them to remain with him, and upon their acceding to this, he furnished a bed-room for them, and they remained with him for upwards of nine months, and then went to Barmouth, in North Wales.

The testator was a tall and corpulent man; he was afflicted with severe chronic rheumatism, and also with hydrocele, and during the next three years he became more feeble, and was unable to move about with that celerity which was necessary to the management of his affairs.

In August 1851 Mr. and Mrs. Henry Swinfen returned to Swinfen Hall; his father gave them a welcome, and said he had determined to live no longer alone; that he knew he was robbed, as he could not look after the people about him, and that his son would need two sets of eyes, to see behind as well as before. Mr. and Mrs. Henry Swinfen accordingly took up their residence at Swinfen Hall, and altered his style of living. Upon looking into the management of the estates H. J. Swinfen found it necessary to part with some of the servants; he also took into consideration the requests of Messrs. Standley and Gibson, two of the tenants, who were troublesomely importunate to have their rents reduced, though the farms upon a survey were found to be worth better rents than they paid for them; to both of these the testator gave notice to quit. He also found fault with Thomas Bacon, another tenant.

The testator had a nervous affection in the wrist of his right hand and a trembling, which made it difficult to write, and during the life of his wife she carried on all his correspondence; his son, therefore, shortly after he came to reside with his father, was requested to write his letters; these were then read to the testator, and if ap-

proved, he signed them; he also continued to sign his own cheques.

In March 1852 the testator expressed a wish to make a will in favour of his son. Mr. Morphett, his former solicitor, had died in 1848; he accordingly sent for Charles Simpson, the town clerk of Lichfield, whom he had employed on various local matters. Both father and son spoke to him about certain missing title-deeds, and also about a will the testator had made and which he desired to destroy. At the same time H. J. Swinfen produced a will he himself had made on the 14th of February 1840, by which, under a power in the re-settlement made in 1830, he gave his wife, the defendant, a jointure of 300*l.* a year; he also left her all his real and personal estates. When the testator expressed his wish with regard to his son, Mr. Simpson said—"Why the law makes a will for you." The testator, however, reminded him of the former will, and said a new will was necessary. He accordingly, with a knowledge of his son's will, made another will, giving the whole of his real and personal estate to his son. In October 1852, in consequence of reports respecting the solvency of Messrs. Blower, Palmer & Greene's bank, the testator transferred the whole of his balance from their bank to an account he had opened with the Provincial Bank of England at Lichfield.

In October 1853 he complained that writing pained him, and from that time his son signed his letters and also his cheques on his bankers. The testator during the whole of this time dined with his son and daughter-in-law, but she had usually cut his food for him; but in November 1853, while going up stairs with his attendant, Mrs. Ann Taylor, he from a weakness in his knees sank upon the stairs, and was unable to reach his room without further assistance; he was alarmed, but not hurt, and to avoid future risk, it was thought better that he should confine himself to his room. He got up usually at ten and went to bed at three o'clock, and during the day he used to sit by the window and watch the improvements going on upon his estates, and his son and daughter-in-law, and also Mrs. Taylor, sat and conversed with him day by day.

On the 15th of June 1854 H. J. Swinfen died suddenly, after a very short illness. The testator was stunned by the event, and Mrs. Swinfen was for several days unable sufficiently to collect herself for the painful interview that must follow with her father-in-law. She, however, caused the whole of her husband's family to be informed of his death: some of these letters were acknowledged, with condolences and inquiries when the funeral would take place; these were answered at the request of Mrs. H. Swinfen, the defendant. One, by Mrs. Rowley to Lady Clifton, was—

"June 18, 1854, Swinfen Hall.

"Dear Madam,—Mrs. Swinfen feels deeply your kind expressions of sympathy for her grief. I am happy to say that though she is most keenly wounded, she is enabled to bear her sorrow with fortitude and great Christian resignation. The interment of the deceased is intended to be on Saturday the 24th, through which, I trust, she will be divinely supported. Mr. Swinfen is happily spared the affliction of this mournful event, being through great loss of memory not equal to dwell many moments upon any subject."

The other, by Mrs. Emilie Lishman to Mrs. Francis Swinfen, was—

"20th June, 1854, Swinfen Hall.

"Dear Madam,—As a friend of dear Mrs. Swinfen, I am requested by her to say that Saturday the 24th inst. is fixed for the funeral of her lamented husband. She is much obliged to you for your kind sympathy; she is feeling as composed as her present painful position can admit of. Poor old Mr. Swinfen is unable to comprehend the extent of his great loss, and I cannot help thinking this a merciful dispensation of Providence towards our dear mourner. I am, &c.

"Emilie Lishman."

On the 20th of June Charles Swinfen, the half-brother of the testator, and his wife and daughter came to Swinfen Hall, at the request of the testator and Mrs. H. Swinfen, the defendant, to be present at the funeral, and they remained there to the 20th of July, and were in the habit of seeing the testator daily.

Mrs. H. Swinfen for several days after her husband's death felt unequal to an

interview with her father-in-law. He several times inquired for her, and expressed an impatience to see her. On the morning of the 23rd of June, however, she, accompanied by Mrs. Rowley, went to see him; she was full of grief; he embraced her and said, "Do not cry; do not cry: I will take care of you." And subsequently the testator intimated to different persons his intention to leave her Swinfen. He stated it to Mrs. C. Swinfen; he told his daughter-in-law herself; he told Mr. C. Swinfen and Dr. Rowley, and on the latter saying, you will give it her for life, he said "No; I shall give it to her."

Mrs. Swinfen, after her husband's death, was anxious to know in what position that event had placed her; accordingly, on the 19th of June 1854, she sent to Lichfield for Mr. Simpson. He told her that the devise of Swinfen made to her by her husband's will had failed in consequence of his death. She then inquired what she was to do in the position she was placed. Mr. Simpson, who had not seen the testator since he made his will in March 1852, entertained ideas, from conversation with different persons, that the testator was incompetent to manage his affairs, and in consultation with Mr. Charles Swinfen, he recommended that there should be an application to the Lord Chancellor in Lunacy, asking that some person might be appointed to manage and control the affairs of the testator. He, accordingly, wrote some instructions to his agents in London, and they informed him that such an application must be supported by a certificate of two medical men, as to the unsoundness of S. Swinfen. Dr. Rowley and Dr. Evans were selected, the one being his usual medical attendant, the other having never seen him before, and their attendance was requested. On the 2nd of July 1854 they went to Swinfen Hall, but they differed in opinion. In the mean time the testator expressed a desire to make his will; and on the 4th of July 1854 Dr. Rowley and Dr. Evans, on their way to Swinfen Hall, called on Mr. Simpson, and he followed them; but as Dr. Evans expressed an opinion that instructions for making a will ought to be postponed, Mr. Simpson returned home without seeing the testator. In the afternoon of that day the testator said to Mrs.

On the same day that the will was executed Mrs. Francis Swinfen, the mother of the plaintiff, unexpectedly called at Swinfen Hall, where she had not been for years; she was accompanied by Mr. Shadwell, her solicitor. They were received by Mrs. H. Swinfen the defendant, who had never seen either of them before. Mrs. F. Swinfen inquired after the testator, and upon being told he was very well, she expressed a wish to see him. The defendant said, certainly. Mr. and Mrs. C. Swinfen then came into the room, and after a renewal of the request, Mrs. H. Swinfen sent for Mrs. Taylor, and desired her to inform the testator that Mrs. Francis Swinfen was there, and that she would be glad to see him, if he would see her. Mrs. Taylor accordingly left the room, and on her return said that Mr. S. Swinfen begged to be excused; she accordingly left without seeing him.

On the 15th of July 1854 the testator was seized with bronchitis; it proved fatal to him on account of his age, and he died on the 26th of July 1854. The trial of the issue came on on the 12th of August 1858, at the Summer Assizes at Stafford.

Mrs. Rowley, in her evidence, said, that Dr. Rowley sent her to stay with Mrs. Swinfen after the death of H. J. Swinfen; that she saw the testator, but had no conversation with him further than wishing him good morning; that on the 23rd of June she went with Mrs. H. Swinfen into the testator's room; that he received his daughter-in-law affectionately, and embraced her tenderly; and she being full of grief, he said, "Do not cry; do not cry: I will take care of you;" that it was the last time she saw him, and she was satisfied he was competent to make a will; and that she was mistaken when she supposed he did not feel the loss of his son.

Mrs. Lishman said, that she saw the testator on the 16th of June; that he apparently suffered under great mental depression; that her letter to Lady Clifton was written on representations made by Mrs. Rowley.

In her cross-examination she said, that the testator, on the occasion of her interview, had made a mistake. That she said, "Sir, are you aware of the great loss you have sustained?" that he said, "Mrs. Swinfen is dead." That she said, "No, sir,

she is not dead: it is your son.' That he said, "Then why does not Mrs. Swinfen come up to me?" That she said, "She is not in a state; her mind is too much distressed to come at present." That she then delivered the message with which Mrs. Swinfen had charged her, and said, "She sends her love to you, and she will come when she is equal to it." That he said, "Go down, and tell her to come up to me." That his mind was tolerably clear up to his last illness.

Mr. Simpson said, he had not seen the testator from March 1852, when he made his will, until the 5th of July 1854; that he had been informed that, after his son's death, he was unable to give any directions for the management of his affairs; that it occurred to him in consequence, that it might be expedient to apply to the Lord Chancellor in Lunacy, but that no medical certificate could be obtained that the testator was of unsound mind and incapable of managing his affairs, and that consequently the notion was abandoned; especially as it was in accordance with the conclusion of other persons competent to form an opinion of the testator's capacity; and that he subsequently saw the testator, and concurred in that opinion.

The jury gave their verdict in favour of the defendant in this suit, and in support of the will.

Mr. Edwin James, Mr. Hobhouse and Mr. Henry James, for the heir-at-law, now moved for a new trial.—The acts of the witnesses were at variance with their evidence. This, and the other discrepancies which were to be found throughout the evidence, entitled the heir-at-law to a new trial of the issue.—

Harewood v. Baker, 3 Moore, P.C.C. 282.

Pemberton v. Pemberton, 13 Ves. 290.

Mr. Kennedy and Mr. Cole, for Mrs. H. Swinfen.—The verdict was right both in fact and in law. The devisee had to prove that the testator was of testamentary capacity; it did not lie upon her to prove that the testator was a man of vigorous intellect or of strong mind; but it was proved by a chain of incontestable evidence that he knew perfectly what he was about when

he made his will ; that his real intentions were carried into effect ; that no fraud was practised, and that no undue influence was exercised upon him. The case made by the heir-at-law was, that the testator, from the death of his wife in 1848, fell into a state of imbecility ; that his son and daughter-in-law were forced upon him by Dr. Rowley ; that he was unwilling to receive them, and that their arrival was an intrusion which he only tolerated ; that the son became master, and that the father gradually sunk into a state of imbecility. This case, however, was wholly disproved, and it was finally admitted that the testator was competent to make a will up to November 1853, when he had the fall ; from which time, it was now said, he fell into gradual imbecility. It was proved that he had an affection for his daughter, and that there was none towards the plaintiff's family. There was evidence of memory, and that he was alive to his affairs, and that he was anxious for the welfare and the future of his daughter-in-law. There was no proof that the testator ever made a foolish or irrelevant remark. His servants treated him with respect ; and their treatment, and that of children, has in all ages been considered by philosophers as proving they were entitled to respect ; and Cicero, in *De Senectute*, speaking of blind Appius says, "*Sic senem, in quo est adolescentis aliquid, probo : quod qui sequitur, corpore senex esse poterit, animo nunquam erit.*" After his son's death he expressed a wish to settle his affairs. He was impatient at the absence of his daughter-in-law ; this was proved by the evidence of the ladies : the letters of the two were mere expressions of opinion, imperfectly formed, and which they found to have been erroneous. On behalf of the plaintiff, some reference had been made to lucid intervals ; they applied to lunacy only, and not to this case, which was one of torpor or comparative feebleness, which might, as in the present case, be caused by a startling or unexpected event. Even Dr. Evans, who had said he was not capable of making a will when he saw him, had not ventured to swear he might not be capable of making a will on another day ; he had gone to the utmost extent, when he said it was highly improbable. It was

known in the physical world that paralysis had been counteracted by a strong fit of the gout. Under such circumstances it was that the testator stated his intentions, and impatiently expressed his wish to settle his affairs, and was not satisfied until he had done it. The Court would protect even persons labouring under imbecility in the exercise of their rights. In *Ridgeway v. Darwin* (1), Miss Kendrick, under a Commission, had been found not lunatic, but of mind sufficient for the government of herself, her manors, &c. Upon a petition complaining of the verdict, the evidence and the result of a personal examination were handed to Lord Eldon, and from these there appeared to exist imbecility of mind, proceeding in a great degree from epilepsy. The order made was that she should be protected, and that she should not be allowed to execute any instrument, except under an attestation directed by the order ; and with respect to her physicians : he said, " I will direct two physicians, who have not been concerned and consulted, to talk to those who have been concerned and consulted, and see the evidence, and afterwards, in the most tender manner, to find the means of visiting her without alarming her, for the purpose of determining whether her state of mind is competent to the management of her affairs." The plaintiffs have to prove a criminal act against five or six persons. Have they proved it? Yet they have to prove it, as if they were indicting them on a charge of conspiracy. The defendant has not to prove the negative. Irresistibly, however, it is shewn that there was no common object, and that no two would have combined to effect it. Mrs. H. Swinfen was left alone on the death of her husband ; it disconnected her with the family. From that moment she, who had been in daily attendance upon him in his room, was absent, and Dr. Rowley, in his attendance upon him, alone conversed with him. On each occasion he expressed his desire to provide for Mrs. Swinfen ; but the Doctor communicated the fact neither to Mr. Simpson nor to Mrs. Swinfen until the 24th of June, when he mentioned it to Mr. Simpson. There was clearly

(1) 8 Ves. 65.

no common object. Mrs. Swinfen also was no friend of Mr. Simpson; he had seen her but once until she sent for him to ascertain her position; and when this was done he of his own accord took a course entirely adverse to her interests. He conceived the idea that the testator was imbecile, and incapable of managing his affairs, and he proceeded to carry out that idea—to obtain a commission to manage the affairs of Samuel Swinfen. Had this been fully developed, there was an end of any probability of a will. This was continued until the 28th of June; it was not abandoned on the 3rd of July; on the 5th of July he saw the testator for the first time since 1852, he then leaves him in doubt whether he will make his will. Again, Mrs. H. Swinfen invites Mr. and Mrs. Charles Swinfen to the house. They were persons of position—members of the family—intimates of the testator. Mr. C. Swinfen was not a young man; and Mrs. C. Swinfen was a lady of talents, accomplishments, and intelligence. Was it probable that Mrs. H. Swinfen could obtain an ascendancy over them? What interest had they to procure a will for the defendant? On one occasion only Mrs. C. Swinfen took an active step, and that was when, at the request of the testator, she sent to Dr. Rowley that he might send to Mr. Simpson. Even that shews Dr. Rowley to have been slow, and that it required some stimulus to put Mr. Simpson in motion. True, he had mentioned it to him on the 24th of June; but Mr. Simpson was not sent for until the 29th of June. Such circumstances as these must satisfy the Court, expand them how you may, that no conspiracy existed; but such must be the end if the plaintiff's case is true. It remains to consider what degree of testamentary capacity the law requires to be established. A man goes into the room of an octogenarian; he finds him sitting silent. Casual observers are apt to fancy he has not much in him, or that his capacity is weak. Those opinions are formed by persons who do not talk to him, or with whom he will not talk, or who do not understand him; but they are not to infer that he has lost his testable capacity, or that his faculties are so impaired that he cannot transact business. That is not so.

Mr. Swinfen had no disease affecting the brain, or likely to affect his mental powers. There was neither apoplexy nor paralysis: his disease was local. Old age merely raises no presumption of testamentary incapacity. In *Lewis v. Pead* (2) a lady of seventy-five gave a large property to her bailiff. It was there said that "there must be substantial ground for suspecting fraud, and that her being old was no proof that she was imposed upon." There have been cases where persons afflicted with paralysis have been capable of making wills. There was the great Duke of Marlborough, of whom the satirist says:—

Down Marlborough's cheeks the tears of dotage flow.

But history says no such thing of him. He made his will after he was struck with paralysis, and he lived six years after that, and died in 1722; but after the stroke his mouth was so awry that he could not pronounce many words, and many he pronounced so imperfectly that he did not like strangers about him, and he was seen only by his most intimate friends; but still he made an important codicil to his will in 1721, disposing of personal property of considerable amount.—*Coxe's Life of the Duke of Marlborough*. Lord Somers also was afflicted with paralysis, in the latter days of Queen Anne. This is an instance of capacity being roused by a shock, for having had a severe fit of the gout, which in some degree counteracted the effect of the paralysis, the Ministers around George the First, when he came to the throne, sent for Lord Somers, and he was offered a seat in the Cabinet. Mr. Swinfen had nothing about him to affect the brain. A late honoured Judge was afflicted with hydrocele; his abilities were transcendent, and they remained so to the last, before he retired from the Bench. The late Sir Herbert Jenner Fust was another instance. He was afflicted with both gout and stone, and had the same nervous affliction that Mr. Swinfen had, so that he was scarce able to raise a glass of wine to his lips. Mr. Swinfen could not feed himself; yet Sir Herbert retained his faculties, and so did Mr. Swinfen. His memory was enfeebled; but that is so with old men, par-

ticularly with regard to dates, recent events, and trifling matters which do not affect them—things they do not care much about. Cicero, speaking of old men, has truly said—" *Omnia quæ curant meminerunt.*" They remember everything they care about. It was not because his memory was in some degree enfeebled that he became fatuous, or that he was to be pronounced imbecile. The greatest men have their memories enfeebled in advanced age. Lord Campbell, in his *Life of Lord Eldon*, remarks, that in the last eight or ten years his memory became enfeebled upon ordinary matters; and yet Lord Eldon made his will, disposing of his immense property, a month only before he died; and who ever thought of impeaching that? Yet his age was ninety-three. These cases establish irresistibly the conclusion, that it is not because Samuel Swinfen was an old man, and because his memory was partially enfeebled, that therefore it is to be inferred that he had not the power of judgment on a matter in which he was deeply interested, and upon which he never failed to reiterate his earnest desire. In *Osmond v. Fitzroy* (3) it was held, that when a weak man gives a bond, if there be no fraud or breach of trust in obtaining it, equity will not set it aside merely because of the weakness of the obligor, if he be *compos mentis*. The bond there, however, was set aside, having been obtained by a servant trusted with the care of Lord Southampton. In *Griffin v. De Veulle* (4) Lord Thurlow said:—"This Court will not set aside the voluntary deed of a weak man, who is not absolutely *non compos*, nor any deed of improvidence or profuseness, where no fraud appears. The case of *Osmond v. Fitzroy* cannot be supported but on the mixed ground of Lord Southampton's extreme weakness of understanding, as well as of the situation of *Osmond*." In 1 *Madd. Ch. Prac.* 375, 3rd edit. it is laid down: "The Court will not measure degrees of understanding, and say that a weak man may not give as well as a wise man." In *Pratt v. Barker* (5) an infirm man of eighty years old made a deed to save legacy duty,

by which he gave property, after his decease, to the defendant, who had attended him as a surgeon. No undue influence was used, and the nature of the deed was explained to the grantor by his solicitor before execution; but, notwithstanding some suspicion, a bill to set aside the deed was dismissed.

In *Griffiths v. Robins* (6) the donor was eighty-four years of age and nearly blind, and depended upon the assistance of the defendant, who had married his niece; and it was there held, that to maintain a gift under such circumstances the donee must establish by the intervention of a third person that the gift proceeded from the free-will of the donor, and was fully understood by her. The evidence of Mr. Sporling, who had before acted as the attorney of the grantor, did establish the intervention of a third person and the free-will of the grantor, and the decree, upon appeal, was affirmed. Again, the character of the instrument is to be considered, whether it is easily intelligible or whether it is complex or difficult. The will in this case is clear. This principle was adverted to in *Willan v. Willan* (7), where an uncle a few days before his death, while confined to his bed in a state of bodily and mental weakness, made a complicated agreement for a lease; this was set aside, but on the same day he made a codicil, which was thought valid. Then follows *Ingram v. Wyatt* (8), the principle of which was that if a testator was of ordinary capacity, sane and strong, proof of bare execution is sufficient; when the man is weak, clear proof of intention is required and the absence of fraud. The will, however, was set aside, because there was no evidence establishing the absence of fraud, but strong evidence impeaching it for fraud. *Durling v. Loveland* (9) also confirms that principle, and *Barry v. Butlin* (10) qualifies it, since it decides that instructions are not the only proof of the knowledge of the contents. The will was prepared by the solicitor of the testator, and he took a large benefit under it; but it was upheld, because there

(3) 3 P. Wms. 129.

(4) 3 Wood. Lec., App. xvi.

(5) 4 Russ. 507; a.c. 6 Law J. Rep. Chanc. 186.

(6) 3 Madd. 191.

(7) 2 Dow, Parl. C. 274.

(8) 1 Hagg. 384.

(9) 2 Curt. 225.

(10) 2 Moo. P.C. 480.

was no proof of any fraud, although his only son was excluded; so far it was a strong case. The testator was held to be of weak but testable capacity. Then there is *Williams v. Goude* (11), the principle of which is that when there is contradictory evidence as to the capacity of a man to make a will, the Court must be guided by what took place when the instructions were given and the will executed. The influence to vitiate an act must amount to force and coercion destroying free agency. In *Evans v. Knight* (12) the Court considered that there was clear evidence that a man of very weak mind had his faculties roused by his desire to make a will, and it held that evidence to that purport overrode the evidence of medical men, who gave it as their opinion, derived from their visits at other times, that he was incapable. Dr. Pritchard, in his work *On Insanity*, says, "In cases of impaired memory the faculties of judgment can be exercised in a sound manner when the attention can be sufficiently aroused"; but in this case it is not necessary to resort to that hypothesis, and Sir H. Halford, in a lecture delivered by him at the College of Physicians, mentioned a variety of cases of persons who were always in a torpid state for a great many years, a kind of lethargy, and who had by some startling circumstance all their faculties to such a degree that they were able to do many important acts. It is well known, both in medical and legal experience. The case of *Harewood v. Baker* has no application to the present; here the testator carried into effect his own expressed intentions of leaving everything to his daughter-in-law. There remain some cases relating to the practice of the Court. Lord Eldon expressed an opinion, most strongly, against granting new trials as a matter of course, and that practice has been entirely altered. All the cases lay it down that the conscience of the Court requires it to be satisfied; that is both a useful and sensible practice, otherwise the litigation may go on in *infinitum*. But in *Wilson v. Bedard* (13) it was held, that an heir-at-law was not entitled

as a matter of course to a second trial of an issue *devisavit vel non*. In *Waters v. Waters* (14) there was only one trial, and a new trial was refused, with costs. In *O'Connor v. Cook* (15) it was laid down that Courts of equity when they administer equitable relief ought to be satisfied that the questions upon the facts have been distinctly and fully before the jury. There is the case of *McGregor v. Topham* (16). Then there is *Boyse v. Rossborough* (17), in which a new trial was granted; but *Pemberton v. Pemberton* recognizes the principle that the Court is at liberty to refuse a new trial. In *Standen v. Edwards* (18) a new trial was refused, though some witnesses had been kept back. What, now, has the plaintiff to complain of? Has he not had a fair trial. Has he not had a favourable summing-up by the Judge? Every point was presented to the jury which could be made in his favour. It has been suggested that because the compromise was mentioned, the feelings of the jury were excited by it, but that has not been supported by affidavit; but the only allusion to it was that the plaintiff must have thought very badly of his own case when they persisted so long in the endeavour to enforce that compromise, which the defendant denounced, and the bill to enforce which was said by Lord Justice Knight Bruce to be a *pis aller*, and he believed it was meant to be nothing more. If that was so, what could they hope to gain but delay and the death of aged witnesses? As it was, the devisee lost some most material witnesses; still she obtained a verdict, and this Court is asked to ignore it, though it has the approval of the jury, the public, the bar and the country.

Mr. Edwin James, in reply.

Jan. 12.—The MASTER OF THE ROLLS.—The only question is, whether Samuel Swinfen was in a state of mind competent to make a will. The jury have found that

(14) 2 De Gex & Sm. 591.

(15) 8 Ves. 535.

(16) 8 H.L. Cas. 132; s.c. 3 Hare, 488.

(17) 6 Ibid. 2; s.c. 3 Irish Eq. Rep. N.S. 489, 540, 620; 1 De Gex, M. & G. 817; Kay, 71; 23 Law J. Rep. (N.S.) Chanc. 305. *Boyse v. Colclough*, 1 Kay & J. 124; s.c. 24 Law J. Rep. (N.S.) Chanc. 7.

(18) 1 Ves. jun. 133.

(11) 1 Hagg. 577.

(12) 1 Add. Ec. Rep. 229.

(13) 12 Sim. 28; s.c. 10 Law J. Rep. (N.S.) Chanc. 305.

he was. The heir-at-law contests the propriety of this finding, and moves for a new trial, on the ground that the verdict was against the weight of evidence. The rules respecting new trials are less stringent in equity than they are at law, and the practice here has always been, not to consider merely whether there was evidence which would support the finding of the jury, and in that case to refuse a new trial; but the course in courts of equity has been, to consider whether, having regard to the entire subject-matter, and to the whole of the evidence given at or before the trial, and what has since become known, the Court is satisfied that full and complete justice has been done between the parties, and that no further investigation is necessary for the purpose of attaining that end; and unless it is so satisfied, the Court requires that the matter shall be again tested by an examination before a jury, with such directions and modifications as it may consider desirable for the fair, thorough and impartial sifting of the whole matter.

The evidence now before the Court consists of three distinct sets: first, that which was given in the Court of Probate, when the paper in question was propounded as the will of Samuel Swinfen; secondly, the evidence given in this cause; and, thirdly, the evidence given at the trial of the issue. It would uselessly occupy the public time to discuss all this evidence; to note, compare and contrast the repetitions, the resemblances, and the contradictions which occur in various parts of this testimony, or to detail the various impressions produced on my mind by the perusal and consideration of the evidence of each witness. All that it is necessary or proper now to do, is to explain distinctly my view, and the grounds for the conclusion at which I have arrived. The general outline of the case is this:—An old man of eighty years of age, of declining health, loses his only son by a sudden and unexpected attack of illness. Three weeks afterwards he made a will, giving his landed estate and mansion, and all the chattels and personal property connected with it to the widow of his son, and three weeks after he has so done he dies. The will is attested by the solicitor, who was sent for to prepare it,

by the medical gentleman who habitually attended the old man, and by his brother.

They all depose to his sanity, and competency to make a will. On the other hand, one of the attesting witnesses to the will, only ten days before, sent instructions to his agent in London to take steps for the purpose of obtaining the assistance of the Court of Chancery to manage his property, stating him to be in a state of fatuity immediately after the son's death. Two ladies, one of them the wife of the physician who attested the will, the other, Mrs. Emilie Lishman, who was intimate in the family, write letters, in which they announce the son's death to the father's relations, and in them state that the old man is incompetent to understand, not merely the extent, but even the nature of his loss. A physician of eminence is brought from Birmingham to examine the state of the health of the old man four days before the document in question is signed; he repeats his visit after the intervention of a day, three days before the will is signed, and on both of these occasions he pronounces the old man to be wholly incompetent to make a will. On the day on which the will is signed, the sister-in-law of the old man, the mother of the heir-at-law, comes to the house to see him, but she does not obtain access to him. It is obvious that such a case requires a careful and jealous sifting; and after this has been done it may well be that not merely a jury, but any person, however much accustomed to consider, weigh and compare the effect of opposing testimony, may hesitate long before they come to a conclusion.

In the first place, in all these cases I lay out of consideration as far as possible the propriety of the disposition made by the testator. I am apprehensive that, in such cases, it does happen, perhaps not unfrequently, where the evidence is nicely balanced, that the jury are swayed by their opinion of whether the will contained such a disposition of the testator's property as it was fit that he should make. Unfortunately, this consideration can never be wholly excluded, because in cases of unsoundness of mind the will itself may disclose tokens of a perverted intellect, but even in these cases the contents of a will are a very dangerous ground to rest upon,

even when connected with other testimony; but in cases where there is no unsoundness of mind, but rather an absence of mind, and the only question is, whether the deceased person knew what he was doing, the contents of the will can rarely be brought to throw light on that subject. Accordingly, in this case I wholly and totally disregard the circumstance that the document purporting to be a will, and signed by this infirm old man, simply restored his son's widow to the position in which she was before the son's death, and in which she would have been in had the dates of the deaths of the father and son been transposed. I look exclusively at the testimony of the state of mind of the alleged testator. If he was competent to make a will, his intentions, however much they may be disapproved of, must be carried into effect. If he was not competent, the contents of the will being such as he would have made if he could, and such as others might have wished him to have made, will not make it valid. If, as expressed in argument, the will was concocted, it cannot stand, although it was for a laudable purpose. I have also kept in view that the burthen of proof lies on the defendant, who sets up the will; and I consider, first, how the alleged will is supported, and I look at the testimony of the witnesses who attested the will. If the case were confined to their testimony, nothing could be clearer or more convincing. Mr. Simpson, a legal practitioner of long standing and great respectability in the city of Lichfield, swears positively to the competency of the old man to give instructions on the 6th of July, and to his competency to understand it on the 7th, and to the fact that he did understand it and did sign it with a full and accurate knowledge of its contents. Dr. Rowley, a medical gentleman of advanced age and high character, swears positively to the same effect. Mr. Charles Swinfen, the half-brother of the old man, who with his wife were residing in the house, gives exactly the same evidence. There is no hesitation or doubt on this point: they all three swear positively to the same fact. After considering this case in every way, I am unable to suggest or imagine a theory

which can enable any Court to get over this testimony short of imputing wilful and corrupt perjury to these three gentlemen. It could not be mistake, it could not be negligence; they knew that S. Swinfen was very old, that he was in a state of failing health, and that his mind and memory were less vigorous than they had been; they had one and all abundant opportunities of knowing whether the old man was or was not competent to make the will; and if he was not, they must have united together to concoct a spurious document, for the purpose of transferring the Swinfen estates from the heir-at-law to the widow of the son. I look for the motives which could have induced these three gentlemen to unite in so disgraceful a combination. I find literally none. Pecuniary interest not only is not alleged, but the absence of it is proved. Indeed, so far as C. Swinfen is concerned, he lost thereby his share, whatever it might be, as one of the next-of-kin of the old man, of the personal property in and about Swinfen Hall.

The only possible suggestion of the motive that has occurred to me is a feeling of compassion for the widow of the son. It may possibly be suggested that they might think that the sudden decease of the son, which had produced so great a change in the prospect and condition of his widow, ought to be repaired, and that it would be but fair if they were to do for her what the old man, if he had been competent, would, in their opinion, most assuredly have done. But even if this were so, it is wholly inadequate as a motive to account for such a transaction. Three respectable gentlemen do not combine together to commit what is little short of forgery, and support it by perjury for the purpose of redressing those calamities which the sudden and unforeseen death of a near relative may inflict on some one of their friends or acquaintances. But it does not stop here. They could not have been the only persons engaged in this conspiracy. Mrs. Patience Swinfen, the defendant, Mrs. Charles Swinfen, the sister-in-law, who would derive no advantage from it, and the nurse, Mrs. Taylor, must all have combined with the solicitor, the doctor and the brother to commit this

fraud. It goes a step still beyond this, for on the assumption of such a combination the conduct of all the persons engaged is wholly inconsistent with any idea of reason or sense. If the conduct of these three gentlemen is referable to a plan to concoct a will for the old man and to obtain his unconscious signature to the document, it is impossible to conceive a more bungling performance, or a case in which greater care was taken to provide for their own detection, for they were active in obtaining testimony to refute their own assertions. On the assumption that a plan was formed to concoct the will for the old man, nothing could have been more simple than to have kept every one away from him but the persons engaged in the transaction, and those who had been in the habit of seeing him, viz., Mr. Simpson, Dr. Rowley, Mrs. Patience Swinfen, Mr. and Mrs. Charles Swinfen, and the nurse, Mrs. Taylor, who waited upon him. If they had done this, the thing was accomplished beyond the possibility of discovery. The old man had not once, for eight or nine months, left his bed-room in consequence of the accident which occurred as he was going up stairs in November 1853, and of his bodily infirmity; it is the common case of both sides that when he began to keep his room he was in the full possession of his faculties. It could have created no suspicion if no other persons had been allowed to see him, so in the ordinary and natural course of events he would have seen no one, and no one would have come to him. But if these three gentlemen were cognizant of the infirm state of his intellect, and that he was in a state of fatuity, if they intended to make a will for him, the sending for Dr. Evans was an act of positive insanity. If the old man was fatuous, they must have seen it; they must have known from the high character of Dr. Evans that he would be privy to no fraud and to no irregular transaction. I consider, therefore, the sending for Dr. Evans to be a badge of the *bona fides* of the conduct of these persons. On this supposition, also, why did Mr. Simpson scruple about preparing the will on the 5th of July and not on the 6th? But adopt the opposite supposition, on

the assumption that they really believed the testator to be competent to make a will, though of feeble and even of a decaying mind, the whole matter is clear and consistent. It is important to keep carefully in view the two modes of looking at this case,—the only two in which it can be regarded by the plaintiff, the heir-at-law, whether Samuel Swinfen was in a state of complete fatuity evident to any one who had fair opportunities of observing him; in which case the conduct of the three attesting witnesses is a gross fraud, as Samuel Swinfen was in such a state of mind that fair, honest and reasonable persons might well hesitate about his competency, in which case the Court must consider and weigh who had the best opportunities of forming an accurate judgment on this subject. It is, no doubt, to be observed that the sending for Dr. Evans to test the mental capacity of the old man is a proof that they or that some one or more of them had a doubt on the subject, and wished to be fortified by his opinion; but this circumstance is not a sufficient reason for rejecting their clear and distinct evidence on the competency of the old man, because if it comes to a balance of opinion between the three attesting witnesses and Dr. Evans alone, the Court must necessarily give the greater weight to the greater number, who had more frequent opportunities of seeing the testator. The case in favour of the will, as derived from the evidence, is not that the testator was not enfeebled in mind as well as in body, but the question is whether it was to such an extent as to render him incompetent to make a will. These gentlemen swear positively that he was competent on the 6th and 7th of July; is their testimony to be rejected because Dr. Evans swears as positively that he was not competent on the 3rd and 4th of July? I fully believe the testimony of both. I believe that the old man was competent to give instructions for a will on the 6th of July, and on the 7th that he did so, and that he signed the will, knowing and approving of its contents. I also believe that this is not inconsistent with his having been incompetent to do so on the 3rd and 4th of that month. It is unnecessary to have recourse to any doctrine

of lucid intervals to reconcile this testimony. Lucid intervals undoubtedly only apply to cases of insanity; here there were no delusions. The infirmity insisted upon is decay of mind, and this, judging from the evidence, no doubt existed to some extent, and I believe that it was gradually getting worse; but it is not the fact that in such a case of the gradual decay of the intellect, the sufferer is always less competent to remember or to think on each succeeding day than he was on the preceding day, and that this process goes on regularly and constantly without any alteration. If it were so, it would be wholly at variance with our experience of all other conditions of the human intellect. The variation in the power of the intellect and the vigour of the mental faculties between one day and another is a matter which every one is conscious of to some extent, and these seem to depend on causes not readily perceptible or ascertainable.

In persons in perfect health, the mind and the power of perception are more rapid at one time than another. The power of recalling names, dates, events, passages of authors formerly committed to memory, is occasionally more active and acute at some times than at others, even in persons in health; but still more so in cases of persons in ill health. It certainly would be a new fact if it could be established that in advanced old age, or in any of the stages of disease, the mind of the sufferer were not one day competent to do or remember what on another day it would fail in accomplishing. In fact, the evidence in this case, if it is believed, exactly proves this fact in the case of the testator. Mr. Simpson states that, on conversing with him on the 5th of July, he did not think the testator was in a competent state to give instructions for his will, and he refused to prepare any will in consequence; but on the 6th he considered him competent, and accordingly he obtained the instructions. He prepared the will and obtained the execution of it on the following day. I repeat, that the conduct of Mr. Simpson in so acting is evidence of his *bona fides*. Certainly, if the state of Mr. Swinfen on the 3rd and 4th of July was that of complete and perfect fatuity it would not be possible to

believe that, on the 6th and 7th, he could have been competent to make a will, and, after a careful consideration of Dr. Evans's evidence, I think that he was convinced that the state of the old man was that of complete and perfect fatuity, or nearly approaching it; but I think that he must, if such was his opinion, have come to an erroneous conclusion. I know not that, in a mere question of testing the capacity of a decaying intellect to do any particular act, a medical man would more than another man be competent to form a correct opinion. Some previous acquaintance with the person examined would seem to be necessary in coming to an accurate conclusion in such a matter, where any question exists at all. It may well be that the habits and disposition of a man may tend to produce a belief that he is in a state of fatuity, when in truth he is not so. If a man remains perfectly silent to all questions put to him it may be very difficult to ascertain whether this arises from an incapacity to understand the questions put to him or to a sulky determination to answer nothing. Even the answers given to questions put may be tinged with the same disposition, and bear the appearance of foolish or senseless words when intended only to signify a surly dislike to be questioned. I think it may well be that Dr. Evans, or any other physician of eminence, might be mistaken as to the capacity of a man whom he had visited two days consecutively for the first time in his life, even though the visits had lasted much longer than Dr. Evans states his to have continued. But I think it impossible to believe that a person in daily attendance on an old man should be deceived as to this point, and I think it difficult to believe that any one well known to him and who visited him daily for a considerable time should be mistaken on this subject. The nature of the subject necessarily makes the evidence as to incapacity much less trustworthy than the evidence as to capacity. A physician who visits a patient several times may say, with perfect truth, I never saw a sign of intellect about him, and therefore I infer that he had none; still, he may be mistaken, though he speaks perfect truth. But, on the

other hand, if a person visits a patient and swears that he made rational answers to questions, and gave clear and distinct marks of his capacity, he cannot be mistaken, he must be perjured if his evidence be erroneous. It is the distinction between proving a negative in opposition to an affirmative: the one may speak perfect truth, and yet be mistaken; the other cannot be mistaken, he must be perjured if his testimony be not correct. I have, therefore, come to the conclusion that the evidence of the three attesting witnesses and of Dr. Evans is not inconsistent, having regard to the nature of the subject-matter to which they depose, and I have the fullest conviction that they all conscientiously and honestly give their testimony believing it to be true. I once more refer to the distinction regarding Mr. Swinfen's competency. I think the state of Mr. Swinfen was not one of utter and complete fatuity such as to preclude all doubt or question as to his competency. That is clear from parts of Dr. Evans's testimony, for it is remarkable that, in the interview which he had with the testator, when Dr. Rowley was making some observations to Mr. Swinfen which might have had the effect of testing the extent of the capacity of the testator, Dr. Evans interposed by an observation which I construe thus: "It is not proper for you to persuade that man to make a will, or to put words into his mouth as to the persons to whom his property is to be left; it ought to be his own spontaneous, voluntary act." This, no doubt, was very right if the object had been then and there to take instructions for the will, but if the object was simply to ascertain what the testator thought or wished, or was capable of thinking or wishing, it might have been more satisfactory to have known in what way the testator would have answered the questions or suggestions of the medical man who was in the daily habit of attending him, even assuming these observations or suggestions to have been highly improper. It is not, however, necessary to pursue that subject into the channel to which it leads, because the case of the plaintiff is, not that undue persuasion was used to induce Mr. Swinfen to make the will in

question, but that he was ignorant of what he was doing. The case is not one of undue influence, but is one of a concocted will, to which his unconscious signature was obtained. Regarding the evidence of the three attesting witnesses and of Dr. Evans together, if the case rested on their evidence alone, I should come to the same conclusion as the jury at law. But there is further evidence in the case, and there certainly remain some circumstances which require to be explained. First, how it was that Mr. Simpson should, on the 26th of June, have sent the instructions to Mr. Cole, his agent in London, which are now in evidence, and which describes the state of Mr. Swinfen in the manner that is there set forth. I have examined the evidence on this point, and although it is not so satisfactory as ought to be afforded, still the explanation which he gives of that circumstance must be treated as sufficient to account for it. At least, I have arrived at this conclusion, that the opinion he expressed to Mr. Cole, though inconsistent with his subsequent conduct in preparing and attesting the will and his present testimony, ought not to have weight to the extent of discrediting his present evidence in favour of the competency of Mr. Swinfen.

The next circumstances that require explanation are the letters of the two ladies, Mrs. Rowley and Mrs. Lishman, describing the state of health of old Mr. Swinfen. These, undoubtedly, shew their belief of his incapacity at the time they wrote, which was within a few days after the son's death, but the evidence satisfied me that they had but imperfect means of forming an opinion, and these letters cannot be treated as more than an exaggeration of the failing condition of old Mr. Swinfen's mind and body, and they ought not to be allowed to counterbalance the direct testimony of the six witnesses who speak positively to the contrary, I mean the three attesting witnesses, the nurse Mrs. Taylor, Mrs. Charles Swinfen, and the defendant. The defendant, undoubtedly, has a large interest in the question; her evidence must necessarily be taken with great caution; but, after reading it more than once, I see no reason for disbelieving any single word uttered by her.

The unanimous testimony of all the witnesses on all sides, so far as it has any bearing on the subject, shews perfect propriety of behaviour on her part throughout the whole transaction. She does not appear to have once asked the testator to give her the property; she took no part in obtaining the instructions; she suggested no course to be taken; she objected to none that was thought proper by Mr. Charles Swinfen, Dr. Rowley and Mr. Simpson. It is but due to her when I state that this is my impression, derived from a careful perusal of the whole evidence; and, further, that if she had thought fit to exert her influence over him she would probably have obtained still greater benefits from the testator. I think it unnecessary and undesirable to comment in detail on the evidence of all the witnesses. I have stated the general view I take of the case, and the steps leading to the conclusion I have arrived at, and the grounds on which I have based my decision. I have before doing so read carefully not only the evidence, but the elaborate summing up of the learned Judge who tried this case, who, I infer, had formed a different opinion on the whole case to that which I have arrived at. But his Lordship observed to me in his letter transmitting the notes, that he was not dissatisfied with the verdict; that it was eminently a question for the jury. And I find that the jury, after having had the advantage of observing the manner and demeanour of the witnesses who gave evidence, and notwithstanding the obvious tendency of the observations of his Lordship, had little doubt or hesitation in giving their verdict in favour of the will. I concur in that verdict, and I think it my duty to state that if, on the evidence now before me, the jury had come to an opposite conclusion, and if the defendant instead of the plaintiff were here asking for a new trial, I should not have thought myself justified in concluding the rights of the parties without a further investigation; but on the case as it now stands, and on the verdict given by the jury, I think that they have properly affirmed the capacity of the testator to make the will in question, and that this motion must be refused.

M.R. } TILLET V. THE CHARING
March 16, 17. } CROSS BRIDGE COMPANY.

Specific Performance — Uncertainty of Contract—Compensation.

A company contracted to purchase the interest of leaseholders in a piece of land for a given sum, and for the conveyance in fee of a piece of the land which they were to take under the compulsory powers of their act of parliament. The agreement contained a clause that the company were to be consulted on any buildings to be erected in the line of street, and that differences should be settled by two parties named, or their umpire. The company held the contract suspended, and after their compulsory powers expired they refused to complete the contract. Upon a bill for specific performance, —Held, that the agreement respecting the buildings was vague, and that the Court could not decree a specific performance of the contract.

Held, also, that as the agreement was uncertain, no compensation could be awarded; but as there was a concluded agreement, the Court dismissed the bill, without costs.

This bill was filed, by Alexander and John Tillett, praying that the Charing Cross Bridge Company might specifically perform an agreement they had entered into for the purchase of a plot of land, situate in the parish of St. Mary, Lambeth, in the county of Surrey, or otherwise that the contract might be rescinded, and that the company might pay the costs, and make compensation to the plaintiffs for the injury they had sustained, and that the company might in the mean time be restrained from applying to parliament for powers inconsistent with, or enabling them to contravene the contract, or to take the lands on any terms other than those of the contract.

The plaintiffs were lessees of four pieces of land, held under the Archbishop of Canterbury for ninety-nine years, from the 29th of September 1824, at the rents, for the first piece, of 85*l.*, and 3*l.* 5*s.* 6*d.* for redeemed land-tax, and for the second piece, of 5*l.*, and 5*s.* for redeemed land-tax; and a further rent for the first of 28*l.* 5*s.*, payable to John Sawyer and Earl

George Clayton, and for the second a peppercorn; and for the third piece 134*l.*, and 12*l.* for redeemed land-tax; and for the fourth piece 7*l.*, and 5*s.* for redeemed land-tax. A great number of houses had been erected upon these plots of land.

By the 12 & 13 Vict. c. li. the company were empowered to improve the approaches to the Charing Cross Bridge, on the Surrey side; and on the 15th of May 1852 they gave the plaintiffs notice that they should require, for the purposes of their act, the land on which thirty houses, which they specified, stood. This led to negotiations, and the result was as follows:—Memorandum of heads of an agreement, dated the 4th of July 1853.—The company to pay Messrs. Tillett the sum of 5,500*l.*, which enables them to pull down, for the purpose of making the street shewn by the white strip on the plan, the houses or buildings indicated. The old materials of the houses, &c. so pulled down, to be the company's. As to such houses as adjoin any of the said houses to be pulled down, the company are to shore up the same, and the exposed party-walls of the same the company are to properly cement. If such party-wall is not of the thickness of one and a half brick, the company to make it of such thickness; but if this be not necessary, by reason of Messrs. Tillett intending to build a new house adjoining, then the company are to pay in money one-half the estimated value of the work so dispensed with. The company to convey to Messrs. Tillett the freehold of the ground shewn on the plan by a red colour. As to the houses which Messrs. Tillett may build on the frontage of the new street, it is understood that both the company and themselves are equally and mutually interested in the character of the street as a respectable and attractive public thoroughfare, and the company is to be consulted on any houses proposed by Messrs. Tillett, and in case of difference between the parties on this point, Messrs. Charles Lee and Richard Withall, or their nominee, shall have power absolutely to define and decide any such question. If by reason of any legal technical difficulty the conveyance of the freehold of the red pieces on either side of the street from the company to Messrs.

Tillett can only be done by the company first taking (as under the powers of their notice to Messrs. Tillett) the whole of the property embraced in that notice, and which comprehended both the red colour on the plan and the white street between, at a gross amount of purchase-money, and then afterwards, at another agreed amount of purchase-money, selling to Messrs. Tillett as freehold the property on the red colour only; and if for such purposes we are asked the amount of those two purchase-moneys, we reply, they will be 8,500*l.* and 3,000*l.* respectively: the only importance of these amounts being, that they should shew as their difference our determined amount of 5,500*l.* as due to Messrs. Tillett.

Two other clauses provided for the payment by the company of the costs and expenses of Mr. Withall.

In the event of a sewer being constructed by the company down the street, and Messrs. Tillett using the same, or any portion, for the drainage of their houses, then Messrs. Tillett to pay for the portion so used, at the rate of two-thirds of the value thereof.

The memorandum, and also a plan, were duly signed by the agents of the plaintiffs and defendants.

The plaintiffs caused many applications to be made, requesting the defendants to complete the purchase, but without effect.

On the 30th of December 1856 the company served the plaintiffs with notice of an intention to apply to parliament to alter the bridge and approaches, so as to adapt the same to the passage of horses and carriages, and for other purposes, and that they required the property in the schedule annexed for the purposes of such alterations. Upon inquiry on behalf of the plaintiffs, the clerk of the company said, the defendants intended to abide by the contract made, but that other houses of the plaintiffs would be required for the undertaking.

The defendants, by their answer, admitted that their agent duly signed the memorandum, and also a plan of the ground; that it was not final, but merely preliminary to a more formal, perfect and complete agreement, and that it was not intended to be

conclusive, as it made no provision for Messrs. Tillett paying the rent; that the agreement could not be performed, as it was vague, uncertain and incomplete; that their powers to execute the works expired on the 13th of June 1854, and that the defendants had no power to perform the agreement; that if the plaintiffs were entitled to any relief it was in damages only, but that they could not be assessed in this court; and after insisting that the plaintiffs were entitled neither to relief nor to compensation, they claimed the benefit of the objections as if they had demurred to the bill.

Mr. Lloyd and Mr. De Gex, for the plaintiffs.—The length of time since the contract was made is not relied on as a bar to the relief asked. The contract was clear and definite. Messrs. Tillett were to receive 5,500*l.* for their interest in the houses taken, with a conveyance back of a part of the land in fee, and the company were to purchase the fee simple of the whole property in the plan for 8,500*l.*, and to sell the fee of part for 3,000*l.* The notice to take the land was of itself a contract which this Court would complete upon finding the price to be paid, and it may be varied by the contract between the parties, so as to allow the company to avail themselves of the compulsory powers in their act. It was arranged that the houses to be built were to be attractive, but no house was to be built unless the parties could agree. It, therefore, introduced no uncertainty into the agreement. The agreement ought, therefore, to be performed, or compensation made for the losses the defendants had sustained by the uncertainty which had prevented the property from being let or dealt with:—

The Marquis of Salisbury v. the Great Northern Railway Company, 17 Q.B. Rep. 840; s. c. 21 Law J. Rep. (N.S.) Chanc. 185.

The Regent's Canal Company v. Ware, 23 Beav. 575; s. c. 23 Law J. Rep. (N.S.) Chanc. 566.

Tawney v. the Lynn and Ely Railway Company, 16 Law J. Rep. (N.S.) Chanc. 282.

Hawkes v. the Eastern Counties Railway Company, 1 De Gex, M. & G. 737;

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s. c. 20 Law J. Rep. (N.S.) Chanc. 243; 22 Ibid. 77; 5 H.L. Cas. 331.
Inge v. the Birmingham, Wolverhampton and Stour Valley Railway Company, 8 De Gex, M. & G. 658; s. c. 1 Sm. & G. 347.

Mr. Baggallay, for the defendants.—The Court cannot perform the agreement. The bill was not filed until after the compulsory powers of the act had expired. The agreement was also incomplete and uncertain. The manner of laying out the houses on each side was not specified. The mode and style of the houses had also to be considered. In fact, nothing but preliminary heads had been arranged, that they might be embodied in a complete agreement:—

Darbey v. Whittaker, 4 Drew. 134.

Collins v. Collins, ante, 184.

THE MASTER OF THE ROLLS.—If the agreement was such that no Court could perform it, that is, assuming it was not valid or that it was void for uncertainty, in these cases no right to compensation would arise; but, assuming the agreement to be valid, but that it could not be performed in consequence of the expiration of the compulsory powers to take land, it may be a question whether compensation ought not to be awarded for any loss, inconvenience or damage that might have been sustained (1).

Mr. Lloyd, in reply.

March 17.—**THE MASTER OF THE ROLLS.**—I collect from the evidence that something more was intended to make the agreement more formal and regular; but still, the memorandum must be considered as a concluded agreement, which, if there were nothing else, this Court would enforce. The Court has, in many cases, enforced the specific performance of agreements, which were so far preliminary that they were to be expanded and embodied in larger terms, and were left with the solicitor for that purpose.

Two objections are taken upon the agreement: one that the powers of the

(1) See 21 & 22 Vict. c. 27.

company had expired, and the other upon the vagueness of the terms of the agreement. With respect to the expiration of the powers, I am by no means clear that the case depends upon whether the powers existed, or whether they had expired at the time when the bill was filed or not. The rights of the plaintiffs would *prima facie* depend upon the position of the parties at the time the agreement was entered into, as it was then that the mutual liabilities were incurred. Upon looking, however, at the terms of the agreement, I do not think it can be carried into effect. There are several elements of uncertainty in the agreement, but I intend to refer to one alone; it relates to the houses, which are to be built on the frontage of the new street. It was argued that this was an essential part of the contract. Assuming that the contract is otherwise free from doubt, the houses were to be of a character and description which must be settled by Charles Lee on the one side and Richard Withall on the other, or by their nominee. Assuming it, then, to be a case of differing, and that they had not settled anything before the bill was filed, I at one time entertained some doubt whether, where the persons themselves were named, and it was not clearly shewn that they could not perform the functions which were required of them, and with which they were entrusted, and there was nothing to shew that they had repudiated them, whether this Court in that case would refuse specific performance. In the case of *Gregory v. Mighell* (2) an agreement was made in 1799 to grant a lease for twenty-five years at a fair and just annual rent, to be fixed by two indifferent persons, the one to be chosen by the plaintiff and the other by the defendant, with liberty to the arbitrators, in case of their differing, to choose one or more umpires. The tenant entered and remained a considerable time in possession. The bill was filed in 1811, and the Master of the Rolls decreed a specific performance of that agreement. He said the plaintiff had no other title to possess the land, and therefore his possession was *prima facie* to be referred to the agreement. Then he referred to the non-payment of rent, and accounts for it by the circum-

(2) 18 Ves. 328.

stance that the rent was not fixed in the manner stipulated by the agreement. He then proceeds:—"After it was known that the arbitrators had not fixed any rent, and that none of the other means provided by the agreement were resorted to, the defendant still acquiesced in the plaintiff's retaining possession of these lands. That is a case in which the failure of the arbitrators to fix the rent can never affect the agreement. It is in part performed, and the Court must find some means of completing its execution. As I have already said, the plaintiff is not to be considered as a trespasser. Some rent he must pay; the amount must be fixed in some other mode; and it seems to me that it should be ascertained by the Master without sending it to another arbitration, which might possibly end in the same way. A specific execution of this agreement must, therefore, be decreed; the Master to ascertain what, in 1799, would have been the fair rent of these premises upon a lease for twenty-one years from that year, and I do not see how I can exempt the defendant from the payment of the costs." That case does appear to go a great length, but it must be explained by the fact that the agreement was for a fair and just annual rent, to be fixed and ascertained by two indifferent persons. This question was fully considered by Sir Wm. Grant in *Milnes v. Gery* (3), which was an agreement for sale, the price to be ascertained by two persons, one to be appointed by either side, or by an umpire to be appointed by those two in case of disagreement. Sir Wm. Grant decreed that that agreement could not be specifically enforced; he said, "The more I have considered this case, the more I am satisfied that, independently of all other objections, there is no such agreement between the parties as can be carried into execution. The only agreement into which the defendant entered was to purchase at a price to be ascertained in a specified mode. No price having ever been fixed in that mode, the parties have not agreed upon any price. Where, then, is the complete and concluded contract which this Court is called upon to execute? The price is of the essence of a contract of sale. In this instance the parties have agreed

(3) 14 Ves. 400.

upon a particular mode of ascertaining the price. The agreement, that the price shall be fixed in one specific manner, certainly does not afford an inference that it is wholly indifferent in what manner it is to be fixed. The Court declaring that the one shall take and the other shall give a price fixed in any other manner does not execute any agreement of theirs, but makes an agreement for them, upon a notion that it may be as advantageous as that which they made for themselves. How can a man be forced to transfer to a stranger that confidence which, upon a subject materially interesting to him, he has reposed in an individual of his own selection? No substantial difference arises from the circumstance that in this case the decision may ultimately fall to an umpire not directly nominated by the parties, as through the medium of the original nominees, they had an influence upon the choice. No one could be chosen without the concurrence of the persons in whose judgment they reciprocally confided. The case of an agreement to sell at a fair valuation is essentially different. In that case no particular means of ascertaining the value are pointed out; there is nothing, therefore, precluding the Court from adopting any means adapted to that purpose." It is upon that principle that the case of *Gregory v. Mighell* must be sustained. This case undoubtedly is not a question of price; but Sir Wm. Grant, I think, puts it in a way which cannot be disputed, which is, whether the matter in question is of the essence of the contract, whether it is an essential part of it; and I think that the building and the mode in which these houses are to be built is an essential part of the contract. In *Milnes v. Gery* it was shewn that the price could not be agreed upon between the parties in the way they had contemplated. Here it is not proved that the style in which these houses were to be built could not be determined in the mode contemplated by the parties, because there was nothing to shew that when the time arose for building the houses, these two gentlemen might not agree upon the character of the houses, or appoint a nominee to determine the question. It was argued that this Court could specifically enforce a contract which,

it may afterwards turn out, is incapable of performance. Suppose it should so happen that these gentlemen will not fix the character of the houses, and will not have anything to do with the matter; the result will then be that the Court ought not to have decreed specific performance. The Court cannot decree specific performance hypothetically on an event to happen hereafter. This was illustrated by the case of *Darbey v. Whittaker*. There the price was to be fixed at a valuation to be made by two persons to be named, or their umpire: that is to say, to be valued "by Mr. George Knight and Mr. Lowndes, or their umpire." And on those very words it was held, that the agreement was too vague to be specifically enforced. As, therefore, I consider this provision to be an essential part of the agreement, and that it cannot be enforced with certainty, I can make no decree for the specific performance of the contract, but as I think there was a concluded agreement between the parties, I shall dismiss the bill, without costs.

WOOD, V.C. }
June 16. }

DUIGNAN v. WALKER.

Injunction—Trade Restriction—Distance—Measurement.

For the purposes of an injunction not to carry on business within a fixed distance from a particular place, that distance must be measured as the crow flies, and not by the nearest practicable route.

Mr. Giffard and Mr. Karslake moved to commit the defendant for breach of an injunction which had been obtained by the plaintiff, restraining him "from practising or carrying on business as an attorney or solicitor, or clerk to an attorney or solicitor, at any place within seven miles from the plaintiff's office or place of business at Walsall, in the county of Stafford, except the town of Wolverhampton, in the same county, without the plaintiff's consent in writing first had and obtained." Since the injunction had been granted the defendant had practised as an attorney in the Dudley County Court, which the plaintiff alleged to be within seven miles,

as the crow flies, from his office at Walsall, although by the nearest practicable route it was over that distance. The question was, how the distance was to be measured. They cited *Lake v. Butler* (1).

Mr. Roberts, for the defendant, claimed to have it measured by the road. If the parties were practically seven miles apart, it did not signify how near they were in reality.

WOOD, V.C. said that the distance must be measured in a straight line upon a horizontal plane; and the defendant not admitting that, even by this mode of measurement, the County Court of Dudley would be found to be within seven miles of the plaintiff's offices, there must be an inquiry.

WOOD, V.C. } THE CORPORATION OF LIVER-
July 20, 21. } POOL v. WRIGHT.

Clerk of the Peace—Agreement to pay by Salary in lieu of Fees—Public Policy.

A clerk of the peace appointed by the corporation of a borough under the Municipal Corporations Act, holding office during good behaviour, and having fees attached to his office, cannot enter into an agreement with the corporation to receive a salary and account for the fees, such an agreement being void on two grounds of public policy: first, because a person accepting an office of trust can make no bargain in respect of that office; and, secondly, because the law presumes that all the fees are required for the purpose of enabling him to uphold the dignity and perform properly the duties of his office.

This was a demurrer. The bill stated the passing of the Municipal Corporations Act (5 & 6 Will. 4. c. 76), whereby provision is made for granting, upon the request of the council for any borough, a separate Court of Quarter Sessions of the Peace, to be held in and for such borough, and for the appointment by such council of a fit person to be clerk of the peace during his good behaviour, the separate grant of Quarter Sessions for the borough of Liverpool, and the appointment of a

clerk of the peace, who continued to hold his office till his death in 1844.

The 3rd paragraph of the bill was as follows:—"At a meeting of the council of the borough of Liverpool, held on the 13th of November 1844, with a view to appointing a successor to the office, the following resolution was passed:—"That regard being had to the duties of the clerk of the peace of this borough, it is the opinion of this council that the net emoluments of that office ought not to exceed the sum of 500*l.* per annum."

"4. At the same meeting, and after the above resolution was passed, the defendant was appointed clerk of the peace of the borough. Previous to his appointment the defendant had been fully informed of the views of the council concerning the emoluments to be derived from the office of clerk of the peace, and he accepted the office on the terms of the resolution set forth in the 3rd paragraph.

"5. The Recorder of the borough of Liverpool having held a greater number of sessions each year than was contemplated at the time of the appointment of the defendant, and the business in the office of the clerk of the peace having increased, the council of the borough agreed in the year 1848 to pay the defendant the additional sum of 160*l.* annually, besides defraying the disbursements incidental to the office, making the emoluments of the office amount to the annual sum of 660*l.*

"6. The agreement between the plaintiffs and the defendant, upon and from the time of his first appointment, was that the surplus of fees received by the defendant as clerk of the peace of the said borough, after the payment of his said salary, but, as from the time of the said increase in the salary, subject also to his retaining thereout the said disbursements incidental to the office, should be placed to the credit of the borough fund.

"7. Up to the year 1851 the costs of prosecutions were paid out of the borough fund, but in that year Government placed Liverpool on the same footing upon which other boroughs and counties had been for some time placed, and agreed to defray the costs of such prosecutions out of a sum annually voted by parliament for that purpose.

"8. In Liverpool prosecutions are conducted by the town clerk as public prosecutor, the money for the necessary disbursements being provided out of the corporate funds.

"9. These disbursements, so far as regards prosecutions at the borough sessions, comprise counsel's fees, the fees of the clerk of the peace, and payments to witnesses. The bills of costs, including these disbursements and the professional charges of the town clerk are taxed by the clerk of the peace, and after each session, up to the time when Government agreed to defray the costs of such prosecutions, the town clerk submitted to the finance committee a list of the disbursements, which included the fees of the clerk of the peace, though the same were not actually paid, being treated as a matter of account and placed to the credit of the department of the clerk of the peace in the borough fund account.

"10. When Government undertook the repayment of the costs of prosecutions it became necessary that a formal order of the Court of Quarter Sessions upon the treasurer of the borough for payment should be obtained, and the clerk of the peace objected to tax the bills of costs as formerly and to obtain the necessary order of the Court, on the ground that each of the bills included the amount of the fees of the clerk of the peace, and the order to be obtained amounted to a certificate from him that those fees had actually been paid.

"12. With the view of obtaining the orders for payment and transmitting the same to Government, the fees due to the office of clerk of the peace were paid to the defendant as from February 1852; but he has never accounted for them to the treasurer, and the amount of such fees, together with other fees received by him as clerk of the peace, has considerably exceeded the salary and disbursements."

The 13th paragraph averred that the defendant, subsequently to the agreement by Government, had received salary at the rate of 660*l.* a year, having on the 31st of August 1852 received from the treasurer 34*l.* 7*s.* 1*d.*, being nineteen days' salary due on the 28th of May 1852, and given a receipt for the same as salary, and he subsequently received fees as from Feb-

ruary 1852, having thus received salary and fees for the same period.

14. "At the time when the payment for salary mentioned in the last paragraph was made, there was also paid to the defendant 208*l.* 4*s.* 4*d.* for salary for a period subsequent to the 28th of May 1852."

The bill prayed that the defendant might be decreed to account with the plaintiffs in respect of all monies received by him in respect of fees payable to the clerk of the peace of the borough, and of all sums received by him in respect of salary or on account of disbursements, and of all sums which would have become payable to him for salary or disbursements as from the month of December 1851, and to pay what should be found due.

Mr. Amphlett, Mr. G. M. Giffard and Mr. E. Macnaghten, in support of the demurrer, relied upon the following grounds:—First, there is no agreement alleged upon which the plaintiffs are entitled to relief; secondly, the agreement as alleged is illegal, as being against public policy; thirdly, if not illegal, it was, at all events, without consideration; and, lastly, the subsequent circumstances alleged in the bill shew that the agreement is no longer applicable, or the plaintiffs have no longer any interest in its performance. They cited the following statutes and cases:—

5 & 6 *Edw.* 6. c. 16.

1 *W. & M.* sess. 1. c. 21. ss. 5, 8.

49 *Geo.* 3. c. 126.

14 & 15 *Vict.* c. 55.

Law v. Law, 3 P. Wms. 391.

Harrington v. Du Chatel, 1 Bro. C.C. 124.

The Queen v. the Mayor, &c. of Stamford, 6 Q.B. Rep. 433.

Egerton v. Brownlow, 4 H.L. Cas. 1; s. c. 23 Law J. Rep. (n.s.) Chanc. 345.

Layng v. Paine, Willes, 571.

Parsons v. Thompson, 1 H. Black. 322.

Garforth v. Fearon, Ibid. 327.

Palmer v. Vaughan, 3 Swanst. 173.

Palmer v. Bate, 6 B. Moo. 28; s. c. 2 Ball & B. 673.

Aston v. Guinnell, 3 You. & J. 136.

Sterry v. Clifton, 9 Com. B. Rep. 110; s. c. 19 Law J. Rep. (n.s.) C.P. 237.

Harrington v. Klopogge, 2 Ball & B. 678, n.; s. c. 2 Chit. Rep. 475.

Mr. Rolt and *Mr. C. Hall*, in support of the bill, contended that there was nothing illegal in the agreement as alleged, there being no allegation of such a corrupt bargain as would render it void under the statute of 5 & 6 Edw. 6. The defence was dishonest; during part of the time the defendant had received fees and salary, and the plaintiffs were clearly entitled to an account—*Sharp v. Taylor* (1).

WOOD, V.C. (without hearing a reply).—I think this demurrer must be allowed. There is a little difficulty, no doubt, in arriving at what the agreement is; but I should be sorry to allow the demurrer on that narrow ground alone, and therefore I take the agreement to be such, in effect, as is represented in paragraph 6, namely, an agreement that upon and from the time of the appointment of this gentleman as clerk of the peace, the surplus of his fees received by him, after payment of his salary, but, as from the time of the increase in the salary mentioned in the previous paragraph, subject to his disbursements being allowed, should be paid over to the credit of the borough fund. I say it is a little difficult to arrive at that being the agreement, because the 3rd paragraph clearly states that the net emoluments of the office ought not to exceed 500*l.* per annum, which would be a matter in the hands of the town council, and they would be capable of adjusting the fees from time to time in order to arrive at that amount. Then, the 4th paragraph says, that previous to his appointment the defendant had been fully informed of the views of the council concerning the emoluments to be derived from the office of clerk of the peace, and he accepted the office on the terms of the resolution, which might well be consistent, as has been urged, with his being willing at all times to assent, as far as his assent is requisite, to any reduction in the fees, without raising any claim to compensation, so long as the amount of salary was retained at about 500*l.* a-year. It is exceedingly difficult to get at the

agreement as it is stated in the bill; but if the agreement is good for anything, I suppose it is meant by the 3rd and 4th paragraphs to be for all time after the appointment, which he holds during good behaviour, the resolution being that, regard being had to his duties, it ought not to exceed 500*l.* a-year. It seems a very reasonable arrangement to come to, that when the duties have increased the salary should be increased; but it seems a sort of fluctuating agreement, very difficult for this Court to perform, being an agreement, not under seal, by a corporation with an officer who holds his office during good behaviour, that from time to time, regard being had to the increase of his duties, he should have a salary instead of fees. That is a strange sort of agreement for the Court to enforce. However, I take it in the view most favourable to the plaintiffs: that the agreement is to be taken as it is stated in paragraph 6; that he is to pay over all the surplus, after the payment of the 500*l.*; but they, out of their bounty, have made him an additional allowance of 160*l.* a-year. At all events, after keeping 660*l.*, he was to pay over the balance to the borough fund.

It seems to me that there are two plain grounds of public policy which render such an agreement illegal; and there is a third point arising from the situation of the plaintiffs, which I will consider presently, and which does not seem to me at all to improve their position, but rather to increase their difficulty. The two grounds of public policy are these. There is, first, the whole class of statutes, agreeing to a great extent with the common law in that respect, although making the common law more forcible, and giving additional penalties—a class of statutes, which say that an office of trust of this description is not an office as to which any bargain can be made. I am now dealing with the corporation as if they had nothing to do with the table of fees; I will keep that separate. I will suppose that they simply have the appointment of the clerk of the peace; that no table had been made, and that no Secretary of State was required to sanction them; in which case he takes such fees as are allowed by the county. There is a class of authorities, and

(1) 2 Phill. 801.

that class of statutes, the only effect of which, as I said before, has been to give additional sanction by penalties, to the doctrine of the common law, by which any officer who accepts an office of trust is prohibited from making any payment in respect of such office, and any person appointing him to the office is prohibited from receiving any payment. When the statute uses the word "corrupt," I apprehend it does not depend on whether the person does it with a corrupt motive or not, or whether the person having the appointment is a public body or not; and I put in the course of the argument the case of a trustee of a charity appointing a steward of a manor at a salary, intending the surplus fees to go to the charity. It is, within the meaning of the statute, equally corrupt if any public body having the appointment to an office of this description, says, "although upon your appointment to the office you at once obtained the right to receive certain fees which are considered proper and sufficient, and not more than sufficient for the discharge of the duties of that office, you shall make over a part to me, the appointor, or to my *cestui que trust*, if I am a trustee." Any person doing that would have been obnoxious to these statutes, obnoxious also to the common law, and such an agreement would be an illegal agreement on that ground alone. Therefore, when a person appointing a clerk of the peace entitled to such fees makes a bargain that he shall pay over part of the fees to the person who appoints him, it does come within the purview of the statute. Mr. Hall says that he is the officer of the corporation, and they may pay him a salary if they like. But that is not so, it is quite clear. They have the appointment, but he is appointed during good behaviour; he is not appointed at a salary, and could not be appointed at a salary, as the payment is provided for distinctly by the 125th section of the act. He is to have those fees which are sanctioned by the Secretary of State; he takes by virtue of the appointment; he is entitled during good behaviour, and he is entitled to the fees allowed by the county before any table of fees had been fixed at all. Therefore, whether the fees he takes immediately on

his appointment to the office are the fees he takes through the county, or the fees he takes through the medium of a table of fees appointed by the corporation, to those fees he is absolutely entitled, and with one shilling of those fees he is not entitled to part to the persons appointing him. That is the first ground of public policy.

Then there is a second ground of public policy, for which the case of *Palmer v. Vaughan* is the leading authority, which is this, that independently of any corrupt bargain with the appointor, nobody can deal with the fees of a person who holds an office of this description, because the law presumes, with reference to an office of trust, that he requires the payment which the law has assigned to him for the purpose of upholding the dignity and performing properly the duties of that office; and therefore it will not allow him to part with any portion of those fees either to the appointor or to anybody else. He is not allowed to charge or encumber them. That was the case of *Parsons v. Thompson*. Any attempt to assign any portion of the fees of his office is illegal on the ground of public policy, and held, therefore, to be void. This gentleman, when appointed, must be taken to have fees which are only the proper fees for him to receive. He takes that set of fees, and is not entitled to alienate any portion either to the appointor or to anybody else. Those two grounds alone would strike at the root of any such agreement as I have supposed to be averred upon the face of the bill, but I have felt some difficulty in finding out what the agreement is, supposing it to be as is averred in the 6th paragraph.

Now let us see whether the position of the corporation improves their legal right upon this statute. They have, besides the circumstance of their being appointors to the office, the power of fixing the fees with the consent of the Secretary of State, and they have the power of diminishing those fees; and, therefore, they, of all others, should be the last persons to wish to enter into an agreement of this sort, because they have the whole fees in their hands; and accordingly that resolution in the 3rd paragraph might be a reasonable resolution to come to, that 500*l.* a-year is enough for

such an officer. All they have to do is, to adjust and vary the fees from time to time, with the consent of the Secretary of State, and to take care that he shall never get more, unless his duties so increase as to make it reasonable that he should have more; but the value of the resolution and of the communication of the resolution to any officer is this, that on applying to the Secretary of State to reduce the fees, that officer's mouth is stopped, and he cannot say they are doing him an injury in reducing those fees which were fixed at the time of this appointment, that appointment being during good behaviour. The answer would be that he was told at the time of his appointment, that 500*l.* a-year was considered sufficient, and all that the reduction does is to bring him down to that position. That might be a perfectly legitimate course, and one that might be perfectly successful, as it seems to me.

But now, taking the view assumed in the bill, in addition to the grounds of public policy arising from the corporation being the appointors to the office, who cannot, therefore, take back any of the emoluments, you have this additional fact, that there are means, considering the position they are placed in, of increasing these fees, subject, of course, to the approbation of the Secretary of State, who might or might not be acquainted with all the circumstances of the case. They have the power of imposing fees, to be paid not merely by the borough fund, but by the public generally, and when they have imposed that table of fees, which they have the power of raising or lowering, the surplus is to go into the chest of the municipality, and though they cannot levy, as Mr. Rolt says, anything on the public themselves, they cannot make the depositors of railway plans or the like contribute a farthing to the borough fund, yet they may hold out to the public that the proper amount of fees to be paid to their officer is so much, and so arrange it that they shall have 100*l.* or 200*l.* surplus, which shall go into their own fund. That makes the case rather worse instead of better. I do not say that it has happened here at all; but it is a privilege which might be very greatly abused. Take what has already happened, that the government now pay the fees

for prosecutions, which did fall on the borough fund; it would be a way of enriching the borough fund at the expense of all the tax-payers throughout the country. They say the fees are much higher than they need be; we do not think the clerk of the peace wants more than 660*l.* a year, but we will tell the world that the clerk of the peace wants 6,000*l.* a year, and we will tell Her Majesty's Government that prosecutions ought to be paid for at such a rate, and we will put the extra amount into the purse of the corporation. How can that be consistent with any principle of public policy? This is not the case of illegality which is raised by the demurrer. The question of illegality raised by the demurrer is the general question of public policy, whether any clerk of the peace holding office during good behaviour, having fees attached to his office, can alienate any of those fees to any human being, or whether it is consistent with the acts of parliament that he can alienate them to the persons who appoint him. But there is an additional ground here suggested, why in the particular case before me, this corporation having the power to shift the table of fees, it would be singularly objectionable and more than usually obnoxious to the objection on the ground of public policy, that persons so situated should have this power. There was a case suggested which I could understand, which was this. Supposing, though it is contrary to the facts stated on the bill, that all the fees payable to the clerk of the peace were payable out of the borough fund, and that he had no other fees to receive, then, no doubt, there might not be so much ground for objection in saying, we are content to pay you in the shape of fees, and under a table of fees these particular sums, but, in reality, we shall only pay you a salary because it would be reduced to a mere matter of book-keeping. The best answer to that is, that it is not any such thing. If it were, the course would be to sweep away the table of fees and pay the salary. I could understand an act of parliament saying, as has been done with regard to many officers of this court, we think it right that the public shall pay a certain amount of fees still, and that the officers shall account for them; but until an act of parliament is

passed for that purpose it is quite plain that a municipal corporation has no power to deal with a fund in that way, and even if the whole fees happened to be paid out of the borough fund, which they are not, I question whether, within the authority of the act of parliament, they could enter into this arrangement; but as the thing stands at present there are none paid out of the borough fund, because, in reality, the Government pays the bulk, and then there are the other fees.

The only remaining point is, with reference to the thirteenth and fourteenth paragraphs. First, it is said, the clerk of the peace has the fees in his hands, and therefore he ought to account for them, on the principle of *Sharp v. Taylor*. But that is not so. The principle of public policy, which says that the fees are inalienable, prevents your accounting for the fees. If the defendant had executed a solemn deed assigning his fees, still the law says he cannot part with them; they are necessary for the dignity of his office, and he must hold them whatever may be the consequences. That is as regards the fees. As regards the salary, it might possibly be alleged that there was some degree of injustice in his holding both the salary and the fees. Whether that might be recovered under all the circumstances of the case might be a question. If the plaintiffs wish to amend their bill for the purpose of trying that, I have not the least objection. It is clear that upon this bill they could not succeed, on account of the Statute of Limitations, because the only payment of salary is alleged thus: that on the 31st of August 1852 the defendant received 34*l.* 7*s.* 1*d.* for salary due to the 28th of May 1852, and at the time when the payment for salary was made, that is August 1852, he received a sum of 208*l.* 4*s.* 4*d.* That being more than six years ago, of course it could not be dealt with upon this bill. If the plaintiffs think it worth while to amend upon that point, of course I shall give them leave to amend. As to some observations of Mr. Rolt, with respect to the honesty of this defence, I am bound to say, in justice to the defendant, that where there is a clear objection as there is in point of law to the bill, the defendant is justified in raising the ques-

tion, and in getting rid of the suit by raising the short point. The question of propriety or impropriety of conduct hardly comes into consideration on demurrer. It is a simple question on the point of law; nothing else is raised, and nothing else can be raised. He wishes to put an end to a suit which may become harassing, and which can end in no result, and I cannot tell on demurrer what the nature of the defence may be. The demurrer will be allowed, with liberty to amend.

STUART, V.C. } HANDLEY v. DAVIS AND
Feb. 9. } ANOTHER.

Trustees' Relief Act, 1847—Payment of Legacy into Court—Costs.

Where the trustees of a legacy, given for the benefit of a lady for life, with limitations over, one of such trustees being also the residuary legatee under the will, refused to comply with the request of the tenant for life, that they would pay the legacy into court under the provisions of the Trustees' Relief Act, 1847, although she offered to pay the costs of the proceedings for that purpose, and she consequently instituted a suit and obtained an order for payment of the fund into court, the costs of the suit were directed to be paid out of the residue.

This was a suit to have transferred into court a sum of 10,000*l.*, and the stocks, funds and securities in which the same had been invested, the plaintiffs, the Hon. Caroline Handley and her second son, an infant, claiming to be entitled thereto under the will of George Trafford Heald, deceased.

By the will in question, the testator gave all his real and personal estate to Daniel Davis and Henry Daniel Davis, upon trust to convert the same into money, and out of the money so produced to pay his debts, funeral and testamentary expenses and legacies, and invest the residue in government or real securities. He then directed his trustees, in the first place, to set apart the sum of 10,000*l.*, or the securities on which the same should have been invested, and stand possessed thereof upon trust for the said Hon. Caroline Handley,

during her life, and after her death upon trust for her said second son, living at her decease, in case he should attain twenty-one, with other limitations over in favour of her children. The testator then gave the residue of his property to the said Henry Daniel Davis.

After the decease of the testator the said trustees set apart and invested a sum of 10,000*l.* out of his residuary estate, pursuant to the direction contained in the will.

Subsequently, and in May 1858, the plaintiff, the Hon. Caroline Handley, through her solicitor, requested the said trustees to pay the said trust fund of 10,000*l.* into court, under the provisions of the Trustees' Relief Act of 1847, and offered to pay their costs of so doing.

To this request the trustees declined to accede, alleging that the sum was already invested pursuant to the trusts of the will; that they saw no reason for paying the fund into court; and they declined to take a proceeding, the effect of which would be to divest them of a trust which they wished to execute. The bill in this suit was, consequently, filed against the said trustees as defendants.

The case now came on to be heard upon motion for decree.

Mr. Malins and *Mr. Nalder*, for the plaintiffs, asked for an order in conformity with the prayer of the bill, that the sum of 10,000*l.* might be paid into court, free from all charges of investment; that the same when paid in might be duly invested, and the interest of such investment paid according to the directions of the will; and that the defendants might be ordered to pay the costs of the suit.

Mr. Bacon and *Mr. Martindale*, for the defendants, admitted that the plaintiffs were entitled to have the fund paid into court, and they withdrew a passage in the answer of the defendants, averring the suit to be unnecessary and improper. They submitted, however, that inasmuch as the Trustees' Relief Act of 1847 was not compulsory in its terms upon the trustees, but only empowered them to discharge themselves of their trust, if they thought fit, by payment of the fund into court, they ought not to be made to bear the costs of the present suit.

Mr. Malins, in reply, submitted that though the Trustees' Relief Act was not compulsory upon the trustees, yet, as it afforded a cheaper mode of getting the fund secured in court, the trustees, by refusing to adopt that course when requested so to do by the plaintiff, and putting her to the more expensive course of instituting a suit to obtain a transfer into court, her right to which they admitted to be unquestionable, ought to be made to pay the costs of the suit. One of them, H. D. Davis, the residuary legatee, was a professional man, and must have been well aware that this question of costs would be raised.

STUART, V.C. said that upon the question of costs, the fact of the trustees having declined to have recourse to that power which the legislature had given to them, was, to his mind, most important. The whole argument, on behalf of the trustees and executors, turned upon the act of parliament not being compulsory; but that had very little to do with the question as to who was to bear the costs of the suit, when a cheaper and more expeditious mode of proceeding was open to the trustees. Soon after the passing of the Legacy Act of 1797, empowering executors to pay into court a legacy given to an infant, in order that it might be secured for the benefit of the infant, the attention of the Master of the Rolls of that time was called to the effect which the discretionary power given to the executors by that act would have upon the costs of a suit to have a legacy secured. In the case of *Whopham v. Wingfield* (1), the Master of the Rolls said, "For the future I shall not give the costs in such a case, for, since the late Legacy Act (2), the executor has nothing to do but, under that act, to pay the legacy into court, and then he has done; and the infant, when of age, may petition for it. That ought to be known, as it will save great expense and prevent the hardship to residuary legatees." By the hardship thus alluded to was meant the hardship upon residuary legatees of their being obliged to bear the costs, as they must have borne

(1) 4 Vea. 630.

(2) 36 Geo. 3. c. 52. s. 32.

them, of the ordinary suit by a legatee who was desirous of having his legacy appropriated and secured under the jurisdiction of the Court. The principle stated by the Master of the Rolls, in *Whopham v. Wingfield*, applied entirely to the present case. In the present case the costs of the suit must, according to the usual course, be borne by the residuary legatee. The costs of every suit to invest and secure a legacy must be borne by the residuary legatee, unless the assets turned out to have been so dealt with as to make it impossible to find a residue. Speaking generally, the costs of a suit of this kind must come out of the general residue of the estate. The residuary legatee, who was here the trustee and executor himself, had wilfully refused to have recourse to the cheaper mode of proceeding, and had wilfully driven the legatees to a longer and more expensive course. That alone would have a very great influence upon the discretion of the Court in deciding the question of costs. He was of opinion, therefore, that the case was one in which, both upon the ordinary principle of the Court and upon its own particular circumstances, the costs must be borne by the general estate.

KINDERSLEY, V.C. *In re* THE WRYSGAN
March 5. SLATE QUARRYING
 COMPANY, *ex parte*
 HUMBY.

Company — Winding up — Contributory — Transferee of Shares.

Upon the winding up of a company, carried on upon the cost-book principle, it appeared, by their deed, that shares in the company would pass by the delivery of the certificates; but no shareholder was entitled to a dividend unless his name was entered in the share register-book. A shareholder, who had transferred his shares, but whose transferee had not been registered, was held to be liable as a contributory of the company.

The above company was established upon the cost-book principle. In May 1857 a winding-up order was made, under the acts of 1848 and 1849. By the company's deed it was, amongst other things,

provided, that the delivery of shares should be a sufficient transfer; that the managing directors and purser should keep a share register-book, and enter therein the names of the shareholders, and the number of the shares held by them; and that the holders of shares might, on application to the purser, require their shares to be registered upon giving one day's previous notice of their intention. It was also provided, that the delivery of the certificates of shares should be a sufficient transfer, but that no holder of shares should be entitled to dividends until the transfer should have been registered; and that after the purser should have made an entry in the register of the name of the party to whom any shares should have been transferred, the interest of the former registered shareholder should cease, and he or she should be thereby freed from all liability.

It appeared that James Humby was a registered holder of certificates for 260 shares, which he handed over to Mr. Manuel, a broker, and at the same time gave notice to the purser, Mr. Wilkinson, of his having done so; but did not inform him of the name of the person to whom they were transferred. A letter was then written to Mr. Humby by the purser, requesting the name of the transferee; and Mr. Humby wrote in answer that he could not inform him of the name. A question was now raised, upon an adjourned summons from chambers, as to the liability of Mr. Humby to be placed upon the list of contributories.

Mr. Baily and Mr. De Gex, for the official manager, contended that Mr. Humby's name had been properly placed upon the list of contributories. He had been registered as the holder of these 260 shares; and although he had transferred them to Mr. Manuel, that transfer had never been registered, and until that was done Mr. Humby remained liable.

Mr. Glasse and Mr. W. D. Lewis appeared for Mr. Humby, and submitted that, under the provisions of the society's deed, the transfer of shares was sufficient to entitle Mr. Manuel to be registered, and Mr. Humby could enforce the registry against Mr. Manuel. The transfer was

complete without registry, although the transferee could not obtain the dividends without having his name registered; but Mr. Humby had transferred all his rights to Mr. Manuel, who was now the only person liable to the company.

The following cases were cited:—

Gordon's case, 3 De Gex & Sm. 249.

Shaw v. Fisher, 2 Ibid. 11.

Chartres' case, 1 Ibid. 581.

In re The Court Grange Silver Lead Company, ex parte De Castro, 2 Jur. N.S. 1203.

In re the Mexican and South American Mining Company, ex parte Barclay, 27 Law J. Rep. (N.S.) Chanc. 660.

KINDERSLEY, V.C.—The various phases of absurdity which these cases present are without number, and it is a marvel how any man in his senses can risk his money by becoming a member of these companies. The provisions of this company are somewhat peculiar. It professes to proceed on the cost-book principle, and the certificates of shares pass as scrip, and any man who gets possession of them may obtain registration; but the question is, whether Mr. Humby, who was a registered shareholder, has discharged himself from liability to the company by merely transferring the shares, though the name of the transferee has not been registered. It appears clearly that the holder of the certificates has the property in the shares; and though it is not provided that he shall not become a shareholder until he is registered, still that effect is clearly implied, because he is entitled to no dividend until his name is entered in the register-book. One of the clauses of the deed provides that when the entry is made in the register, then the interest of the former shareholder ceases, and he is freed from all liability. Nothing can be more explicit than that provision; but the natural inference is, that until the name of the transferee is registered the former holder remains liable; and there is nothing in the deed or in law which can make his liability cease until the fresh registry is effected. It is unnecessary to provide that the party shall continue a shareholder until the act is done upon which alone the liability passes

to another party. It has been argued that a contract must be implied on the part of Manuel to obtain registration; but neither party ever dreamed of such an obligation, and the shares passed in the same manner from hand to hand until the bubble burst. There was no intention on the part of Humby to compel Manuel to register; and suppose Manuel had passed the shares to another person, there could have been no object in Manuel being registered. The whole question, however, appears to me to be concluded by what passed between Mr. Humby and the purser of the company, which clearly proves that Humby did not intend to take any steps to get Manuel to register his name. He thought he had done all that was necessary to get rid of his shares, when, in fact, he had done no such thing. His name must therefore be put upon the list of contributories. The costs of the official manager will come out of the estate.

M.R. } YESCOMBE v. LANDOR.
May 5, 31. }

Judgment—Charge on Lands under 1 & 2 Vict. c. 110.—Tenant for Life—Impounding Interim Rents.

The 1 & 2 Vict. c. 110. declares that a judgment at law shall not be enforced for a given period, but a Court of equity will in the mean time restrain trustees from paying to the debtor, a tenant for life, the income arising from the property affected until the charge can be enforced.

*A judgment creditor of a tenant for life of real estate sued out an *elegit*, but was unable to obtain payment of his demand, as the estates were vested in trustees. Upon a bill by the judgment creditor, asking for the aid of this Court to obtain satisfaction of his demand,—Held, that he was entitled to an injunction to restrain the trustees from paying the rents and profits of the estates to the tenant for life until the plaintiffs were in a position to obtain the benefit of the judgment.*

The bill in this case was filed, by the Rev. Morris Yescombe and Mary Jane, his wife, against Walter Landor, Robert Landor and Walter Savage Landor, praying

for a declaration that a judgment obtained by them against Walter Savage Landor was a valid charge upon his life interest in certain estates, called "Ipsley Court," situate in the county of Worcester, and the Llantonny estate, in the county of Monmouth. It also prayed the aid of the Court in obtaining the benefit of an *elegit* sued out, and that the trustees might be restrained from paying the rents to him.

The plaintiffs, in an action for libel, obtained a judgment against Walter Savage Landor for 1,362*l.*; it was entered up on the 31st of January 1859, and registered on the 7th of February following.

The bill alleged that Walter Savage Landor had gone to Italy to avoid payment, and that the plaintiffs had sued out an *elegit* upon the judgment; but that they had been unable to execute it in consequence of the defendant not having any lands vested in him at law; but that the plaintiffs had recently discovered that the estates called Ipsley Court and Llantonny, the former alone producing about 1,200*l.* a year, were vested in Walter and Robert Landor, upon trust to pay the rents and profits to Walter Savage Landor for life, with remainders over.

The plaintiffs gave a notice of motion that the trustees might be restrained from paying the rents to Walter Savage Landor. The trustees demurred to the bill for want of equity.

Mr. R. Palmer and Mr. C. Barber, in support of the demurrer.—The estate is equitable; a bill therefore will not lie to enforce an *elegit*. The 1 & 2 Vict. c. 110. ss. 13, 14. would, no doubt, after the lapse of a year, give an equitable charge; but in the mean time the plaintiffs had no right to come into this court to enforce their judgment. The provision in the statute was for the year equal to a covenant for quiet enjoyment.—

Waters v. Taylor, 2 Ves. & B. 299.

The Derbyshire and Staffordshire Railway Company v. Bainbrigge, 15 Beav. 146.

Mr. Follett and Mr. Southgate, for the plaintiffs.—The property which was ultimately to be made available was a life estate; the tenant for life had a right

to the rents from year to year. Did the statute 1 & 2 Vict. c. 110. intend that he should receive all the rents, without any reference to the ultimate rights of the judgment creditor? The act contained nothing which prevented the Court from protecting the rights of any party who had or might have an interest in the estate. The plaintiffs, therefore, had a clear right to ask the Court to restrain the trustees of this estate from paying over the rents which, through the tenant for life, were charged with the payment of this debt. A judgment creditor was entitled to an order restraining the payment of the dividends of stock to a debtor who was tenant for life—*Watts v. Jefferyes* (1). An *elegit* having been sued out, the title of the judgment creditor against the real estate was complete; but his power of suing was restrained for six months in respect of stock, and for twelve months in respect of land. The Court, however, would assist him in dealing with his legal rights.—

Smith v. Hurst, 10 Hare, 30; s. c. 22

Law J. Rep. (n.s.) Chanc. 289.

Smith v. Hurst, 1 Coll. 705.

Mackinnon v. Stewart, 1 Sim. N.S. 76;

s. c. 20 Law J. Rep. (n.s.) Chanc. 49.

Bristed v. Wilkins, 3 Hare, 235.

3 & 4 Vict. c. 82.

Jones v. Bailey, 17 Beav. 582.

But though the judgment creditor was restrained from immediately having the benefit of his charge, still the Court would prevent the property from being deteriorated or wasted; it would not allow a house subject to such a charge to be pulled down. It would also interfere when there was an expiring interest—as, for instance, long annuities which expire next year—if it did not, a judgment creditor would get nothing. The 1 & 2 Vict. c. 110. was a remedial statute, given in lieu of the right to take the creditor in execution. The plaintiffs were told that they must take under the statute; but they were not told how the Statute of Frauds (29 Car. 2. c. 3.) required the execution of the *elegit*. The sheriff, however, was not in possession, and the act did not put him in possession; the creditor was merely left to bring an ejectment.—

(1) 3 Mac. & G. 372; s. c. 20 Law J. Rep. (n.s.) Chanc. 659.

1 *Archbold's Practice*, 649, 10th ed.

Taylor v. Cole, 3 Term Rep. 292.

Jefferson v. Dawson, 3 Keb. 243.

Neate v. the Duke of Marlborough, 9 Sim. 60; s. c. 3 Myl. & Cr. 407.

The plaintiff stated his inability to get relief at law, and he asked the aid of the Court. The 17 & 18 Vict. c. 125. s. 61. gave further benefits to judgment creditors; it empowered them to attach an equitable debt in the hands of trustees. The relief was analogous to that given by the Statute of Frauds. The bill, therefore, was sustainable: were it not so, W. S. Landor would have power to avoid payment of the debt.—

Gore v. Bowser, 3 Sm. & Gif. 1; s. c. 24 Law J. Rep. (N.S.) Chanc. 316, 440.

Bennett v. Powell, 3 Drew. 326; s. c. 24 Law J. Rep. (N.S.) Chanc. 736.

Harris v. Davison, 15 Sim. 128; s. c. 15 Law J. Rep. (N.S.) Chanc. 255.

Prideaux on Judgments, 70, et seq. 4th edit.

Mr. Palmer, in reply.—The charge is a cumulative security upon real estate, but there are no means of reaching stock or funds except by a charging order, and whether legal or equitable it must be executed in this court. Can the plaintiffs do anything equivalent to taking possession? There was no charge upon the present rents. There was no allegation that the *elegit* could not be executed: on the contrary, it was clear that it could be executed at law, and the plaintiffs have no defence against the demurrer. By means of the sheriff, the plaintiff could have got possession of the estates by virtue of the Statute of Frauds, 29 Car. 2. c. 3. s. 10. It was said that in all cases of trust relief must be obtained in this court, but no such case had been cited, and the statute last mentioned negatived the allegation.—

Harris v. Pugh, 4 Bing. 335; s. c. 5 Law J. Rep. C.P. 189.

Doe d. Hull v. Greenhill, 4 B. & Ald. 684.

Harris v. Booker, 4 Bing. 97; s. c. 5 Law J. Rep. C.P. 92.

May 31.—The MASTER OF THE ROLLS.
—The decision in *Watts v. Jefferyes* was

made upon a sum of stock, but it equally applies to land. The distinction insisted on between stock and land was that the one can be dissipated, while the other cannot; that distinction, it was said, is recognized and provided for by the 1 & 2 Vict. c. 110. s. 15, through a *distringas*. No similar provision was mentioned as to land: that cannot be parted with to any one, since the register becomes notice. I reserved my judgment to consider this point; the result is, that I think the supposed distinction between stock and land is not to be found in the act, and cannot be justified on principle. Where the debtor is entitled to an absolute interest, whether in stock or land, the creditor cannot affect the income during the six months or the year, as the case may be; but where the interest is for life, the subject-matter charged consists of the income only, and it is constantly decaying. In *Watts v. Jefferyes*, Lord Truro said, "It is clear the judgment debtor would not be entitled to any benefit from the stock after service of notice of the order, even during the six months allowed for redemption; and I think it is equally clear that the debtor is not entitled to intermeddle with the dividends, and especially as the charging order is to have the same effect as a charge made by the debtor himself; and it is obvious that if the debtor had charged the dividends he could not be entitled to receive them after such charge, although by the terms or effect of the instrument the party entitled to the benefit of the charge might be restrained from enforcing it during six months. If the respondent's interpretation of the statute is correct, the security of the creditor would be very different when the debtor is entitled to the dividends from what it is when such debtor is entitled to the stock. No part of the security upon the stock could be diminished; but if the dividends which should accrue during the six months might be received by the debtor, the security of the judgment creditor would be diminished *pro tanto*, and it might constitute the whole interest of the debtor. The correct construction of the proviso seems to be, that although no steps can be taken to enforce immediate payment of the debt by realizing the security, yet that the judgment creditor may in the mean time, by force of

the order, prevent the security given him by the statute from being defeated or diminished *pro tanto*, by stopping payment to the debtor of part of his security. When the debtor is entitled to the dividends only, the payment of any part of such dividends to him is, in fact, equivalent to a transfer of part of the capital when he is entitled to the capital." This applies, in principle, equally to land. It is true that in the case suggested of a mortgage of a life interest, with a proviso against entry for twelve months, the Court will allow the mortgagor to receive the rents, but that depends on the terms of the contract. The question here is, not what is the contract, but what construction is to be put on the 1 & 2 Vict. c. 110? The statute is silent as to the dividends of stock, and yet when the subject of the charge was a life interest, Lord Truro held, that the debtor could not take the intermediate dividends; the subject-matter is the rent of an equitable life interest in real estate. There can be no practicable charge on rents which have been paid to the debtor. The statute says there is to be a charge. It also says that the creditor is not to proceed to get the benefit of the charge until after a year. If the debtor were to die within the year the creditor would get nothing, although the act gives him an express charge, unless the Court was to interfere to stop the payment of the rents. If the debtor had an estate of inheritance, the Court would interfere to prevent the destruction by pulling down a house or the like. But the case of a life interest is stronger, because the inheritance could not be absolutely destroyed, while the receipt of the income would enable the debtor if he died within the year to dissipate the whole subject of the charge. I am, therefore, of opinion that the judgment creditor is entitled to have the rents impounded in the hands of the trustees until he is in a position to institute proceedings to obtain the benefit of the charge under the statute. The demurrer must be overruled, and the injunction granted to restrain the trustees from paying the rents to the judgment debtor.

FULL COURT
OF
APPEAL.
July 16.

In re THE ROYAL BRITISH
BANK, *ex parte* MIXER.

*Company—Winding up—Contributory—
Fraud.*

Under a supplemental charter a banking company, being empowered to issue new shares, a fraudulent report of the company's affairs was made by the directors, and adopted at a general meeting of the shareholders. In June 1856 M., a customer of the bank, took twelve of these new shares, executed the deed, and received the share certificates. In the next return to the Stamp Office his name was not inserted as a shareholder, and in the monthly balance-sheet the sum paid by him for the shares was treated as a debt from the bank. In his pass-book he was credited with interest at 4l. per cent. upon the sum he had paid on account of the shares. M. also attended two meetings of shareholders. In September 1856 the bank stopped payment, all the new shares not having been issued, and the affairs of the company were afterwards ordered to be wound up:—Held, that M. was a contributory in respect of the twelve shares, and was not entitled to claim as a creditor in respect of the deposit paid for his shares.

This case, involving a question similar to that in *Brockwell's case* (1) and *Ex parte Nicol* (2), came on to be heard upon two points: viz., first, whether Mr. Mixer was properly a contributory in respect of twelve shares taken by him under the supplemental charter of the Royal British Bank; and, secondly, whether he was entitled to claim as a creditor for the sums paid by him by way of deposit upon taking those shares.

Mr. Giffard and Mr. Field, for Mr. Mixer, contended, first, that the shares taken under the supplemental charter were conditional only, provided the full amount intended to be raised under it was so raised. The issue of the shares under this charter

(1) 4 Drew. 205; s. c. 26 Law J. Rep. (n.s.) Chanc. 855.

(2) *Ante*, p. 257.

was never completed; and the sums paid in respect of those issued were treated as loans to the bank at interest until the entire issue should be completed. The issue to Mr. Mixer was on the 13th of June 1856, when he executed the supplemental deed, and the last return to the Stamp Office of the shareholders' names previous to the stoppage of the bank was on the 28th of June, and that return did not include Mr. Mixer's name. The monthly balance-sheet, published on the 30th of June 1856, described Mr. Mixer's deposits as an amount due from the bank; and in Mr. Mixer's pass-book, he having been previously a customer of the bank, he was credited with interest on his deposit, the last entry being on the 28th of August. On the 3rd of September 1856 the bank stopped payment. Where a prospectus has been issued, representing that a definite amount is to be the capital, the persons to whom allotments of shares have been made could not be taken to have become shareholders, except upon the terms that the whole capital had been subscribed.—

Nockells v. Crosby, 3 B. & C. 814.

Fox v. Clifton, 6 Bing. 776; s. c. 9 Law J. Rep. (N.S.) C.P. 257.

Pickford v. Davis, 5 Mee. & W. 2.

Walstab v. Spottiswoods, 15 Ibid. 501, 515; s. c. 15 Law J. Rep. (N.S.) Exch. 193.

Wontner v. Shairp, 4 Com. B. Rep. 404; s. c. 17 Law J. Rep. (N.S.) C.P. 38.

Jarrett v. Kennedy, 6 Ibid. 319.

Chaplin v. Clarke, 4 Exch. Rep. 403.

Ashpitel v. Sercombe, 5 Ibid. 147; s. c. 19 Law J. Rep. (N.S.) Exch. 82.

According also to the terms of the charter, there could be no holding of shares unless the whole amount was paid up—7 & 8 Vict. c. 113. s. 5. As to the invalidity of the transaction, on the ground of fraud, they referred to *Brockwell's case*.

Mr. Glasse and Mr. W. D. Lewis, for the official manager.—The subscriptions for new capital under the supplemental charter was not conditional; each share was to have a separate existence when issued, and did not depend upon the issue of the whole number. The supplemental

charter required shareholders to execute the deed, and that execution was the contract of partnership. Any objection to the charter itself was a matter between the Crown and the bank, not between the shareholders and the bank—*Macbride v. Lindsay* (3). At the payment of the last dividend the old shareholders, and the allottees of new shares, had equally 4l. per cent.; but previously the old shareholders had 6l. per cent. and the new 4l. per cent. These dividends had been received by Mr. Mixer, who had attended two meetings of shareholders. Mr. Mixer had certificates of his shares, which he might have sold in the market. As to the fraud practised on Mixer, the case would be governed by—

Clarke v. Dickson, 27 Law J. Rep. (N.S.) Q.B. 223.

The Deposit and General Life Assurance Company v. Ayscough, 6 E. & B. 761; s. c. 26 Law J. Rep. (N.S.) Q.B. 29.

Mr. J. Browne, for the assignees of the bank, as the creditors' representatives, contended that, supposing Mr. Mixer had been defrauded, he could not now rescind the contract; and referred to—

Henderson v. the Royal British Bank, 7 E. & B. 356; s. c. 26 Law J. Rep. (N.S.) Q.B. 112.

Powis v. Harding, 1 Com. B. Rep. N.S. 533; s. c. 26 Law J. Rep. (N.S.) C.P. 107.

Daniell v. the Royal British Bank, 1 Hurl. & N. 681.

White v. Garden, 10 Com. B. Rep. 919; s. c. 20 Law J. Rep. (N.S.) C.P. 166.

Stevenson v. Newnham, 13 Ibid. 285; s. c. 22 Law J. Rep. (N.S.) C.P. 110.

Blackburn v. Smith, 2 Exch. Rep. 783; s. c. 18 Law J. Rep. (N.S.) Exch. 187.

Mr. Field was heard in reply.

The LORD CHANCELLOR said, that he was of opinion that Mixer was not entitled

(3) 9 Harc. 574; s. c. 22 Law J. Rep. (N.S.) Chanc. 166.

to prove for the amount he had paid, and that he ought to remain on the list of contributories. In June 1856 he became a shareholder; he received the certificates of his shares, and he executed the deed. What had been relied on as to the supplemental charter was between the Crown and the directors, and did not affect the shareholders. It was quite clear that the construction contended for by Mr. Giffard, as to the conditional nature of the allotment, did not apply to all the sums being subscribed, but to the sums to be paid on each allotment. It would be quite monstrous to say that the allotment of particular shares should depend upon what happened between the directors and other persons. It was then said that there was fraud. No doubt, there was gross fraud; and his Lordship had no doubt that it was through that fraud that Mixer was induced to take the shares. But if this were the fraud of the company, he could not rescind the contract. Where there was a contract tainted with fraud, it was not necessarily void; but the party defrauded might repudiate it, if he did it on the discovery of the fraud, and parties could be placed in the same position in which they were before. In this case Mr. Mixer acted on the contract; he executed the deed, received dividends on his shares, which, although called interest, was, in some sense, a benefit. He had the certificates of his shares, which he had a right to sell. He attended meetings of the shareholders, and thus declared that he was a shareholder; and even after the bankruptcy he did not repudiate the contract, but in a letter to the directors stated that he was not well used. His name must, therefore, be placed on the list of contributories.

LORD JUSTICE KNIGHT BRUCE said, that Mr. Mixer was manifestly a contributory, and not a creditor of the company.

LORD JUSTICE TURNER said, that his only doubt had been as to the payment of interest; but it appeared to be plain that Mixer was to have interest until the full amount of the shares was paid up.

KINDERSLEY, V.C. } MOODIE v. BANNISTER.
Feb. 15.

Statute of Limitations—Acknowledgment of Debt.

A bond was executed in 1821, and the obligee having claimed against the estate of the surety in the bond more than twenty years after the debt, it was held, that an acknowledgment of the debt, in the answer of the executrix of the surety, was sufficient to take the case out of the Statute of Limitations.

This case came on upon an adjourned summons from chambers.

On the 30th of November 1821 a bond was executed, by which John Bannister and John William Bannister became jointly and severally bound to George Heasley in the sum of 600*l.*, to repay to the said G. Heasley the sum of 299*l.* on the 30th of November 1824, with interest in the mean time at the rate of 5*l.* per cent. per annum. The above sum was paid to J. W. Bannister, the said J. Bannister, his father, having joined in the bond by way of surety for his son. J. Bannister died in the year 1825, and J. W. Bannister died in 1829. The money secured by the bond remained unpaid, and no interest had been received by the obligee since the 20th of February 1827.

Under the will of J. Bannister, the father, Esther Bannister was appointed executrix. A suit was instituted for the administration of the estate of J. W. Bannister in the year 1839; and in this suit the bond was proved, but no portion of the debt was recovered.

A suit was also instituted to administer the estate of J. Bannister, the father, under which the claim was now made in respect of the bond debt and interest from the time of the last payment. The defence set up to this claim was, that the debt was barred by the Statute of Limitations.

The claimant, however, rested his case upon the admissions made by Esther Bannister in certain letters written by her to the obligee, and in her answer filed in this suit.

The admissions relied upon were as follows.—A letter, written by Esther Ban-

nister to G. Heasley, dated the 2nd of August 1826, in the following words:—

"Dear Sir,—My brother John has informed me that his late father and himself, some years since, became bound to you for the sum of 300*l.* and interest to secure that sum advanced by you for a friend of my mother's. I therefore think it right to inform you that, if neither my brother's friend nor himself attend to this engagement, I, as my father's executrix, will not neglect it."

Another letter, by Esther Bannister to Mr. G. Heasley, dated the 7th of February 1852, was as follows:—

"Dear Sir,—I have this day heard from Messrs. Bolton, who inform me that the suit you mention is for the administration of my late father's estate, and under it you will have an opportunity of proving your debt at the proper time."

The answer of Miss Bannister in this suit contained the following passage:—

"I say the only debt of the testator (John Bannister) which remains unpaid is a debt of 299*l.*, with a considerable arrear of interest, owing to G. Heasley on the testator's bond, and such debt has not hitherto been paid, because the testator was a party to the said bond as surety only for J. W. Bannister, who died in 1829."

G. Heasley carried in his claim before the Chief Clerk, who decided against the claim on the ground that it was barred by the Statute of Limitations.

The question was then adjourned into court for argument, as to whether the above admissions were sufficient to take the case out of the statute.

Mr. Dickinson appeared in support of the claim, and contended that the admissions in the letters and the answer of Miss Bannister were sufficient to revive the debt, and to take the case out of the Statute of Limitations. He referred to the following statutes and authorities:—

21 *Jac.* 1. c. 16.

9 *Geo.* 4. c. 14. s. 1.

3 & 4 *Will.* 4. c. 42. ss. 3, 5.

Halliday v. Ward, 3 *Campb.* 32.

Roddam v. Morley, 1 *De Gex & Jo.* 1;
s. c. 26 *Law J. Rep.* (n.s.) *Chanc.*
438.

Barkworth v. Young, 4 *Drew.* 1; s. c.

26 *Law J. Rep.* (n.s.) *Chanc.* 153.

Hill v. Walker, 4 *Kay & J.* 166.

Stahlschmidt v. Lett, 1 *Sm. & Gif.* 415.

Mr. Langworthy, for the residuary legatee, opposed the claim, on the ground that it was barred by the statutes, and cited—

Clark v. Hougham, 2 *B. & C.* 149.

Bryan v. Horseman, 4 *East*, 599.

Baillie v. Lord Inchiquin, 1 *Esp.* 435.

Tanner v. Smart, 6 *B. & C.* 603; s. c.
5 *Law J. Rep.* *K.B.* 218.

Shewen v. Vanderhorst, 1 *Russ. & M.*
347.

Mr. Speed appeared for the executrix, and cited—

Hart v. Prendergast, 14 *Mee. & W.*
741; s. c. 15 *Law J. Rep.* (n.s.)
Exch. 223.

Linsell v. Bonsor, 2 *Bing. N.C.* 241.

Kennett v. Milbank, 8 *Bing.* 38; s. c.
1 *Law J. Rep.* (n.s.) *C.P.* 8; 1
Mo. & Sc. 102.

Batchelor v. Middleton, 6 *Hare*, 75.

Holland v. Clark, 1 *You. & C.C.C.* 151.

Stansfield v. Hobson, 16 *Beav.* 236;
s. c. 22 *Law J. Rep.* (n.s.) *Chanc.*
457; 3 *De Gex, M. & G.* 620.

Briggs v. Wilson, 5 *De Gex, M. & G.* 12.

Atkins v. Tredgold, 2 *B. & C.* 23.

KINDERSLEY, V.C.—There is no dispute but that the claimant is a creditor unless he is barred by the Statute of Limitations. That statute was set up by the plaintiff in chambers, and the question is, whether it is a good bar. Although the executrix has not set up the statute, it is clear that the residuary legatee is not precluded from doing so. It is admitted that more than twenty years have elapsed since the bond became payable. The letters written in 1826 and 1852 are neither of them a sufficient acknowledgment of the debt. If a man demands a debt, the merely saying "Prove your debt" does not amount to an acknowledgment. Upon the answer, as far as terms can go, nothing can be imagined more distinct, but the question, whether such acknowledgment comes within the statute, depends upon the construction of the 3 & 4 *Will.* 4. c. 42. s. 5. The 3rd section of the 21 *Jac.* 1. c. 16.

does not, in terms, exclude debts on bond. The word "acknowledgment," however, is not used; but the Courts have held, that, where not only the original contract—whether by bill of exchange or otherwise—is relied upon, but also some subsequent act, that must be such an act or acknowledgment as would, according to the language, be a cause of action, which must have arisen within six years. That which amounts expressly or impliedly to a promise to pay amounts to a cause of action; and therefore, if a promise to pay is a cause of action, and if that is made within six years, it is protected by the statute. An acknowledgment of the existence of a debt is not necessarily either a contract or a promise to pay, and there can only be a cause of action where there is a promise to pay. It might or it might not amount to such promise, although it may be a perfect acknowledgment of the existence of the debt. Suppose A. claims a debt, and the debtor tells his wife or son or friend that he owes it, how could that amount to a promise to pay to the claimant, although, under some circumstances, such an acknowledgment might amount to a promise? The Courts, indeed, have gone so far as to decide that an acknowledgment of a debt does amount to a promise to pay, and is therefore a good cause of action; but that is now, happily, altered. It is not necessary to go into the cases; there is no dispute upon them. Then, as to Lord Tenterden's Act (9 Geo. 4. c. 14). The 1st section requires the acknowledgment to be in writing, the act being framed with a view to the state of the law then existing; and, with respect to simple contract debts, it declares that such acknowledgment must be in writing, signed by the party chargeable thereby; the effect being, that whereas, previously, a mere parol or verbal acknowledgment might amount to a promise to pay, and therefore a cause of action, it must in future be in writing. With respect to specialty debts, a bond creditor can claim his debt forty or a hundred years after it has been incurred, there being no bar in time. Courts of law, however, not only with respect to debts but other matters, have held the doctrine of presumption after a certain lapse of time, and a jury has been directed, after twenty years,

to presume payment. This, however, is capable of being rebutted by evidence. It is a necessary consequence, that any evidence of acknowledgment by the debtor was sufficient, for he could not ask the Court or jury to presume payment when he had, by writing or otherwise, acknowledged the debt, and therefore, evidence of acknowledgment even to third persons, was admitted, but that did not necessarily amount to a cause of action. Then, as to the two statutes, 3 & 4 Will. 4. c. 42. and 3 & 4 Will. 4. c. 27. The purport of the first statute is, in the 3rd section, in very nearly the same words as the statute of James, to make the bar apply to specialty debts, twenty years being substituted for six years. This would have put specialty debts on the same footing as simple contract debts (except the limitation of twenty years) if it had not been for the 5th section, which relates to matters not within the operation of the statute of James. This section, for the first time, contained the word "acknowledgment," which does not occur in the statute of James. On what acknowledgment is here meant the whole question for decision turns. Is it any acknowledgment, whether amounting to a promise to pay or not? This is a question of considerable importance, arising for the first time, and, except in one case where it was not decided, the authorities do not touch the question, otherwise I would have abstained from forming a judgment. With regard to what the legislature intended by the word "acknowledgment," the purport of the Statute of Limitations must be looked at. It is not to enable a *bond fide* debtor to escape payment, but to protect a person who, from lapse of time, may have lost the evidence and vouchers necessary to prove such payment. The 5th section, having provided for acknowledgment generally, does not provide that it shall be made by the party liable to pay to the party making the claim for payment, but by the person liable or *his agent*. Having regard to the object of this statute, the legislature could not have intended the word "acknowledgment" to mean a promise to pay and a cause of action; if it had it would have said so, and would not have introduced this section. The effect of this section, according to the language,

is, that any acknowledgment in writing will be sufficient, and will prevent the setting up of the statute. This interpretation is in the interests of moral justice, and it is naturally just that a man who has acknowledged a debt, although twenty years should have elapsed, should not be able to set up the statute, and the legislature framed this clause to meet the case. So far as to the technical view of the statute of 1833. Lord Tenterden's Act of 1828 was passed only with respect to the statute of James, and did not require any particular terms of acknowledgment to the party making the claim, leaving the effect of it just where it stood under that statute. There are no decisions which now hold an acknowledgment to be a promise to pay and a cause of action, and it was necessary in this act (3 & 4 Will. 4. c. 42.) to introduce words importing a promise to the party making the claim; but, in the same year passed the 3 & 4 Will. 4. c. 27, applying to real estate, in which some clauses relate to money and one to legacies, and the legislature was imposing limitations of actions, and made an exception with respect to acknowledgments by the party liable, to the party claiming payment, —unless in the mean time some part of the principal or interest shall be paid, or some acknowledgment of the right thereto shall be "given in writing, signed by the person by whom the same shall be payable or *his agent*, to the person entitled thereto or *his agent*." The 42nd section provides the same thing. This act being passed in the same year with the 3 & 4 Will. 4. c. 42, it must be assumed to be passed for the same purpose, and whereas, in one act a writing was required, and in the other none, the conclusion must be that the legislature meant that any acknowledgment in writing is sufficient. In this case there is a statement in the answer of the executrix in the clearest terms, and entitled to the greater weight, inasmuch as it is in the exercise of a duty towards co-legatees in setting forth the debts of the testator. This is such an acknowledgment as comes within the language and principle of the 5th section, being a writing signed by the party liable, of so much (299*l.*) being due.

KINDERSLEY, V.C. }
June 24. } DOWSON v. SOLOMON.

Practice — Chancery Amendment Act, s. 38.—Time for closing Evidence—Period of setting down a Cause.

The plaintiff obtained an order for a subpoena to hear judgment, and set down the cause for hearing after the time for closing the evidence in chief had expired, but before the time allowed for cross-examining affidavit witnesses. The defendant moved to set aside the order for a subpoena, and to strike the cause out of the Registrar's list, on the ground of irregularity:—Held, that the plaintiff's proceedings were regular, and that the cause might be set down for hearing before the period for closing the cross-examination of witnesses.

This suit was instituted, on the 2nd of March, to enforce the specific performance of a contract to purchase a house at Dulwich; the defendant, by his answer, submitting that he ought to be allowed compensation for damage which had been occasioned by damp while the house was unoccupied, and for not having been able to obtain possession. The suit proceeded, and the time for taking evidence expired on the 27th of April, but was extended, by order, to the 11th of May; and the time for cross-examination of witnesses upon affidavit was extended to the 8th of June. The period for cross-examination was subsequently enlarged a second time to the 6th of July. On the 10th of June the plaintiff obtained an order for a subpoena to hear judgment, which was served upon the defendant; and the cause was set down for hearing. The defendant now moved to set aside the subpoena, on the ground of irregularity, and to strike the cause out of the Registrar's list of causes.

Mr. Bazalgette and Mr. C. Hall, in support of the motion, contended that the plaintiff was not entitled to have the cause set down for hearing until the time for taking evidence had closed; and that time would not expire, under the new practice, until the cross-examination of all the witnesses had concluded. They cited—

Jenkyn v. Vaughan, 24 Law J. Rep. (N.S.) Chanc. 495; s. c. 3 Drew. 20.

Ellis v. King, 4 Madd. 126.

Langley v. Fisher, 5 Beav. 588; s. c.

12 Law J. Rep. (N.S.) Chanc. 72.

And the following Orders:—

May 8, 1845, Order 16, Rule 44.

August 7, 1852, Order 32.

January 13, 1855, Order 5.

15 & 16 Vict. c. 86. s. 38.

Mr. Baily and *Mr. Forster*, *contra*, submitted that, under the present practice, the *subpœna* to hear judgment might be issued upon the close of the evidence in chief, and contemporaneously with the continuance of the cross-examination. This was the practice always adopted in the office of the Clerks of Records and Writs; and the question was, whether this practice was now to be altered.

KINDERSLEY, V.C. — This is a most miserable and worthless motion, and one that is calculated to do no good whatever to the party moving. If the motion is granted the only result would be, to make the plaintiff pay a certain additional amount of costs to the defendant's solicitor. The application is for an order to set aside a *subpœna* to hear judgment, and to strike the cause out of the Registrar's book and the cause list. The motion for that purpose is made by the defendant, part of whose case, as set up by his answer, is, that he claims compensation for damage done by damp to the house he has contracted to purchase, and for being delayed in obtaining possession of it. That is substantially the defendant's case. The act of the plaintiff in endeavouring to bring the cause to a hearing appears to me to be for the benefit of the defendant, as it may facilitate his getting possession of the house. Still, if the order for the *subpœna* be irregular, and if it has been issued contrary to the existing practice of the Court, the motion must be dealt with on that footing. Now, what are the facts of the case? The bill having been filed on the 2nd of March, and the time for taking the evidence being about to expire on the 27th of April, that time was extended by order to the 11th of May. The time for cross-examining the affidavit witnesses was enlarged, first, to the 8th of June, and then to the 6th of July. On the 10th of June, however, the

plaintiff obtained the *subpœna* to hear judgment, served it on the defendant, and set the cause down for hearing. The *subpœna*, therefore, was obtained two days after the time when, but for the order for enlarging it to the 6th of July, the period for cross-examining the affidavit witnesses would have expired; and a month after the time for closing the evidence in chief. It was contended, by the defendant, in support of the motion, that this was irregular and contrary to the practice of the Court; because, at the time the *subpœna* issued, the cross-examination of the affidavit witnesses was proceeding. The other side say that it is not irregular; that the practice is for the Clerk of Records and Writs to certify when the cause is in a fit state for hearing, and for the Registrar to set it down for hearing on that certificate. Now, assuming that to be the practice, the question is, whether it is wrong; that is, whether it is contrary to the provisions of the Chancery Practice Amendment Act (15 & 16 Vict. c. 86), and the Orders made in pursuance of that act. If the practice is wrong, it must be corrected. The old practice before that act was this:—A time was fixed for passing publication, as it was called—when witnesses were examined, but rarely cross-examined—and there was no distinction between the time for examination in chief and cross-examination. The examination and cross-examination of witnesses were included in the same period. The Chancery Practice Amendment Act introduced a totally different practice, which was this:—That witnesses may now be examined on their affidavits at the hearing of the cause; and such evidence is good evidence. But that examination carries with it the right of cross-examination, and that cross-examination may be a *viva voce* one, in open court. That right is a most convenient one. At the same time witnesses may be examined and cross-examined, before an examiner of the court, as before the act, with this difference—that the examination and cross-examination, instead of being, as it formerly was, secret, is now open and public. When the examination and cross-examination is upon affidavits, the new practice has necessarily fixed a time within which the affidavits shall be filed in the first

place, and a separate time within which the witnesses swearing the affidavits shall be cross-examined on them. Where there are no affidavits introduced, and the witnesses are examined orally, before the Examiner or in court, the cross-examination follows immediately, then and there. The effect of the Chancery Practice Amendment Act, s. 38, and of the 32nd of the Orders of the 7th of August 1852, and of the 5th of the Orders of the 13th of January 1855, is this:—There are two periods mentioned in the act: *the one*, in which the evidence on both sides, whether taken orally or upon affidavit, is to be closed within such time or times, after issue joined, as should be prescribed by any order of the Lord Chancellor under that act, the Court, however, having power to enlarge the same as it may see fit; *the other*—and which is referred to in the latter part of the clause—is, that, after the preceding period, affidavit witnesses may, notwithstanding such closing of the evidence, as previously stated, be orally cross-examined and re-examined. These are the two periods mentioned in the act. The time for closing the evidence, then, does not include the period during which *any* witness may be cross-examined, but it is only that period which ends with the commencement of the time for the cross-examination or re-examination of affidavit witnesses; that is, in other words, the evidence closes at the end of the first period referred to in the act, beyond which no evidence, whether oral or by affidavit, is receivable without the leave of the Court. Now, it appears to me that, assuming the practice to be, as stated by the plaintiff's counsel in this case, viz. that the *subpœna* to hear judgment is ordinarily issued contemporaneously with the second period, such practice is a good and wholesome one. It is intended to prevent the parties from unnecessarily dawdling over the conduct of the cause. A case was referred to in the argument, in which it was said that I had myself taken a different view of the practice in question. If I did so, and if I should now think I was wrong in so doing, I should have no hesitation in correcting that view. But when I look at the case of *Jenkyn v. Vaughan*, it is not at all similar to the present.

It was an application to dismiss a bill for want of prosecution; the motion for that purpose being made after the closing of the evidence, but preceding the time during which there was a right to cross-examine affidavit witnesses. I thought that application to dismiss a bill, under such circumstances, so monstrous, that I refused the motion. But it is clear that that case is quite different from the present. I must say, I think the practice as stated by the plaintiff's counsel is not irregular, and that the *subpœna* was not irregularly issued; and therefore that the plaintiff's proceedings have been correct.

Mr. Murray, the Record and Writ Clerk, subsequently stated to his Honour that the practice in their office was as stated by the plaintiff's counsel, and produced certain written reasons for the adoption of such a practice.

KINDERSLEY, V.C. said, the reasons appeared to him to be very sound, and, under the circumstances, he should refuse the motion, with costs.

M.R. }
July 7. } WILLIAMS v. NASH.

Patent—Time—Computation—16 Vict. c. 5. s. 2.

In computing time under the 16 Vict. c. 5, avoiding letters patent, on failure in payment of stamp duties, held, that the day of the date is excluded, and that the three years do not expire until twelve o'clock at night of the anniversary of the day on which the letters patent were granted.

The bill in this suit was filed to restrain the infringement of a patent granted on the 26th of February 1855. The 50*l.* stamp duty was paid on the 26th of February 1858, and the question raised was, whether the three years allowed for the payment of the duty had not then expired.

The 16 Vict. c. 5. s. 2. enacts, that "all letters patent for inventions, to be granted under the provisions of the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), except in the cases provided for in the 4th section of the act, shall be made

subject to the condition that the same shall be void, and that the powers and privileges thereby granted shall cease and determine at the expiration of three years and seven years respectively from the date thereof, unless there be paid, before the expiration of the said three years and seven years respectively, the stamp duties in the schedule to this act annexed, expressed to be payable before the expiration of the third year and of the seventh year respectively; and such letters patent, or a duplicate thereof, shall be stamped with proper stamps, shewing the payment of such respective stamp duties, and shall, when stamped, be produced before the expiration of such three years and seven years respectively, at the office of the Commissioners, and a certificate of the production of such letters patent or duplicate so stamped, specifying the date of such production, shall be indorsed by the clerk of the Commissioners on the letters patent or duplicate, and a like certificate shall be indorsed upon the warrant for such letters patent, filed in the said office."

The schedule referred to in the act was as follows:—On the letters patent, or a duplicate thereof, before the expiration of the third year, 50*l*.

Mr. R. Palmer and *Mr. C. Ellis*, for the plaintiff.—The time for paying the 50*l*. did not expire until twelve o'clock of the 26th of February 1858.

Mr. J. H. Palmer, for the defendant.—The three years were completed on the 25th of February 1858; the patent then became void—*Russell v. Ledsam* (1).

THE MASTER OF THE ROLLS.—If the language of the act had been from the day of the date thereof, the three years would not have begun to run until the following day, but it has been pointed out by the Court, that in fact "the date thereof" and "the day of the date thereof" are synonymous, and that when a certain time is to begin to run from a particular date, the term begins to run from the day following. Therefore, the three years beginning to run from the day following the date of the

(1) 14 Mee. & W. 574; s.c. 14 Law J. Rep. (N.S.) Exch. 353.

patent, the three years would not expire until twelve o'clock p.m. of the anniversary of the day on which the letters patent were granted. These letters patent were granted on the 26th of February 1855, they would, therefore, not expire until twelve o'clock on the night of the 26th of February 1858. In *Russell v. Ledsam* the plea alleged that the letters patent were granted after the expiration of the term of fourteen years granted by the original letters patent. The question was, whether the fourteen years mentioned in the first letters patent, which were granted on the 26th of February 1825, expired on the 26th of February 1839. The letters patent were clearly not granted for fourteen years and a day, and the question was, whether the day of the date of the letters patent was included, and it was held that it was. Parke, B., in his judgment, says, "The next question arises on a point reserved at the trial on the evidence in support of the seventh plea. That plea was that the second or renewed letters patent were granted after the expiration of the term of fourteen years granted by the first letters patent; the replication took issue on that allegation, and the proof was, that the original letters patent were dated on the 26th of February 1825, and the second on the 26th of February 1839; and the question is, whether the day of the date of the first letters patent was inclusive or exclusive. The usual course in recent times has been to construe the day exclusively whenever anything was to be done in a certain time after a given event or date; and, consequently, the time for enrolling a specification within the six months, given by the proviso, is reckoned exclusively of the day of the date; and many other instances are collected in *Webb v. Fairmaner* (2) and *Young v. Higgon* (3). But in this case the question is, when the term given by the patent commences; and the same rule would apply as to the commencement of a term, which, if it is to run from the date of the lease, includes the day of the date." Parke, B., in that case, draws the very distinction which makes the patent

(2) 3 Mee. & W. 473; s.c. 7 Law J. Rep. (N.S.) Exch. 140.

(3) 6 Ibid. 49; s.c. 8 Dowl. P.C. 212; 9 Law J. Rep. (N.S.) M.C. 29.

good in this case. The 5 & 6 Will. 4. c. 83. s. 4, authorizing the grant of a further extension of the patent, provides, "that no such extension shall be granted if the application by petition shall not be made and prosecuted with effect before the expiration of the term originally granted in such letters patent." Consequently, the extension of the patent was granted after the expiration of the fourteen years, because the fourteen years granted by the original letters patent included the day of the date. But when a thing is to be done from the day of the date it means "from and after the day of the date." The above case, therefore, conclusively establishes that payment on the 26th of February was good, and that the patent is subsisting, and the plaintiff is entitled to the injunction he prays for.

STUART, V.C. }
 July 25. } *In re* STORIE'S TRUST.

Insurance on Life—Right to Policy—Debtor and Creditor.

A mortgagee, by way of collateral security for his mortgage debt, insured in his own name the life of his debtor, the latter paying the premiums upon the policy. The debtor afterwards took the benefit of the Insolvent Debtors Act, obtained the ordinary vesting order, and, having put in his schedule, in which the mortgage debt was specified, and the policy, as one of the securities for payment of such debt, obtained his discharge. The debtor, after surviving the mortgagee, died, and the insurance company paid the amount due upon the policy to the personal representatives of the mortgagee, who, after retaining thereout the amount of their debt and costs, paid the balance into court. The balance being claimed by the assignee in insolvency of the debtor, on the one hand, and by his personal representatives on the other, — Held, that the title of the assignee in insolvency was to be preferred.

In 1829 Walker, the mortgagee of certain lands, for 3,600*l.*, being the amount of a debt due to him from Storie, the mortgagor, by way of collateral security, effect-

ed, in his own name, a policy of insurance for that amount upon the life of Storie. The premiums upon this policy were paid by Storie. In 1851 Storie took the benefit of the Insolvent Debtors Act, and having obtained the usual vesting order and filed his schedule, in which was inserted the debt secured by the policy, and the policy, as one of the securities for payment of such debt, was discharged. Upon the death, subsequently, of Storie, who survived Walker, the insurance company paid the sum of 4,600*l.*, being the amount then due upon the policy, to the representatives of Walker; who, having retained thereout the amount of their debt and interest, paid the balance, amounting to 402*l.*, into court.

This sum was claimed, on the one hand, by the personal representatives of Storie, and on the other by his assignees in the insolvency.

Mr. Lorence Bird, in support of a petition presented by Storie's representatives, asked for payment to them of the fund in court, on the ground that the policy and the fund secured by it, did not belong to the insolvent, but to the creditor or mortgagee, at the date of his discharge, and, therefore, according to the provision of the Insolvent Debtors Act, could not pass to his assignee.

Mr. Caldecott, for the assignees in insolvency, referred to *Godsall v. Boldero* (1), as governing this case.

Mr. Lorence Bird, in reply, referred to *Dalby v. the India and London Insurance Company*, 15 Com. B. Rep. 365; s. c. 24 Law J. Rep. (N.S.) C.P. 2; and

Law v. the London Indisputable Life Policy Company, 1 Kay & J. 223; s. c. 24 Law J. Rep. (N.S.) Chanc. 196,

as overruling *Godsall v. Boldero*.

STUART, V.C. held, that the title of the assignee in insolvency was to be preferred:—the fact that the policy of insurance was inserted in the schedule of the insolvent, as one of the securities for payment of the debt, being of itself sufficient to shew that

(1) 9 East, 72.

the other creditors under the insolvency had an interest in the fund.

The costs of the petitioners were ordered to be paid out of the fund.

KINDERSLEY, V.C. }
April 16. } RUDGE v. WEEDON.

Practice—Married Woman—Protection Order—Chancery Amendment Act.

A married woman obtained a protection order from a magistrate, under the provisions of the Divorce Act, on the ground of desertion. A suit was then instituted against her as a feme sole. The protection order was afterwards discharged, on application by the husband, who proved there had been no desertion on his part. The plaintiff in the suit then obtained a supplemental order as of course, under the Chancery Amendment Act, to bring the husband before the Court:—Held, that the protection order was void ab initio, and there having been no "change or transmission of interest or liability" the supplemental order was wrong, and must be discharged.

This suit was instituted for the administration of the estate of William Weedon. The plaintiffs were two infants, the residuary legatees of the testator, who sued by their next friend, Robert Harris, and the defendant was Elizabeth Rudge, who was also a residuary legatee. It appeared that previously to the institution of the suit Elizabeth Rudge had obtained a protection order, under the Divorce and Matrimonial Act, 20 & 21 Vict. c. 85, from Mr. Elliott, the magistrate of the Lambeth Police Court, upon an allegation that she had been deserted seventeen years ago by her husband, George Bickerton Rudge; and in consequence of this order having been obtained, Mrs. Rudge was made a defendant to the above suit as a *feme sole* under the 21st section of the Divorce Act, by which it is enacted, that a married woman who has obtained a protection order shall, during the continuance thereof, be and be deemed to have been during such desertion in the like position in all respects with regard to property and contracts, and suing and being sued, as she would be under

that act if she had obtained a decree of judicial separation. Mrs. Rudge, in pursuance of the magistrate's order, had also obtained leave from this Court to put in a separate answer as a *feme sole*. Subsequently, however, G. B. Rudge, upon having notice of the magistrate's order, applied that it might be discharged on the ground that he never had deserted his wife, and this fact having been proved to the satisfaction of the magistrate the protection order was discharged.

An application was then made by the plaintiffs, at the Rolls, for the common supplemental order in the suit, for the purpose of making G. B. Rudge a party defendant to the suit, inasmuch as Elizabeth Rudge, his wife, could no longer be sued as a *feme sole*, and that order was made as of course under the 52nd section of the Chancery Amendment Act, 15 & 16 Vict. c. 86.

A motion was now made on behalf of the defendant, G. B. Rudge, to discharge the supplemental order as being irregular and improper.

Another suit had been instituted in this matter, by another next friend to the infant plaintiffs, for the same object as the first suit, but to which G. B. Rudge had been added as a co-defendant, and a motion was now made on behalf of Robert Harris, the next friend of the plaintiffs in the first suit, that all further proceedings in the second suit might be stayed, on the ground that being for precisely the same object as the first suit it was unnecessary.

Mr. Giffard and Mr. Simpson, who appeared in support of the first motion, contended that the supplemental order was irregular, inasmuch as there had been no change or transmission of interest or liability in this case, as provided for by the 52nd section of the Chancery Amendment Act. The magistrate's order was, in fact, void *ab initio*, and matters were therefore left *in statu quo*. The defendant, Mrs. Rudge, was a married woman from the first, and continued to be a married woman notwithstanding that a mistaken order had been made, and therefore her husband was a necessary party from the commencement of the suit.

Mr. Baily and Mr. Rogers, contra, submitted, that while the magistrate's order remained in force the plaintiff could not do otherwise than treat Mrs. Rudge as a *feme sole*. It must be assumed that the protection order was right, and under the terms of the Divorce Act the plaintiff was bound to frame the suit as he had, and make the wife the sole defendant. When the order was discharged a new right accrued, and it was then competent for the plaintiff to bring the husband before the Court by a supplemental order under the Chancery Amendment Act.

Mr. Glasse and Mr. Baggallay appeared upon the motion to stay proceedings in the second suit.

The following cases were cited:—

Edwards v. Bailey, 19 Beav. 457; s. c.

23 Law J. Rep. (N.S.) Chanc. 872.

Cartwright v. Shepherd, 20 Ibid. 122.

Pickford v. Brown, 1 Kay & J. 643.

KINDERSLEY, V.C.—The question in this case turns entirely upon a technicality, and is very unsatisfactory to decide, because it will involve the parties in expense without advancing the suit at all. I speak of the motion to discharge the order in the nature of a supplemental order, the question on which turns upon the construction to be put upon the 52nd section of the Chancery Amendment Act. My duty is not to do otherwise in construing an act of parliament than to put a fair and natural construction on the words, and not to distort the language in order to give it a more extensive construction or confer a benefit upon a particular party. Now, this is a case in which Mrs. Rudge, a married woman, is made a defendant by a person who has an interest in the character of residuary legatee, Mrs. Rudge being also a residuary legatee, or, at least, having an interest in the residue, and she is made a defendant without her husband, the suit being for the administration of the estate. As it turns out, her husband ought to have been a party with her unless that rule has been altered by the 21st section of the Divorce Act, which makes a special exception in particular cases. It appears that before the suit was instituted a magistrate made an order, giving her protection, on the ground that she had been deserted by her

husband. The effect of such an order is to make her so entirely a *feme sole* that she may sue and be sued as such. That is different from the case of a married woman who has a separate estate, for the act of parliament says she may sue and be sued without him, and it has been determined that he need not and ought not to be a party to a suit. The suit then was rightly constituted at the time, and the plaintiff had no choice in the matter. A decree was taken with nothing special in it, but it turned out that the order for protection was wrong, since there had been in fact no desertion, and accordingly the order was discharged, on the ground of its having been wrong *ab initio*. That order, then, except so far as there is anything special in the Divorce Act, stands in no higher position than an order made by any Court of Justice which is afterwards discharged by another branch of that Court as being wrong; and unless there is something to give it a different effect the whole of that order is swept away. Now, it appears to me that there is nothing in the act of parliament to give it any different effect. By the act 21 & 22 Vict. c. 108. s. 8. it is enacted—"That in every case in which a wife shall under this act, or under the said act, 20 & 21 Vict. c. 85, have obtained an order to protect her earnings or property, or a decree for a judicial separation, such order or decree shall, until reversed or discharged, so far as necessary for the protection of any person or corporation who shall deal with the wife, be deemed valid and effectual; and no discharge, variation or reversal of such order or decree shall prejudice or affect any rights or remedies which any person would have had in case the same had not been so reversed, varied or discharged in respect of any debts, contracts or acts of the wife incurred, entered into, or done between the times of the making such order or decree and of the discharge, variation or reversal thereof." So that the effect of the amending statute is, that if, pending that order, the wife has contracted any debt or entered into any contract, or done any act as a *feme sole*, there is to be no alteration, but otherwise the act gives no validity to her acts. Now, the plaintiff found himself in this position

—he had got his decree against a married woman, treating her as a *feme sole*, and the husband was not before the Court. It is clear now that the husband ought to have been a party to the suit, and that the decree as it stands is defective. Therefore, the plaintiff obtains an order according to the 52nd section of the 15 & 16 Vict. c. 86. in the nature of a supplemental decree. I cannot find any fault with him, but the question is, whether that order is valid as being regular and proper. It appears to me that it is strictly irregular and improper, and I can come to no other conclusion. The 52nd section of the Amendment Act is this—"That upon any suit becoming abated by death, marriage or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual or necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive, or of the usual supplemental decree, may be obtained as of course upon an allegation of the abatement of such suit or of the same having become defective, and of the change or transmission of interest or liability." Now, has this suit become defective by reason of any change or transmission of interest or liability? If there has been none, then this order is not valid. The magistrate's order has, in fact, been swept away, and the matter stands upon the same footing as any discharged order of a Court. There has been no transmission of interest, and there is nothing changed. *Edwards v. Batley* and *Cartwright v. Shephard* were cases in which an actual party to a suit had died, and it was decided that there the act did apply. In *Pickford v. Brown* there was the birth of a child, that is to say, a change of interest; but here there is no change of interest. Mr. Rudge's rights are now just what they were when the decree was made; although, by the erroneous decision of a magistrate, there was an order of protection against him. It is just as if there had been a decree of the Ecclesiastical Court under the old forms declaring a marriage null and void. As long as that

decision stood the marriage was null and void; and if pending that decision there had been a suit against the wife, the husband would not have been a party. But, suppose afterwards that decision had been set aside, would she not have been a married woman *ab initio*? The marriage still existed; they did not become married, for they were married throughout; and it appears to me that Mrs. Rudge was never in this case a *feme sole* from the beginning. For these reasons it appears to me that I must come to the conclusion that there has been here no change or transmission of interest, and therefore the case does not come within the terms of the 52nd section of the act. The supplemental order must, consequently, be discharged, with costs.

With respect to the second motion, there must be a reference to chambers to inquire which of the two suits will be most for the benefit of the infants.

M.R. Feb. 28; March 1.	}	<i>In re</i> MEADOWS.
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*Banker—Customer's Balances—Security
—Future Advances.*

A customer kept three accounts with his bankers, the whole of which were overdrawn. Upon their applying for further security he executed a deed-poll, which recited the intention to give security and charge certain estates already mortgaged with the payment of the "three several sums of money which shall or may be found due, on the balance of the several accounts, for principal, interest, commission and other usual and lawful bankers' charges, not exceeding the aggregate sum of 3,000l." He subsequently executed a deed of assignment for the benefit of his creditors. The real estate charged by the deed-poll was sold by the mortgagee, and after paying all incumbrances a balance remained, which was claimed by the bankers and by the trustees of the creditors' deed:—Held, upon a petition of the bankers, that the security did not include the floating balance.

Daniel Charles Meadows carried on the business of a solicitor, in partnership with

Cooper Charles Brooke, at Woodbridge, in the county of Suffolk ; he was a customer of Messrs. Alexander & Co., who were bankers both at Ipswich and Woodbridge, and kept three accounts with them :—a private account, a partnership account, and a trust account.

In January 1857 the whole of these accounts were overdrawn, to the aggregate amount of 2,974*l.* 6*s.* 3*d.* The bankers applied for further security.

On the 12th of January 1857 Mr. Meadows executed a deed-poll, which, after reciting that Mr. Meadows (who had adopted the name of "De Medewe"), and also his partner, C. C. Brooke, had, each of them, for many years kept their banking accounts with Frederick Alexander & Co., and that Ann Lucock and D. C. Meadows, as executors of William John Lucock, deceased, had also kept their executorship banking account with Messrs. Alexander & Co., and that the bankers having required security for the balances due, Mr. Meadows had, subject to existing incumbrances, agreed to charge his estate thereafter mentioned with the payment of the balance of all the three several accounts to the aggregate sum of 3,000*l.* as thereafter mentioned, and that Messrs. Meadows & Brooke had also agreed to execute a joint and several bond for further securing the balance of their banking account ; and that Ann Lucock had agreed to deposit with F. Alexander the title-deeds relating to certain hereditaments at Grunnersburg belonging to her, and with D. C. Meadows, to execute a joint and several bond for further securing the balance of their executorship account : it was then witnessed, that D. C. Meadows "doth hereby subject and charge all his estate called 'Witnesham Hall,' with the payment to F. Alexander, his executors, administrators or assigns, of the three several sums of money which shall or may be found due on the balance of the said several accounts for principal, interest, commission and other usual and lawful bankers' charges, not exceeding in the whole the aggregate sum of 3,000*l.* (but subject to the existing mortgages and the principal and interest monies thereby respectively secured)." And D. C. Meadows, covenanted for himself, his heirs,

executors or administrators, as follows :—
"I will, within three months after demand, pay unto F. Alexander, his executors, administrators or assigns, such several sums as may be due on the several banking accounts 'as aforesaid,' not exceeding in the whole the aggregate sum of 3,000*l.*, without any deduction whatsoever."

By a bond of even date, Mr. Meadows and Ann Lucock, as executors of W. J. Lucock, executed a bond to Messrs. Alexander, conditioned to be void on payment of such sum or sums of money "as now are or which shall from time to time be or become due and owing on the said executorship bankers' account, not exceeding the sum of 3,000*l.*"

On the 20th of April 1858 Mr. Meadows assigned the estate comprised in Messrs. Alexander & Co.'s security to trustees for the benefit of his creditors. Messrs. Alexander & Co. obtained a judgment against Mr. Meadows for 2,234*l.* 9*s.* 3*d.*

The first mortgagee sold Witnesham Hall, and, after the payment of all incumbrances, there remained a balance upon the purchase-money of 2,499*l.* 11*s.* 2*d.* This sum was claimed by Messrs. Alexander & Co., and also by the trustees of the creditors' deed. It was accordingly paid into court under the Trustees' Relief Act.

Messrs. Alexander continued to make advances to Mr. Meadows after the deed of the 12th of January 1857, and a balance of 2,800*l.*, chiefly consisting of such advances, remained due to them on the three accounts.

They now presented this petition, claiming a right to recover the balance due out of the funds in court, on the ground that the deed of January 1857 was a security not for the balance then actually due only, but also for the floating balances, to the extent of 3,000*l.*

Mr. R. Palmer and Mr. Prendergast, for the petitioners.—The intention of the parties was expressed in the recitals. The deed-poll was not the only security to be given; the debtors were to execute bonds; these, by express words, extended to future balances. The petitioners were also judgment creditors, and by these several

securities they were entitled to have their balances paid out of the fund in court—

Woolley v. Jennings, 5 B. & C. 165.

Devaynes v. Noble, 1 Mer. 530.

Pease v. Hirst, 10 B. & C. 122; s. c. 8 Law J. Rep. K.B. 94; 5 M. & R. 88.

Walker v. Hardman, 4 Cl. & F. 258; s. c. 11 Bligh, N.S. 229.

Mr. Lloyd and Mr. Lewin, for the trustees of the creditors' deed.—The security taken by Messrs. Alexander & Co. was nothing more than a charge for the amount which Mr. Meadows covenanted to pay. It was annihilated by the judgment which had been obtained, and it could not extend to the future balances. The creditors' trustees in this case were in the position of purchasers without notice.—

1 & 2 Vict. c. 110.

2 & 3 Vict. c. 82.

29 Car. 2. c. 3.

Jones v. Williams, 24 Beav. 47.

Mr. Eddis, for the mortgagee, who paid the fund into court.

THE MASTER OF THE ROLLS.—I cannot consider this deed as a security for future balances. There might not be much uncertainty in the amount due upon a banking account at any particular time, still, it would not be definitely ascertained until the interest and other usual charges were added. Until that was done the balance could not be struck. The operative part of the deed, taken in connexion with the recitals, shews that the balance then due was referred to, but that was to be ascertained at a future time. The recitals alone could not have been sufficient to lead to the conclusion which the bankers contend for. They expressly refer to what is "hereinafter mentioned." It was argued that the intention of the parties, as expressed in the recitals, was to execute bonds, and that the bond subsequently executed extended to future balances; but the operative words of the deed-poll giving the charge fell far short of carrying the construction of the deed to that extent. They were "shall or may be found due on the balance of the said several accounts." The words in the bond being, "such sums

of money as now are or which shall from time to time be or become due and owing on the said account." The apparent intention of the parties, as expressed in the deed, was to secure the balance then due, but which was to be ascertained at a future time. The covenant in the deed referred to the former part of the instrument by the words "as aforesaid," and it did not extend the construction beyond the operative part of the deed.

M.R. } *In re HUE'S ESTATE.*
June 16. }

Trustees — Costs — Paying Money into Court — Taxation.

The costs incurred by trustees in paying money into court under the Trustees' Relief Act, and also the costs of their appearing on paying it out, are subject to taxation.

The petitioner was entitled to a fund which had been paid into court under the Trustees' Relief Act. The original sum was 164*l.* 7*s.* 3*d.*, which had become payable to the estate of a testator on the happening of a contingency. The trustees paid this amount into court, after deducting 39*l.* "for costs in taking the opinion of counsel relative to the said sum, and in and about transferring the balance into court." The petitioner now asked for payment of the amount, and for a taxation of the costs.

Mr. W. Morris, for the petitioner.

Mr. Hallett, for the trustees, applied for the costs of their appearing on this petition.

Mr. W. Morris asked that the order to tax might be extended to the costs incurred by the trustees in paying the money into court.

THE MASTER OF THE ROLLS directed the fund to be paid to the petitioner, and ordered the costs to be taxed, including those incurred by the trustees in paying the money into court, and also that they should give credit for the 39*l.* which they had retained.

KINDERSLEY, V. C.
March 11.

In re THE WRYSGAN
SLATE QUARRYING
COMPANY, *ex parte*
BIRCH.

*Company—Winding up—Contributory—
Relinquishment of Shares—Duties of Purser.*

A shareholder in a company, carried on upon the cost-book principle, relinquished his shares upon paying his pro rata portion of the liabilities of the company. All the formalities required for the relinquishment of such shares were regularly complied with and entered in the books of the company, and the correspondence was conducted with the purser, who fixed the amount to be paid by the shareholder without the sanction of the managing committee:—Held, that, the purser being the authorized officer of the company to conduct such transactions, the shareholder was exempted from liability in respect of any excess of power on the part of the purser; and upon the winding up of the company it was ordered that such shareholder should not be placed upon the list of contributories.

Upon the winding up of the above-named company a question was raised as to the liability of the Rev. E. Birch, and Marianne, his wife, to be placed upon the list of contributories. The case came on upon adjourned summons from chambers.

It appeared that the company was carried on upon the cost-book principle, and it was provided by their deed that the purser, who was also called the managing director, was to take charge of the offices of the company, with the assistance of a clerk; that he was to keep the books, papers, documents and accounts, conduct the correspondence, give notice of dividends, defend actions, and receive notices of withdrawal of the shareholders, who, upon such withdrawal, were to pay a *pro rata* share of the debts and liabilities of the company. It was also provided, that the affairs of the company should be managed by a committee of not less than three, and not more than ten directors, and that such committee, subject to the control of a general meeting, should carry on the affairs of the company.

It appeared from the evidence that, in October 1853, Mr. and Mrs. Birch had

each of them taken 100 original and 50 preference shares in the company. In the early part of the year 1857 the company had become embarrassed, and Mr. Birch, who resided at Windlesham, in Surrey, was sued by certain creditors in the County Court of Caernarvon, where the mines were situate. Mr. Birch immediately took steps, by the advice of his solicitor, to withdraw from the company, and a formal notice of the relinquishment of their shares was forwarded by Mr. and Mrs. Birch to Mr. Wilkinson, the purser of the company. Mr. Wilkinson thereupon fixed the sum of 6s. 6d. per share as the amount to be paid by Mr. and Mrs. Birch for their *pro rata* portion of the liabilities. This sum was duly paid, and the shares were relinquished; and upon reference to the cost-book and other documents it appeared that the whole of the transaction had been regularly entered, and all the forms required by the company with reference to the withdrawal had been strictly complied with.

It also appeared that 1,400 other shareholders had withdrawn from the company about the same period; but in the case of these persons the sum of 8s. per share had been paid as the *pro rata* share of the liabilities of the company.

The company was subsequently declared to be insolvent, and a winding-up order was obtained; and the questions now raised were, whether the purser had a right to settle the *pro rata* share to be paid by each shareholder upon his withdrawal, and whether the amount so fixed by him in the case of Mr. and Mrs. Birch was the proper amount to be borne by them.

Mr. Baily and *Mr. De Gex* appeared for the official manager, and contended that the *pro rata* share of the liabilities ought to have been fixed by the managing committee, and that the purser had no power of himself to assess the amount. No shareholder could be exonerated until the managing committee had sanctioned the withdrawal of a shareholder; the purser was a mere officer of the company, and the arbitrary fixing by him of a certain sum as the *pro rata* share of the liabilities could not make the transaction binding. Then, as to the correctness of the amount, it was

clear that the 6s. 6d. could not be the full share, since the other shareholders who had withdrawn at the same time had paid 8s. per share. At any rate, the two amounts could not both be correct. Under these circumstances, as the purser had evidently acted *ultra vires*, Mr. and Mrs. Birch could not be considered to have legally relinquished their shares; and their names must consequently be put upon the list of contributories. They cited—

Hawthorne's case, 1 Mac. & G. 49; s. c. 18 Law J. Rep. (N.S.) Chanc. 179; 1 Hall & Tw. 225.

Morgan's case, Ibid. 225; s. c. 18 Law J. Rep. (N.S.) Chanc. 265; 1 De Gex & Sm. 750; 1 Hall & Tw. 320.

Stanhope's case, 3 De Gex & Sm. 198; s. c. 19 Law J. Rep. (N.S.) Chanc. 389.

Walters's case, Ibid. 149; s. c. 19 Law J. Rep. (N.S.) Chanc. 501.

Mr. Giffard and *Mr. Pontifex*, who appeared for Mr. and Mrs. Birch, were not called upon to address the Court.

KINDERSLEY, V.C.—I cannot see how any human dealings are to go on if these parties are to be held liable. It is impossible to conceive anything more strict and fair than the whole proceedings on the part of Mr. and Mrs. Birch. The real question is, whether, as between these two persons on the one hand, and the whole body of contributories on the other, there is sufficient to acquit them of liability in respect of those shares which they held up to the month of April 1857. It appears by the regulations of the company that the purser was the proper person to conduct the correspondence as between the managing committee and the shareholders; and it is manifest that such must be the course of proceeding in a company, for how could a shareholder know anything about the transactions except through the proper officer appointed to conduct the correspondence? He could not be aware of what took place from time to time in the board-room, and he could only communicate with the committee through the purser. I will assume that Mr. Birch was cognizant of the difficulties existing on the part of the com-

pany by the fact, that he had been sued by some of the creditors, and that knowledge led him very naturally to wish to withdraw from the concern, if it could be legally done, and knowing that the rules of the company gave him power to withdraw upon certain conditions, he did all that was required of him for that purpose. It is alleged that he did not, in fact, pay the *pro rata* share of the liabilities, because he only paid the amount fixed by the purser, which was not the full amount; but whether this was so or not, he had no means of proving, and at the present time he cannot even ascertain the correct amount of the liabilities by reference to the books, because he has no right to any access to the books unless he admits his liability as a contributory. If this argument were to prevail, any shareholder who might have regularly retired could be called upon, after the lapse of several years, to prove a thing he has no means of ascertaining. It appears to me, therefore, that the clause must receive this modification, that the company can only act through the purser in respect to the matters in question. Mr. Birch was resident at Windlesham, the mine was situate in Wales, and the office was in London, and the only person Mr. Birch could deal with was the purser, and if the purser or the directors failed in their duty, that is no reason why Mr. Birch should suffer. Under these circumstances, the names of Mr. and Mrs. Birch cannot be placed on the list of contributories. Their costs, and the costs of the official manager, must come out of the estate.

M.R. }
May 11, 12. } WILSON v. KEATING.

*Vendor and Purchaser — Contract —
Trustee — Misrepresentation — Liability —
Principal and Agent.*

If a party executes a deed as principal he at once takes the property and makes himself liable for the purchase-money, and he will not be heard to say that no contract existed with the vendor, or that his execution was obtained upon the representation of a third party that the purchase-money was

paid, and that he took the property in the character of trustee only.

The Newcastle Commercial Banking Company was established under the 7 Geo. 4. c. 46. They carried on business at Newcastle-upon-Tyne under a deed of settlement dated the 10th of February 1837.

John Sadleir, in 1853, contemplated the amalgamation of several northern joint-stock banks and the formation of one large banking company.

On the 6th of October 1855 William Walker, who was the managing director of the Newcastle Commercial Banking Company, undertook within seven days from the 26th of October instant, that he would procure to be transferred to James Sadleir, Farmery John Law and Richard Hartley Kennedy, or their nominees, not less than 4,000 shares in the bank, and also that the present directors of the company would do such acts as might be requisite to transfer and vest in Messrs. Sadleir, Law and Kennedy, or their nominees, the management and direction of the company and vacate their respective offices; and Messrs. Sadleir, Law and Kennedy agreed to purchase or find purchasers for as many shares as should be offered to them within six months at the price of 5*l.* per share, to be paid within twelve months from the execution of the respective transfers, with interest at 5*l.* per cent. per annum.

By a subsequent agreement, dated the 5th of November 1855, it was agreed that the certificates of all shares taken by Messrs. Sadleir, Law and Kennedy should be deposited with W. Walker until the purchase-money for the shares was paid, either by them or by the other individuals for whom they acted and to whom the shares might be transferred, and that they should not deal with any of such shares, or mortgage or sell them, until the purchase-money for the same had been paid, and that W. Walker should hold the certificates of the shares until paid for, for himself and others, as unpaid vendors.

The bill alleged that the defendant, Robert Keating, was one of the persons for whom Messrs. Sadleir, Law and Ken-

nedy acted, and that on the 20th of November 1855 R. Keating agreed to purchase from the plaintiff 105 shares for 525*l.*, upon the terms of the agreement, and that on the same day a deed of transfer was executed, and subsequently registered in the books of the company, by which it was witnessed that, in consideration of 525*l.* therein stated to have been paid to R. Wilson by R. Keating, who acknowledged to have received the same and thereby released the defendant therefrom, he, R. Wilson, transferred the 105 shares and all dividends then due and to become due thereon, unto the defendant, his executors, administrators and assigns, subject to the provisions of the deed of settlement, which the defendant thereby covenanted to observe and perform.

Notwithstanding the acknowledgment of the receipt and release in the deed, the purchase-money for the shares was not paid, and the certificates were deposited with W. Walker to secure the 525*l.* and interest, which was still due to the plaintiff.

On the 12th of March 1857 the plaintiff, under the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106), issued a writ of summons against the defendant, as being a trader having privilege of parliament, to recover the 525*l.* and interest. The defendant deposited 700*l.* with the London and County Bank, in the names of Messrs. Mawe and Harwood, and on the 30th of May 1857 Coleridge, J. ordered it to remain in the bank to abide the event of the action.

The plaintiff finding he was estopped from denying the statement in the deed of transfer respecting the consideration money and the acknowledgment of the receipt and the release therefrom, and that he could not proceed with the action, filed this bill, praying for a specific performance of the agreement, and that the defendant might be restrained from requiring the plaintiff to proceed in or to discontinue the action, and from in any way determining the same, and from requiring the repayment of the 700*l.* until the determination of this suit, and that it might be retained in the bank to abide the result of this suit.

In consequence of the agreement of the 6th of October 1855 the assets of

the Newcastle bank were transferred to London, and on the 20th of August 1856 it stopped payment and the shares lost all value.

The defendant, by his answer, said—“Some time in November 1855 John Sadleir told me that he had made arrangements for purchasing the Newcastle Bank, and that he had put some shares in my name. I told him that I could not take them as I had no money to pay for them; upon which he replied, that was not what he meant, but I was to act as trustee for him, and that I should incur no responsibility in so doing, as the shares were already paid for; that he produced one or two deeds of transfer and shewed me the recital thereon, that the purchase-money for the shares had been paid, which I read; and he asked me to sign the deeds, which I did on the faith of the recital that the shares were paid for; but when I signed the deeds I had no idea of taking any beneficial interest under the deeds, and I have never claimed any such beneficial interest, and I considered that the shares transferred to me were to be held by me merely as trustee for John Sadleir, and that I should incur no responsibility in respect of them. The said John Sadleir, at the same time I executed the deeds also informed me that I had been appointed a director of the company and that he wished me to accept the office. After I had signed the deeds John Sadleir took them away with him, and I have never seen them since.” He then said that he had the fullest confidence in the word and integrity of John Sadleir and that he was not undeceived till after his death, on the 17th of February 1856, by his own hand. “Except as regards the fact of my having signed the deeds of transfer, the circumstances under which I signed them and the representations made to me by John Sadleir as aforesaid, I was wholly ignorant of the facts and circumstances hereinbefore stated until some time after the death of John Sadleir, and some of the facts and circumstances I have only discovered since the filing of this bill, and the first time that I heard of there being any agreement for the purchase of the shares in the Newcastle Bank between Messrs. James Sadleir, Law and Ken-

nedy was some time after the death of John Sadleir, when Mr. O'Shea, the manager of the Newcastle Bank, told me that they had agreed to purchase the shares, and that they were to give 5*l.* a share for them, and that they were to be allowed a year to pay for them. I never gave any authority directly or indirectly to Messrs. James Sadleir, Law and Kennedy, or any or either of them, to purchase or negotiate on my behalf for the purchase of any shares in the Newcastle company with any shareholder in the said company.”

Mr. R. Palmer and Mr. A. G. Marten, for the plaintiff.—The defendant was the purchaser from the plaintiff of some shares in the Newcastle Bank; he accepted the transfer and executed the deed, but he refuses to pay the purchase-money. The deed contains the usual acknowledgment of the receipt of the purchase-money, but neither that nor the release is any ground for withholding payment of the money, when it is not even pretended to have been paid.

Mr. Selwyn and Mr. H. Stevens.—There was no contract existing between the plaintiff and the defendant. It was true the defendant had agreed to become a trustee for John Sadleir of the property purchased; but that created no liability upon the defendant in respect of the shares. If the plaintiff had any claim it was at law; he could not ask the Court to enforce the deed, and at the same time ask it to reject facts apparent on the face of it. The transfer was accepted by the defendant on the faith that the shares were paid for, and not with any idea that he was to pay for them. The defendant was willing to re-transfer the shares.

THE MASTER OF THE ROLLS.—By the deed of transfer, which has been executed, the plaintiff, in consideration of 5*l.* a share, transfers 105 shares in a joint-stock banking company to the defendant. The deed is executed by both parties; the purchase-money was not paid at the time, and the vendor now files a bill to obtain payment. Were that all, it would be a matter of course. The deed recites that the money was paid, and the plaintiff by his signature admits the fact, but in this court parties

may always shew that the recital was not true, and that the money was not paid. It has been argued, on behalf of the defendant, that there was no contract to purchase, but the argument rests upon a fallacy. The contract to purchase is not distinct from the deed. There may be, and there often is, a contract distinct from the deed. If the deed is in accordance with the contract it is absorbed by the deed; but if the deed does not carry the contract into effect then various equities may arise. In ordinary cases a separate contract need not be prepared; the whole transaction may be carried out by the deed. This usually recites that a contract has been made, but it is immaterial whether any previous agreement existed or not, as the deed constitutes the contract between the parties. The conveyance vests the property in the purchaser, and it gives the vendor a right to receive the purchase-money; and if it is not paid, he is entitled in this court to ask that payment may be enforced. The plaintiff has filed this bill for the performance of the contract, and the defence is, "You cannot refuse to abide by the deed, and at the same time seek to enforce it; but if you accept the deed proceed upon it at law: it estops neither the plaintiff from denying payment, nor the defendant from denying that there was any contract." In practice all sales for joint-stock companies are made through a broker; there is no previous contract; the parties who buy and sell know nothing of each other. The objection that there was no existing contract would apply as well to a sale of shares as a sale of lands, and it is wholly untenable against a vendor who is asking for his purchase-money. It was also objected that W. Walker was not the agent of the defendant. If that is supposed to be material, I think he was not, but at the same time I do not see how it can be material. The defendant actually executes the deed, and it is wholly immaterial whether he had any agent or not in the preliminary agreement. I assume that Mr. Walker made no misrepresentation to the defendant, and that no grounds exist for setting the deed aside either for misrepresentation, fraud, or even mistake; if they existed, it was the duty of the defendant to have brought them forward. The party,

then, who resists the performance of what he has undertaken to do must shew the grounds of his refusal; these the defendant has stated in his answer, but can his conversation with J. Sadleir exonerate him from the consequence of having executed the deed? It is certain that J. Sadleir was not the agent of the plaintiff, who knew nothing about him, and no agent of the plaintiff made any false representation to the defendant. The plaintiff merely executed the deed, and delivered it to his agent to be presented to the defendant to be executed by him. I do not doubt the accuracy of the defendant's statement. J. Sadleir said, "You are not to pay for these shares; I have already paid for them. You are to hold them really for me, and you are to undertake the whole matter for me." Thereupon the defendant said, "I cannot pay for them." To which J. Sadleir replied, "They are already paid for." The defendant, however, was himself bound to see that the shares were paid for; he had executed the deed, and he was bound to know that he had legally made himself liable to pay for the shares if they were not already paid for; and unless he had an acknowledgment from the plaintiff, or some agent of the plaintiff, that he had received the money, the mere statement of another party that he had paid would not exonerate the defendant from his liability to the plaintiff. The question then is, which of two innocent parties is to bear the loss occasioned by the fraud of J. Sadleir? The false representations were made by J. Sadleir to the defendant; it was between them alone. How is the plaintiff to blame for the false representations made by J. Sadleir which deceived the defendant? As between innocent parties, the person who is induced by the false representations of another to enter into an engagement must be answerable and bear the loss; it was he who incurred the liability upon those engagements. I disregard all the statements respecting the previous arrangements, by which it is alleged, I dare say truly, that three persons, who were puppets in the hands of J. Sadleir, contracted with W. Walker to take 4,000 shares in the bank: but that does not in the slightest affect the plaintiff, except so far as, being one of the shareholders in the bank, he may have

ratified that transaction; but that did not affect his right to sell his shares, or disentitle him to the purchase-money. It has been said in argument that the defendant was willing to give back those shares, but now they are not only worth nothing, but they are a burthen. At the time of the sale, the shares were, no doubt, of some value, and might have been sold to somebody, but now it is impossible to place the parties in the position they were in prior to the transaction. It was suggested that the case must be tested by the fact, whether the plaintiff could have filed a bill within a twelvemonth; but that affords no test. He certainly could have filed a bill and have claimed a performance of the whole contract; but if the plaintiff's agent when he handed the deed over for execution by the purchaser told him, "You shall not be called upon to pay the purchase-money for twelve months," then, undoubtedly, the purchaser, having executed the deed upon the faith of such a statement, would be entitled to the benefit of that agreement; and even if the deed had been executed upon the faith of a parol statement, still the defendant would have been entitled to the benefit of it; and, consequently, if a bill had been filed within twelve months, the defendant would have been entitled to say, "The statement made by your agent was, that the purchase-money was not to be paid for twelve months." But that does not alter the nature of the engagement constituted by the execution of the deed: that remains the same. The whole case rests upon the operation of the deed; it is not pretended that it was obtained by fraud on the part of the plaintiff, or upon any statement which can affect him. The defendant, therefore, is bound to perform the obligations contained in the deed, one of which is to pay the purchase-money. The purchase-money has not been paid; the defendant, therefore, must pay it, and the plaintiff is entitled to a decree, with costs.

July 16.—Upon appeal to the Lord Chancellor and the Lords Justices, the decision was affirmed.

LORDS JUSTICES. { *Ex parte* WOOD, *in re* THE
1858.* SUNKEN VESSELS RECO-
June 28. VERY COMPANY (LIMIT-
ED).

Winding up—Contributory—Conditional Application and Conditional Acceptance of Shares.

W, the partner of a firm, applied for shares in a joint-stock company, on condition that the firm should be employed to supply chains and other things manufactured by them, which the company would require in their business. The company was ordered to be wound up in bankruptcy, under the provisions of the statute 19 & 20 Vict. c. 47. (the Joint-Stock Companies Act, 1856), and one of the Commissioners placed the name of *W*. on the list of contributories; but, upon appeal, the order was reversed.

This was a petition of appeal from a decision of the late Mr. Commissioner Stevenson, of the Liverpool District Court of Bankruptcy, placing the name of Mr. Henry Wood upon the list of contributories of the Sunken Vessels Recovery Company (limited).

This company was incorporated on the 22nd of November 1856, under the provisions of the statute 19 & 20 Vict. c. 47. (the Joint-Stock Companies Act, 1856), and adopted the terms of association comprised in Table B. of the schedule to that act—at least so far as concerned the application for and taking of shares. The objects of the association were the raising and recovering of sunken ships and their cargoes, the capital being 60,000*l.* in 6,000 shares of 10*l.* each.

Mr. Wood was, in 1857, in the trade or business of chain cable manufacturer, in partnership with others, under the firm of "Henry Wood & Co." Capt. Smith was the manager of the company, and between these two gentlemen the following correspondence (stated partly in substance and partly in the words used), all dated in 1857, took place, the same being not

* This case was omitted in the volume for 1858, the reporter considering that a state of circumstances so peculiar was not likely to arise again. As, however, the case has been cited in *Ex parte* Wollaston (*ante*, p. 721), it is deemed better now to insert it.

only the foundation, but the whole substance of this case.

Jan. 6.

Letter from Mr. Wood, in the name of his firm, to the manager, "hoping that my firm shall receive in due time orders for what the company shall require in our way of business."

Jan. 12.

Answer of the manager of the company, requesting the firm of Wood & Co. to take 100 shares.

Jan. 15.

From Wood & Co. to the manager.—"Sir, we have your favour of the 12th inst. In reply it is rather out of our line to take shares, but, should we do so, may we expect the orders for the chains and anchors required? Of course it would be our part to shew that the quality of our manufactures is first class. We are now about to make the chains for the Liverpool new landing stage."

Jan. 16.

The manager to Wood & Co.—"I beg to acknowledge the receipt of yours of the 15th, and to say that when I wrote to you I had in view your obtaining the order for the chains, anchors, &c. As everything relating to the construction and equipment of the vessels, &c. will have to be under my superintendence, it may be considered as a mutual arrangement only depending on your engagement to supply everything in your way of the first material. If you will please to send me the form of application for shares you can do so, subject to your supplying the various materials in your manufacture that may be required for our purposes."

Jan. 23.

Wood & Co. to the manager.—"Sir, we return your prospectus filled up in application for 100 shares to our principal, but as there specified we do so on the condition named in our previous letters of the 5th (mistake for the 6th) and 15th inst., that we have the supplying of chains and anchors, and such goods as we manufacture that may be required for the operations. Of course the quality of the articles is to be first class, and the prices moderate."

Enclosure.

"To the Directors of the Sunken Vessels Recovery Company (limited).—Gentlemen, I request you to allot me 100

shares in the above company, and I undertake to accept the same or any less number that may be allotted to me, and to execute the memorandum and articles of association of the said company, and to pay the deposit and calls. Your obedient servant, Henry Wood, iron-merchants, 4, Grove Piazzas, Liverpool, Jan. 15, 1857, upon condition named in my firm's (Henry Wood & Co.) letters to Capt. Smith of January the 5th (mistake for 6th) and 15th."

March 12.

Letter from the manager to Mr. Wood, stating that the directors had allotted to him 100 shares.

March 17.

Wood & Co. to the directors.—"Gentlemen, we have received your allotment letter 100 shares, under date the 12th inst. Having made application for them, and arranged with Capt. Smith that it should be on condition that we should have the supplying of the chains and anchors, and such other goods which we manufacture, as may be required by the company, before paying any deposit we are desirous of an undertaking to that effect."

May 20.

The Secretary to Wood & Co.—"I find that a letter of yours, dated in March last, respecting the shares allotted to you on the 12th of that month has not been answered, owing to the resignation of the late secretary, and I now beg to inform you that, at a board meeting held on the 18th of March, a minute was recorded to the effect that, provided your chains, &c. are approved after the usual test and rendered at the market price on terms similar to those of the general trade, you will be dealt with by the board. I shall, therefore, have much pleasure in receiving your letter of allotment, with the banker's receipt for payments of the deposit on your shares, in order that it may be exchanged for the share certificates bearing the seal of the company."

June 4.

Wood & Co. to the secretary, in substance, as follows:—"The conditions you name are rather vague, and, on the part of the company, engage nothing. On the other hand, it is not our desire to require such engagement from them as would be unreasonable. We expect merely

that on our taking the shares we shall have the supplying of the chains, anchors and other manufactures of ours that may be required, of the required quality and description, and at fair prices for such. It appears to us that there is now a good opportunity of arranging the point, in a manner satisfactory to both parties. You have contracted for the first vessels for the use of the company, send us specifications of the chains, &c. required for them, and we shall be happy to submit tenders for their supply, and propose that, if we get the tender, we shall take the shares. It may be that the required quantity of chains, &c. is so small (for the first vessel) that we may have to stipulate we are to have the orders for outfits for future vessels for a certain number of years at same prices, with such advance or decline as there might be in the price of iron."

Messrs. Wood & Co. were never asked to supply the company with goods, and Mr. Wood was not called upon to sign the articles of association or to pay deposits on the shares; but the company entered his name on the list of shareholders, and returned his name to the Registrar of Joint-Stock Companies.

In this state of circumstances, on the 16th of April 1858, an order was made for winding up the company under the before-named act and the Amendment Act of 1857, and on the 27th of the same month Mr. Commissioner Stevenson placed Mr. Wood's name on the list of contributories.

The present petition prayed that Mr. Wood's name might be removed, and the list of shareholders might be rectified by striking out his name.

For the appellant it was insisted that he never accepted the shares in writing as required by the form in Table B. of the Joint-Stock Companies Act of 1856 (19 & 20 Vict. c. 47); that there never was any binding contract to take the shares, the whole being conditional, conditional in offer and conditional as to assent or acceptance of the offer; and whether (as the Bench had suggested) the condition was legal or illegal, it did not differ in any material respect from an agreement to perform works and supply articles of manufacture, and accept payment of the amount

due in shares in the company. Such would be the effect if the transaction were legal, and if the Court considered it to be illegal the difficulty would be obviated, for the condition was one precedent to the taking of the shares. Moreover, by the 19th section of the act, no person could be a contributory unless he has both accepted shares, which this gentleman never did, unconditionally, and his name is on the share register, which latter fact only is present in this case.

For the official liquidator it was argued that the bargain was that if the company wanted articles of the appellant's manufacture they would buy of his firm; but it so happened that they wanted none, and therefore did not buy, so that no breach of condition had taken place. In the last letter written by Wood & Co., the shares are treated as taken, and in the former letter, namely, that of the 23rd of January, there was an undertaking to accept, but to this was added an illegal qualification, and, in such circumstances, the Court would enforce the legal part, namely, the acceptance, and reject the illegal part, namely, the qualification, and confirm the decision of the Commissioner.

Mr. Willcock and *Mr. Roxburgh*, for the appellant.

Mr. Bacon and *Mr. Woodroffe*, for the official liquidator.

LORD JUSTICE KNIGHT BRUCE.—The condition expressed in Mr. Wood's letter of application of the 23rd of January, whether legal or illegal, corrupt or not corrupt, was, in my judgment, a condition precedent. It appears to me that the terms of that condition were never with sufficient distinctness acceded to by the company, and that the name, therefore, of this gentleman ought not to be on the list of contributories.

LORD JUSTICE TURNER.—I think that a condition was attached not only to the offer to take the shares, but also to the acceptance of them, and that there was no acceptance, except subject to the condition upon the terms of which the offer to take the shares was made. I do not find that the condition was accepted by the company, for the minute of the 18th of

March is merely to the effect that the appellant should be dealt with by the board; whereas, what he intended to stipulate for was, that the company should take from him all the cables and anchors that should be wanted. I am of opinion, therefore, that there was no effectual acceptance of these shares, and that the name of the appellant ought to be removed from the list of contributories.

KINDERSLEY, V.C. } HOLROYD v. HOL-
May 1. } ROYD.

Partnership Property—Really or Personally.

Where land is purchased by partners out of the partnership assets, and used for the purposes of the business, it is to be considered as personally, both as between the partners themselves and as between the heir and personal representatives of a deceased partner.

Henry Holroyd and Richard Holroyd carried on the business of sizers at Colne, in Lancashire, under articles of partnership; and in the year 1855 they purchased certain copyhold property, which was conveyed to them as tenants in common. Upon this property the two partners erected a size-house and other buildings, in which the business of the partnership was carried on. H. Holroyd then died, and this suit was instituted to administer his estate; and a summons was taken out by Jane Holroyd, the administratrix of H. Holroyd, to confirm a sale of the copyhold property forming part of the real estate of the partnership; and a question was raised between the heir-at-law and the next-of-kin of H. Holroyd, whether the proceeds of the sale were to be considered as realty or personally.

The case now came on upon adjourned summons. An affidavit had been made in the suit by R. Holroyd, to the effect that the property was purchased, and the size-house and buildings were erected, with money forming part of the partnership assets, and during the continuance of the partnership.

Mr. Kay, for the administratrix, contended that the copyhold property must

be considered as personal estate, and must go to the next-of-kin of the intestate. The rule was, that all partnership property purchased out of the partnership assets, and used for the purposes of the trade, must be considered as personal estate. When the partnership was dissolved by the death of H. Holroyd, this copyhold property was sold for the purpose of winding up the affairs and dividing the residue as money.

Mr. Jessel, for the purchaser, supported the same argument as that used by the administratrix.

Mr. Hughes, for the heir-at-law, submitted that the authorities were by no means conclusive upon the subject, and there had been much difference of opinion among the Judges. It was in evidence, moreover, in this case that the intestate was in the habit of purchasing property of this nature for his own purposes, and not for the partnership; and it was fair to assume that the property in question was so purchased by him.

The following authorities were referred to:—

- Thornton v. Dixon*, 3 Bro. C.C. 199.
- Townshend v. Devaynes*, 1 Roper on Hus. & Wife, 346.
- Selkraig v. Davies*, 2 Dow, 230.
- Crawshay v. Maule*, 1 Swanst. 495.
- Phillips v. Phillips*, 1 Myl. & K. 649; s.c. 1 Law J. Rep. (n.s.) Chanc. 214.
- Broom v. Broom*, 3 Ibid. 443.
- Morris v. Kearsley*, 2 You. & C. 139.
- Houghton v. Houghton*, 11 Sim. 491; s.c. 10 Law J. Rep. (n.s.) Chanc. 310.
- Essex v. Essex*, 20 Beav. 442.
- Darby v. Darby*, 3 Drew. 495; s.c. 25 Law J. Rep. (n.s.) Chanc. 371.
- Dale v. Hamilton*, 5 Hare, 369; s.c. 2 Ph. 266; 16 Law J. Rep. (n.s.) Chanc. 126, 397.
- Bell v. Phyn*, 7 Ves. 453.
- Balmain v. Shore*, 9 Ibid. 500.

KINDERSLEY, V.C.—It appears that the copyhold property in question was conveyed to the partners as tenants in common in fee, and the question now is, not only as between the partners themselves,

but between the heir and personal representative of the deceased partner, whether that property is to be considered as realty or personalty. In the case of *Darby v. Darby* the points differed from those now raised; but I had fully to consider the authorities on the subject, and the result of them appeared to me to be this:—in *Thornton v. Dixon*, Lord Thurlow said he had always understood that where partners bought lands for the purpose of a partnership concern, it was to be considered part of the partnership fund, and consequently must be considered as personalty, and distributable as such; but the case having come on before him again, he altered his opinion, and said this: “That had the agreement been between two or more partners, that the mills (that is, the property in question) should be valued and sold,”—if there had been an express agreement to that effect,—“it would have converted them into personalty of the partnership; but that he considered the agreement in that case was not sufficient to vary the nature of the property; and, therefore, after the dissolution of the partnership, one partner having died, the property would result according to its respective nature, the real as real, and the personal as personal estate.” Sir W. Grant had the question before him in two different cases, in the case of *Bell v. Phyn* and *Balmain v. Shore*, and in both those cases he decided on the authority of Lord Thurlow’s decision in *Thornton v. Dixon*. Lord Eldon had the question raised before him in several cases, and expressed an unmistakeable opinion that where property is purchased by partners carrying on a trade out of the partnership assets, for the purpose of the business, it is not only partnership property, but because it is so, it is also personalty to all intents and purposes, not only as between the partners themselves, but as between the heir and personal representative. Lord Eldon’s opinion is a host in itself, but Sir J. Leach decided in the same way, even more distinctly; and Sir Launcelot Shadwell, in *Houghton v. Houghton*, though at first his mind seemed to vacillate, took the same view of the principle. Even supposing that the language in *Phillips v. Phillips* is too unreserved, which, however,

I do not think is the case, the preponderating weight of opinion is in favour of property like this being considered as personalty. The argument that the intestate bought this copyhold, as he did other property, for his own benefit, is met by the fact of its having been conveyed to him and his partner as tenants in common, and that premises were erected on it, and the business carried on there. It appears to me to be a clear case within the principle; and having once come to the conclusion that it was partnership property, it must follow also that it is to be dealt with as personalty. In the common case of a devise of land to trustees to sell and divide the money between different persons, there, if one dies, and the land remains unsold, still it is considered as personalty, because, for the purpose of working out the right which each party may insist upon, there must be a sale, although no doubt all parties may agree to keep it unsold. There is no reason why the same principle should not be applicable to partnership, and it is certainly more convenient to consider it altogether as personalty than as personalty for one purpose and realty for others. In this case it is clearly personalty.

STUART, V.C. }
 July 19. } GARDNER v. GARDNER.

Baron and Feme—Separate Estate.

A legacy of 1,000l. bequeathed to the separate use of a married woman was paid to her, she and her husband both joining in a release to the executors. The money was then allowed to get into the hands of the husband, who paid it to his own bankers, and mixed it with his own money, and employed it in his own business and in the family expenditure. This continued nearly twenty years, when the husband died. There was no evidence to shew the circumstances under which the money was paid to the husband’s banker, nor any proof of any formal assent on the part of the wife to the mode of dealing with the fund by the husband, or of any gift of the fund by her to him:—Held, notwithstanding, upon special case, that the wife’s assent to the employment and expen-

diture of the money by the husband must be presumed, and that she could not be allowed to claim it back from the husband's estate, as if still affected by the trust for her separate use.

In 1838, Mrs. Gardner, the wife of Thomas Gardner, received the sum of 1,009*l.* in payment of a legacy bequeathed to her by the will of a testator and interest thereon, and she executed a release to the executors of the will, such release being also executed by her husband in order to testify his privity and consent. The said sum came almost immediately afterwards to the hands of Thomas Gardner, the husband, who paid it to his own account at his banker's, and mixed it with his own money and employed it in his own business and in the family expenditure. This continued for about twenty years, when T. Gardner, the husband, died intestate. A question then arose, whether his widow, Mrs. Gardner, could claim the 1,009*l.* out of his estate, which question was now submitted for the consideration of the Court, upon a special case, filed by Mrs. Gardner, stating the facts above mentioned. There was no evidence to shew in what manner or under what circumstances the money came into the husband's hands, or was dealt with by him as above mentioned, save that the special case did not contain any statement denying that the money came to his hands, and was paid by him to his banker, and dealt with by him as above mentioned, with her knowledge and assent. There was likewise no evidence to shew whether, in assenting to the money being held by her husband, the plaintiff intended that the sum in question should be a gift to her husband, or should be held by him in trust for herself for her separate use; and the special case stated that no communication took place between them on the subject after the payment.

Mr. Archibald Smith, for the plaintiff, submitted that in the absence of any proof of a gift of the fund having been made by the plaintiff, Mrs. Gardner, to her husband, and of circumstances shewing her assent to the dealings with the fund by him stated in the special case, the Court would con-

sider him to have all along been a trustee of the fund for her separate use.—

Rich v. Cockell, 9 Ves. 369.

Rowe v. Rowe, 2 De Gex & Sm. 294; s. c. 17 Law J. Rep. (N.S.) Chanc. 357.

Mr. Welford, for the defendants, the next-of-kin of the testator, said the rule laid down by Lord Eldon in *Rich v. Cockell*, and ever since followed by the Court, undoubtedly was, that where there is a gift to a married woman to her separate use, without the intervention of a trustee, the husband becomes a trustee for her; but submitted that such trust might be destroyed by clear evidence that the wife intended to make it over to the husband. He contended that, from the circumstances of the present case, the clear inference was that the wife had assented to the mode of dealing with the fund by the husband, and had, in fact, made an absolute gift to him of such fund. He cited—

Essex v. Atkins, 14 Ves. 542.

Calon v. Rideout, 1 Mac. & G. 599; s. c. 19 Law J. Rep. (N.S.) Chanc. 408; 2 Hall & Tw. 33.

Darkin v. Darkin, 17 Beav. 578; s. c. 23 Law J. Rep. (N.S.) Chanc. 890.

Mr. A. Smith replied.

STUART, V.C. held, that, although in this case there was no evidence to shew the circumstances under which the money was paid to the husband's banker, nor any proof of any formal assent on the part of the wife, or of any gift of the fund to her husband, yet her assent to the employment and expenditure of the money by the husband in the manner mentioned in the special case must be presumed, and that she could not now be allowed to claim it back, as if still affected by the trust for her separate use. He observed that the case was not one of gift to the husband, but it was one in which the husband, holding the money upon trust for the wife, or as she should direct, employed it for the most part in purposes for their common benefit; and the question was, whether, after all that had been done with the knowledge and assent of the wife, she was to recover

the money from the husband's estate, just as if it had remained in his hands without any act of hers to put an end to the trust for her separate use. His opinion was, that the assent of the wife to the employment of the money by the husband, partly in his business and partly in expenditure for the benefit of the family, rendered it impossible for the wife, after that assent, to claim the money out of the assets of the husband. The answer, therefore, to the special case would be to that effect.

M.R. }
June 11. } MEDWORTH v. POPE.

Will—Devisee—Description.

A testator, who had several natural children by his housekeeper, devised real estate to each of them, by name. He then devised certain real estate "to such other child, if any, that might be born of his housekeeper in his, the testator's, lifetime, or in due time after his death," and to such child's heirs and assigns:—Held, that a child born after the date of the will took no interest under the devise.

Joseph Medworth had six children by his housekeeper, Sarah Gibson. They were all known by the name of Medworth.

By his will, dated the 18th of October 1825, he devised to his natural son John Medworth Gibson, his heirs and assigns, for ever, his house in Union Place, Wisbeach. He in like manner gave a house and premises to each of his other natural children, by name, and their respective heirs and assigns.

The testator then "devised to such other child, if any, that might be born of his housekeeper Sarah Gibson in his, the testator's, lifetime, or in due time after his death, for such child's own use and benefit, and to the said child's heirs and assigns for ever, two houses, with the appurtenances thereto belonging, being 1 and 2, Market Street, Wisbeach, aforesaid."

The testator died on the 17th of October 1827.

Edward Medworth was born of Sarah Gibson after the date of the will. He was

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the reputed son of the testator, and he claimed the two houses in Market Street, as the devisee under the will.

The suit was instituted by John Medworth, one of the natural children, for the administration of the testator's estate.

Mr. Follett and Mr. Welford, for the plaintiff.—The question was whether there could be a good gift to an unborn child of an unmarried woman. The will referred to his other children by the same woman.

Pratt v. Matthew, 22 Beav. 328; s. c.

25 Law J. Rep. (N.S.) Chanc. 409.

Bentley v. Blizard, 4 Jur. N.S. 652.

2 *Jarman on Wills*, 202.

Mr. Shebbeare, for T. S. Watson, a purchaser of the share of one of the children under the will.

Mr. Lloyd, jun., for another defendant, cited *Mortimer v. West* (1).

Mr. R. Palmer, for Edward Medworth.—The law will recognize a provision made by a testator for a child who in the course of nature might be his. The interest must arise in the life of the testator or in due time after his death.—

Wilkinson v. Adam, 1 Ves. & B. 422.

Metham v. the Duke of Devon, 1 P.

Wms. 529.

Evans v. Massey, 8 Price, 22.

Gordon v. Gordon, 1 Mer. 141.

Earle v. Wilson, 17 Ves. 528.

THE MASTER OF THE ROLLS.—The defendant, E. Medworth, cannot take under the words of this will. The law does not construe wills with reference to the birth of illegitimate children. A gift to future children of an unmarried woman must mean to future legitimate children. The law will not allow illegitimate children any interest with them. Illegitimate children may take, if specifically pointed out. In this case, however, I think Edward Medworth took no interest under the will (2).

(1) 3 Russ. 370; s. c. 5 Law J. Rep. Chanc. 181.

(2) See *Blundell v. Dunne*, 1 Madd. 433.

KINDERSLEY, V.C. } *In re* MARSDEN'S
June 4. } TRUST.

Power of Appointment—Fraudulent Appointment.

A married woman, having a power of appointment in favour of any one or more of her children, appointed the whole fund to one child absolutely; and there was evidence to shew that an arrangement had been entered into, that such child should hand over one half of the fund to her father absolutely, and should give him a life interest in the other half. No notice of such arrangement was, however, given to the appointee during the life of the mother:—Held, that the execution of the appointment was in fraud of the power, and therefore void.

By an indenture of settlement, dated the 14th of October 1836, and made previously to the marriage of William John Martin and Charlotte Marsden, but not stated to be in consideration of such marriage, certain canal shares belonging to Charlotte Marsden were assigned to trustees, upon the trusts therein mentioned, for the benefit of Charlotte Marsden during her life, with power to the trustees, in case she should marry, to settle the property upon her for her separate use; and after her decease, in case she should leave any husband surviving her, upon trust during the remainder of his life to pay one-fourth part of the dividends arising from the above shares to him, or his assigns, with power for the said Charlotte Marsden at any time to revoke the trusts in favour of such husband, and subject to the said trusts in favour of her said husband, in trust for all and every, or such one or more exclusively of the others or other, of the children or child or other issue of the said Charlotte Marsden, with provision for their maintenance and education, at such age or time, or respective ages or times, and if more than one, in such parts, shares and proportions, and charged with such annual sums of money and limitations over for the benefit of the same children or issue, or some or one of them, and upon such conditions and restrictions, and in such manner as the said Charlotte Marsden, whether covert or sole, and if under coverture, notwith-

standing such coverture, should by deed or will, to be attested as therein directed, appoint; and in default of such direction and appointment, in trust for all the children of the said Charlotte Marsden in manner therein mentioned, as tenants in common; and in case there should be no children of the said Charlotte Marsden, then, without prejudice to the trusts of a fourth part in favour of any husband, as she, the said Charlotte Marsden, should by deed or will appoint; and in default of appointment in trust for her next-of-kin.

On the 21st of October another deed was executed between Charlotte Marsden of the one part, and W. J. Martin of the other part, which recited that the previous deed had not been prepared in conformity with the intentions of Charlotte Marsden; and that it was her desire to have it rectified. The deed then contained certain clauses altering the deed of the 14th of October, and giving W. J. Martin the absolute interest in the canal shares in case of there being no children of the marriage then intended between them. The marriage took place on the 22nd of November 1836, and there was issue six children, the eldest of whom was Isabel Martin. By a deed-poll, dated the 24th of July 1857, Charlotte Martin (formerly Charlotte Marsden) appointed the whole of the trust property to her eldest daughter, Isabel Martin, absolutely. Charlotte Martin died intestate in August 1858, and Isabel Martin attained twenty-one on the 20th of September 1858. On attaining her majority she applied to the surviving trustee of the deed of the 14th of October for a transfer of so much of the funds as she should be entitled to, but the trustee declined to do so, and paid the whole fund into court, amounting to 5,104*l*. An affidavit was then made by the trustee to the following effect:—That Mr. and Mrs. Martin while residing at Brussels had employed Messrs. Parker & Co., solicitors, for all parties, and had consulted with them what means ought to be taken for the purpose of giving to her husband a larger beneficial interest in the property than he then had; and Mrs. Martin expressed a wish to make a will under her power in the deed of the 14th of October 1836, leaving the whole fund to her eldest

daughter, upon condition that she should, upon coming of age, make over to her father one-half of such fund, and should give him a life interest in the remainder; but if this intention could not be legally carried into effect, she proposed to give her eldest daughter the whole property absolutely, and expressed an intention of giving directions to her to carry out her wishes after her death. Instructions were thereupon given to a conveyancer, and he, having a discretion to prepare a deed or will, prepared an appointment to be executed by Mrs. Martin in favour of her daughter absolutely, but appended an opinion thereto that Mrs. Martin ought to have a separate solicitor to advise with her upon the subject, and that notice should be given to the surviving trustee. The appointment was executed, and after Mrs. Martin's death a correspondence took place between the parties, which led to this petition being presented by Isabel Martin, stating that the petitioner was ignorant until after her mother's death of the execution of the appointment by her; and that no bargain or agreement was entered into on her part with reference to the funds appointed to her, and praying that the money might be paid out of court to her.

The petition was opposed by the younger children of the marriage, on the ground that there was the secret understanding above mentioned with respect to the funds; and that the appointment was, therefore, a fraud upon the power and void.

Mr. Shapter and *Mr. H. G. Bagshawe*, for the petitioner, contended that no fraud upon the power had been shewn to exist. Whatever intention Mrs. Martin might have had to benefit her husband, it was evidently never communicated to the daughter; and the appointment was, therefore, valid, and the petitioner was entitled to the fund.

Mr. Baily and *Mr. Cracknall*, contra, submitted that the evidence was sufficient to vitiate the appointment. Mrs. Martin, no doubt, intended to give her husband, if possible, a larger share in the property than was sanctioned by the terms of the power; and, having expressed that intention, she went on to state that if it could not legally be done, the appointment was

to be made absolutely in favour of her daughter, and no one could fail to see that a fraud upon the power was contemplated by the parties.

The following authorities were cited:—

Beere v. Hoffmeister, 23 Beav. 101; s. c. 26 Law J. Rep. (N.S.) Chanc. 177.

Fearon v. Desbrisay, 14 Ibid. 635; s. c. 21 Law J. Rep. (N.S.) Chanc. 505.

M'Queen v. Farquhar, 11 Ves. 467.

Daubeny v. Cockburn, 1 Mer. 626.

Wellesley v. Mornington, 2 Kay & J. 143.

Birley v. Birley, 25 Beav. 299; s. c. 27 Law J. Rep. (N.S.) Chanc. 569.

Walt v. Creyke, 3 Sim. & Gif. 362; s. c. 26 Law J. Rep. (N.S.) Chanc. 211.

Butcher v. Jackson, 14 Sim. 444.

Carver v. Bowles, 2 Russ. & M. 301; s. c. 9 Law J. Rep. Chanc. 19.

Wright v. Goff, 22 Beav. 207; s. c. 25 Law J. Rep. (N.S.) Chanc. 803.

Keily v. Keily, 4 Dru. & W. 38.

Askham v. Barker, 12 Beav. 499.

Wheate v. Hall, 17 Ves. 80.

Vane v. Lord Dungannon, 2 Sch. & Lef. 118.

KINDERSLEY, V.C.—The question in this case is, whether the execution of a power of appointment is to be defeated on the ground that it is what is commonly called a fraud upon the power? The petitioner is the person in whose favour the power has been exercised, and she insists that the appointment is good. On the other side, it is said to be a fraud upon the power, having regard to the circumstances of the case, which are by no means common. Upon the face of the instrument, the power is well executed; and the question is, whether the circumstances which took place prior to its execution are sufficient to shew that a fraud upon the power was intended. This power is, in point of form, a trust, to be exercised by a certain person in favour of certain objects of the trust. These powers occur in a great many forms: one is, at the discretion of the donee with a view to accomplish some purpose for the benefit of other persons;

and in such cases the persons to take under the power are, in a great majority of instances, the persons who would take in default of appointment; but, on the failure of these, there are often ulterior objects. I mention this because it may be one thing to do an act which turns out to be to the prejudice of the persons who take, if there are no immediate objects of the power, and another thing to do an act which is to defeat the immediate objects of it. Now the purpose of such a power as this is to provide for the children of the marriage, or rather of the lady; but, at the same time, to preserve to the parent such powers as will keep the children under the control of the parent. The power is intended to enable the parent, when the children come into existence, to distribute and deal with the property in such a manner as will be best for the objects of the power. Now I need hardly say that the same rules which are applicable to discretionary trusts generically must be applicable to every species of them. As you cannot enter into a man's mind and so conjecture what were his motives, unless there are some acts from which we can draw a legitimate inference as to his motives, whenever there is a discretionary trust, and that discretion is exercised either improperly or corruptly—unless you can shew to the Court that such was the case, the Court will not control the exercise of the discretion. You may have a suspicion that the power has been exercised from a particular motive; but if it is a mere suspicion, and not a matter of clear, judicial inference, you must leave it as you find it. When, however, we find that trustees have a discretionary trust, and it is proved to the satisfaction of the judicial mind that the exercise has been either corrupt or for purposes which have the effect of defeating, instead of carrying into effect the trusts, then the Court will not uphold that exercise of the power. Now this is not a general, but a special, power; and as to a special power, whether exclusive or with power to appoint among the children generally, if the donee of such a power attempt to exercise it in plain terms in favour of a person who is not an object of the power, that is no proper exercise of the power—it is no exercise of it at all. If a person having a power

to appoint to A. appoints to B, that is, of course, void. But when the donee exercises the power so that upon the face of the instrument it is not entirely within the scope of the power—that is to say, not in favour of the objects of the power alone—then arises the question whether it is a fraud upon the power—whether it was exercised under such circumstances that the Court will say the appointment ought not to be sustained. If a power be honestly exercised, the Court will not control its exercise, though it may be exercised capriciously or under a prejudice for a particular child. Now, in this case it is clearly proved that, for two years before this instrument was executed, Mr. and Mrs. Martin had had the settlement under discussion. And why? Because it excluded the husband from that interest which he usually has under a marriage settlement of this kind. Mrs. Martin regretted that it was so; and I will assume that nothing could be more right than the feeling she has entertained on the subject. They seem to have said, "We have now five children, the eldest will be twenty-one in a little more than twelve months; suppose an appointment is made to her entirely under a condition that she shall hand over one-half to the husband, and give him a life interest in the other half; and as to the other five children, they will have nothing." I do not blame them for having this idea in their minds; they were not aware of the moral rule which exists in courts of equity, as to the exercise of powers. This was never communicated to the daughter till after the death of Mrs. Martin. She was in a bad state of health, and it was arranged that Mr. Martin should go over from Brussels to England and consult their legal adviser. He, of course, advised that what they wished could not be done. Then the husband suggested that, still, the appointment might be made to the daughter absolutely. He then intended to communicate to her what had been the object of the appointment, and that if she thought fit she might give him the benefit contemplated; which I will assume was a very legitimate design. This was not an appointment made because the daughter was going to be married, or anything of that kind; but the whole purpose was for the

benefit of Mr. Martin. There was no concealment about it; but there was clear evidence of what was the design of Mr. Martin and also of Mrs. Martin: viz. that it was her intention to exercise the power, if possible, in such a manner as to defeat the real purpose of the power. The exercise of the power by Mrs. Martin in the mode suggested was an exercise that defeated the interests of the real objects of it. I am satisfied that this case comes within what is called a fraud upon the power, without imputing any bad motives to the parties; but it is clearly contrary to the scope of the power. In some of the cases it has been a bargain under which the donee of the power was to derive a benefit—that is something more than a moral fraud—but there is nothing of the kind here. It is not necessary that the appointee should be aware of the appointment; *Wellesley v. Mornington* shews that. Nor is it necessary for the purpose of constituting fraud that the object of the donee should be to benefit himself alone, because, if he wishes to benefit another person not the object of the power, it is just the same. I do not think it is necessary that an appointee should be aware of the intention, but it is necessary that the motives at the time of the execution should be matter of proof. I must, therefore, decide that the execution of this appointment is void as being in fraud of the power, and the petition cannot be granted.

WOOD, V.C. { THE NORTH LONDON RAIL-
July 6. { WAY COMPANY v. THE
METROPOLITAN BOARD OF
WORKS.

Metropolis Local Management Act (18 & 19 Vict. c. 120. ss. 135, 150, 151, 152.)
—*Powers of the Metropolitan Board of Works—Purchase of Land.*

The powers conferred upon the Metropolitan Board of Works by the 135th section of the 18 & 19 Vict. c. 120, of carrying their sewers and works into, through or under any lands, making compensation for any damage done thereby, may be exercised without purchasing such lands, or any easement in them; and the 150th, 151st and

152nd sections of the act, enabling them to purchase any land, or any right or easement in or over any land which they may deem necessary or expedient for the formation or protection of their works, are not to be read as restricting such exercise of those powers.

In the construction of powers conferred by act of parliament upon public bodies, acting for the public benefit alone, the intention of the legislature is not to be measured by the more guarded powers given to public companies established for trading purposes.

On the 24th of December 1858 the defendants, the Metropolitan Board of Works, in pursuance of the Metropolis Local Management Act (18 & 19 Vict. c. 120.) and of the 21 & 22 Vict. c. 104, served upon the plaintiffs a notice in writing that they required to purchase, and intended to take for the purpose of the embankment forming a portion of the main drainage works authorized by the last-mentioned act, and also for the purpose of constructing the other works in connexion therewith, certain lands and hereditaments belonging to the plaintiffs, and delineated on a plan annexed to the notice. By this plan it appeared that the sewer and works intended to be constructed must necessarily pass through a portion of the plaintiffs' land other than that which the board had given notice to purchase; and, in fact, it was intended to carry on the works through such additional land by means of a tunnel. The defendants claimed to construct their sewer through this portion of the plaintiffs' land without purchasing the same, or any interest therein.

The bill prayed that the defendants might be restrained from constructing their sewer and works through, or from entering upon or using any land of the plaintiffs not comprised in the notice of the 24th of December 1858, until, in conformity with the provisions of the Lands Clauses Consolidation Act, 1845, in that behalf, they should have given to the plaintiffs notice of their intention to purchase and take the same land, and should have deposited in the Bank of England such sum as should, in the mode prescribed by the last-mentioned act, be determined to be the value of the plaintiffs' interest in the same land, and should have also given to the plaintiffs

such bond as, in that behalf, is by the said act directed to be given.

Sir Hugh Cairns and *Mr. Edgar Rodwell* now moved for an injunction in the terms of the prayer, and contended that the large powers conferred by the 135th section of the Metropolis Local Management Act were not intended to be exercised without purchasing the land, or at all events the easement, and that the section must be read in connexion with the 150th, 151st and 152nd sections of the same act, giving power to make such purchases.

Mr. Oster appeared for an adjoining landowner.

Mr. Rolt and *Mr. Charles Hall* opposed the motion on behalf of the defendants.

In addition to the above-mentioned sections of the act, the *Public Health Act*, 1848, (11 & 12 Vict. c. 63.) ss. 45, 46, 144, the 11 & 12 Vict. c. 112. and *Oldaker v. Hunt* (1) were referred to.

Mr. Rodwell was heard in reply.

WOOD, V.C.—This act must be considered upon the strict construction of its clauses; and if they should appear to be in any degree doubtful, then the scope, frame and object of the whole act must be taken into consideration, as in construing any other instrument; and for that purpose I do not think it immaterial to refer back to a view of the scope and frame of the clauses which are contained in similar acts, as far as they may be of any assistance, although I doubt whether it would be necessary to have recourse to any such assistance in construing this particular act. The 135th section is in truth the one which creates the greatest difficulty on the part of the plaintiffs, and *Sir Hugh Cairns* felt this difficulty in the outset, and therefore, in endeavouring to get out of it, he invited me to consider the improbability of the legislature conferring such large powers upon this body, seeing how careful it has been upon all occasions in which railway and the like companies have been authorized to take lands compulsorily for the particular purposes of their undertaking, to guard and protect the interests of the landlord. In such a state of the argument,

it was a perfectly legitimate course on the part of the defendants to say, that the measure of the intention of the legislature with regard to those acts which deal with private companies is not to be applied at all to an act of this description, which is an act for an entirely different purpose; not being for the purpose of conferring a benefit upon a certain company, upon the condition and consideration of that company providing public accommodation in return; but an act solely intended for the public benefit, and vesting certain powers in the Commissioners for the general benefit of the whole community.

Now, the powers conferred by the 135th section certainly are very large, and are given unfettered by any condition whatever, save the condition of making compensation for any damage done; that is to say, power is given to the three corporations who are constituted by the act, namely, to the vestry board, the district board and the Metropolitan Commissioners of Sewers; but the present section in particular is confined to the Metropolitan Commissioners of Sewers, giving them the power of making any sewers, with the "walls, defences, banks, outlets, sluices, flaps, penstocks, gullies, grates, works and things thereunto belonging." The interpretation clause has no definition of the word "works," but I take it from the section itself—they have power to make these sewers and works within the limits of the metropolis or beyond, "or through, or under any cellar or vault under the carriageway or pavement of any street, and into, through, or under any lands whatsoever within or beyond the said limits, making compensation for any damage done thereby, as hereinafter provided; and all sewers and works from time to time made by the said board shall vest in them." The only limit provided with reference to the power is, that they are to make compensation for any damage done thereby. No doubt, it is a very large power; and it is a very legitimate argument on the part of the plaintiffs to urge that,—seeing so large a power is given they might even drive the sewer itself through the middle of a cellar, or so near the surface as, in combination with the 204th section, to prevent any building upon building land and the compensation being only that dam

(1) 19 Beav. 485; a.c. 6 De Gex, M. & G. 376.

age is to be paid for, and no limit being set down in this section by which they are bound to give any previous notice, or to take any previous steps whatever,—it is a perfectly legitimate argument to say you would expect to find some clause which should in some way or other limit this construction; and if you can find such a clause, the Court must apply it and limit the power accordingly. And then the difficulty is of finding such a clause. Now, the mode in which the plaintiffs proceed to fulfil the task is by pointing to the 150th section, by which the Commissioners are enabled, though not in any way compelled, “to take on lease for such term as they may think fit any land, or any right or easement in or over any land which they may deem necessary or expedient for the formation or protection of any works which they are authorized to execute under this act.” That is to say, having a previous power of driving the works in the way I have described, under any property whatsoever, they have here a power, which is given also to the district board and to the vestry board, if they think fit so to do, to take any land which they deem necessary “for the formation or protection of the works, and also for the erection and formation of such offices and other buildings, yards, stations or places for deposit,” and other things, going a good deal beyond the works themselves, if they think fit; and many other matters are particularly mentioned in that section. Then the argument upon that would, of course, be, (and there is some shew of reason in it, until the matter comes to be explained by the other sections of the act, and I was myself struck with it at the first outset), that when you find so large a power is given in the 135th section, and simply the duty of making compensation for damage and no other duty imposed, the Court might be led to the construction that, the Metropolitan Board having the power given to them of making purchases if they deem it necessary for the formation of the works, as the sewer cannot be made without taking the land, they must find it necessary, for the purpose of making their works, to take this land, and therefore, of course, it will be deemed by them necessary to take it: that this is a

clause to enable them to do so, and in that case, as the 151st section points out, the provisions of the Lands Clauses Consolidation Act, 1845, apply, with the exception of “the provisions of that act with respect to the recovery of forfeitures, penalties and costs.” Then comes a very important section in the construction of this act, the 152nd, which says that, “The provisions of the Lands Clauses Consolidation Act with respect to the purchase and taking of lands otherwise than by agreement, shall not be incorporated with this act, save for enabling the Metropolitan Board of Works to take land, or any right or easement in or over land, for the purpose of making any sewers or works for preventing the sewage, or any part of the sewage, within the metropolis from passing into the Thames in or near the metropolis, or otherwise for the purpose of the sewerage or draining of the metropolis.” So that you have a two-fold restriction: first, a restriction which says that the vestry board and the district board shall have no compulsory powers whatever of making a single sewer; for if I am to apply the powers which I find given to these boards in the same way as I am asked to apply and construe, on the part of the plaintiffs, the 135th section with regard to the Metropolitan Board, then there would not be in them any power whatever of doing it compulsorily, which you find exists in the Metropolitan Board; and the second limitation, which is not important in this suit, would be, that the power of the Metropolitan Board is to be confined to the sewage works which are entrusted to them. However much one might be tempted by the argument that the 150th section was intended to point out a course of procedure with reference to taking any land necessary for making the sewer, and therefore that the 151st and 152nd sections would immediately apply to it the whole of the Lands Clauses Act for the purpose of making the sewer, which might be done without any great injustice, inasmuch as, after all, the sewer would be carried on as soon as notice was given, under the 153rd section, and the money paid into court or a bond given in the usual way if they wanted to take immediate possession,—still, I must look back to the rest of the act, and see whether,

upon a reasonable construction of the whole act, I ought so to apply the 150th, 151st and 152nd sections as to impose a restriction (for that is what I am asked to do) upon those very general powers conferred by the 135th section, those general powers being subjected to a certain restriction which mentions nothing else by which they are to be limited, except the mere fact that compensation is to be paid for damage done.

Now, when I come to construe the whole act, I must look back to the other sections, and there I find that what the Metropolitan Board of Works are to do with regard to the main arterial system, if we may call it so, the vestry boards are to do for the parish, and the district boards are to do for certain districts. The legislature, at all events, has considered them absolutely necessary and proper works which it has desired to have done, and has empowered and authorized the vestry and district board to do; but to say that it shall be limited to carrying on a system of sewage which can be carried on only by the consent of every individual person through whose land any sewers are to be made, is absurd; and I do not hesitate to say that such a construction would nullify every power of making a sewer conferred upon a vestry or district board. Every man knows that if, in dealing with a work of this description, persons have the power of stopping the work, not a sewer could be made by a vestry or a district board under the powers of this act. I take it that that would in itself be so great an absurdity that it would lead one strongly to the conclusion immediately that the 150th and 151st sections were inserted for some other purpose, and not for the purpose of restricting the 135th. I am bound to say also that, at the first opening of the case, I was a little struck with this, that it seemed somewhat remarkable that the legislature should think it necessary to give these powers to the Metropolitan Board of Works, which, by the 135th section, it is supposed to have given them without any such proceeding under the Lands Clauses Act at all. But, at the same time, it does appear to me that if you can find any other interpretation with reference to the conferring of those powers,

the observation is so forcible—I now confine myself to this act entirely—as to the effect it must necessarily have upon the construction of the powers vested in the vestry and district boards, that the construction contended for by the plaintiffs ought not to be adopted, unless I find myself driven necessarily to it.

Now it seems to me that there is a good reason for inserting these compulsory powers, because these are gentlemen acting for the public benefit, having no private interest whatever, and, therefore, persons in whom the legislature has thought it right to vest a certain power, if they think fit, of proceeding to buy, when they feel they are destroying the property which they are passing through by means of their sewer; they may say, we will take it compulsorily and pay for it out and out, for a twofold reason: first, it was thought that there would not be any great deal of feeling in a public body—which was an argument pressed upon me—exercising to the utmost severity the powers intrusted to them; and, secondly, even in the severe exercise of their duty, if it is looked upon in such a view, they may find it much better for the public, whose money they are dealing with, to buy a property out and out, which it may be said they are injuring, than to go to a jury to assess the damage done, inasmuch as a jury might be induced to give a much larger sum than probably the whole property might be acquired for if bought out and out. One sees, therefore, there are reasons why it might be desirable that the Metropolitan Commissioners should have this particular power. Then also, one finds it goes not only to the work of making the sewer, but of preventing the sewage of any part of the metropolis from passing into the Thames or otherwise. That again may be another purpose for which they may be empowered to make purchases which it might be desirable for them to make, instead of merely making the sewer itself on making compensation for damages. I find, therefore, there are reasons which may be given for that, and I am not driven to the construction that it is necessary to be imposed as a limit upon the 135th section.

I have been up to the present moment dealing with the act alone; but there

are other arguments perfectly legitimate in a case of this kind. I am referred to other acts of parliament, to see how the legislature has guarded in other cases. In railway cases large powers are given to the companies, which are always coupled with this, "subject to the provisions contained in this act, or in any act incorporated herewith." This is the very thing missing in the 135th section. It is only "subject to making compensation for any damage done herein." Then, if you look to an act of parliament made *in pari materia* exactly, you do find a whole series of clauses *verbatim* similar in the general Commissioners of Sewers Act (2), which existed before this body was established, giving powers of this description, under which nobody ever supposed they could be arrested at any period in the progress of their work, by anybody saying they should not make a sewer through his land. We have the fact of those powers existing for a long time; we have the fact of an immense body of sewage being complete under the powers of the act, (and there are here clauses exactly similar to those in every respect), and they also had the power of contracting, if they thought fit, by agreement, for the purchase of land. When you find that to be the case, and find the highway surveyor, whose powers, by-the-bye, I have a right in every sense to look at, because they are incorporated in one of the clauses, and when you find also the Board of Health having powers in exactly a similar form, and that the whole scheme of the sewage, therefore, must be entirely stopped if such a construction is to be put upon this act of parliament as I am pressed to adopt, namely, that I am to tie the 150th and following sections to the 135th in such a way as to limit powers, which do not appear to be limited, I apprehend, when you come to such a mass of legislation, all having one effect and bearing one way, that it is perfectly conclusive that the only construction that can be given to these powers is, that they are given for some purposes which are desirable to be added to all the powers hitherto possessed.

It was remarked, by Mr. Rodwell, in reply, that it was not intended by this act

to limit, but to extend the general powers; and he added that, that being the case, more control was to be imposed as to how they should be exercised; and I say that, finding that this limit would be a limit of the serious character I have described, by which any individual, if so minded, might, as regards the district and vestry boards, stop the sewers altogether, and as regards the other board, if it were put into a course of action the delay would be most serious, I have no hesitation in coming to the clear conclusion, that the effect of the 135th section is such as the defendants contend for, and not that which is contended for on behalf of the plaintiffs. The true key to the act is that express limit with regard to the vestry and district boards as contrasted with the powers given to the metropolitan board for their particular purposes; and if I wanted an additional assistance in construing this, which I do not, it is to be found in this last act (3), in which the powers have been extended to property perhaps more valuable than any that can be suggested, viz. wharfs upon the banks of the Thames; and I have no hesitation in saying I cannot grant this motion. At present I shall make the costs costs in the cause.

KINDERSLEY, V.C. }
March 22. } HENDERSON v. ATKINS.

Trust, Breach of—Statute of Limitations.

By a will, dated in 1761, a trust was created in favour of a certain class of the testator's relations, nearly all of whom were paid their proportions. The surviving executor and trustee of the testator had the remainder of the funds standing in his name at his death, and by his will he recognized the existence of the trust and directed that it should devolve upon his nephew. Administration de bonis non was granted in 1822 to the surviving executor's estate, and subsequently to another person in 1826, when the remaining trust fund was mixed up with such administrator's personal estate and applied in the purchase of real estate. A bill was filed by a person claiming part of the legacy

(2) 11 & 12 Vict. c. 112.

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(3) 21 & 22 Vict. c. 104.

6 A

under the original testator's will, charging a breach of trust by the surviving executor, and that his real and personal estate were liable to make good the amount:—Held, upon demurrer to the bill, that the real estate could not be charged with the legacy; that there was an implied trust created by the will, but the right of the claimants having accrued more than twenty years since, their claim was barred by the Statute of Limitations.

The bill in this suit stated that Frazer Honeywood, being seised of considerable real and freehold estate, by his will, dated the 24th of May 1757, devised his real estate to Sir John Honeywood, Abraham Atkins, Clarke Wilshawe and Edwin Martin, and their heirs, upon certain trusts, appointing them executors. By a codicil, dated the 14th of August 1761, he gave to his trustees 20,000*l.*, upon this special trust, that his said executors, and the survivors and survivor of them, his executors and administrators, should distribute the whole of the said sum, with the interest and improvements, to and amongst such of his relatives by consanguinity, and not by marriage, who should not appear to his said executors to be worth, each person, more than 2,000*l.*, and who within two years next after his decease should apply, or being minors cause application to be made, to his executors to participate in the legacy, such distribution to be made at such times and in such proportions as his executors should in their discretion judge to be most proper, and having due regard to the nearness of such relations to him, and to their situations, ages, abilities and professions and families, according to their circumstances, not to be confined to any particular degree of kindred. The testator then directed the 20,000*l.* to be invested in stock, and there was a general discretionary power as to the evidence upon which distribution should be made, with a gift of the residue to John Honeywood. The testator died in January 1764, the will and codicil being proved by his executors. 456 claimants came in to participate in the legacy, and in 1767 a bill was filed by three claimants named Bennett against the executors for an account of the legacy of 20,000*l.*, and to establish the

will, when, by a decree, dated the 20th of February 1767, it was declared that the bequest was good, and a reference to the Master was ordered, who was to make a separate report as to those not entitled to the legacy. On the 12th of December 1769 the Master made his report, and after distribution of a great portion of the legacy, but before any further report, the suit abated by deaths of parties, and no complete distribution took place of the legacy, but the residue was distributed as part of the estate of Atkins Edwin Martin, who had taken the surname of Atkins. The bill then stated that the legacy had increased by investment to 23,000*l.*, and what remained unappropriated amounted to a considerable sum. Abraham Atkins was the surviving executor of the will, and he made his will, dated the 12th of July 1791 and died in 1792. The will having been proved by his executors, administration with the will annexed was granted to Atkins E. M. Atkins on the 4th of September 1822. On the 14th of November 1826, after the death of Atkins E. M. Atkins, a similar grant was made to John Cook and Joseph Cook, who were also the executors of the will of Atkins E. M. Atkins, proved on the 14th of March 1826. One of the claimants to a share of the legacy of 20,000*l.* was Patrick Henderson, since dead, who was a relative of the testator entitled to participate in the legacy, and his claim was allowed by the Master in the suit of *Bennett v. Honeywood*. Administration to the estate of Patrick Henderson was granted to the plaintiff, who thereby became his legal personal representative, and, as such, entitled to his share in the legacy and accumulations. The bill then stated that the dividends of the legacy being invested, distribution was made from time to time to claimants found entitled in the suit, and among others, of a sum of 25*l.* to Margaret Henderson, the then representative of Patrick Henderson, but for temporary relief and as only a part of his share. After such payments there remained a clear sum of 2,550*l.* 4*l.* per cent. Bank annuities, which came to the hands of Abraham Atkins as surviving executor and trustee of Frazer Honeywood, which he did not apply under the will,

but retained in his own hands, as evidence whereof the plaintiffs charged that his will, dated the 12th of July 1791, contained this passage—"And whereas, as surviving trustee under the will of Frazer Honywood, Esq., there remains some trusts to be performed respecting the sum of 20,000*l.* given by him to his poor relations, which sum hath been all paid and applied except a sum of [here followed a blank]: now I do declare it to be my will that the said trusts, if the same have not been fully performed by me, shall devolve on my nephew, Edwin Martin Atkins, to whom I give full power to perform the same."

The bill further stated that in January 1783 Abraham Atkins wrongfully transferred 300*l.* to one P. Cherry, who was not entitled to it, and the sum of 2,250*l.*, which was the sum referred to in Abraham Atkins's will, was transferred from the name of Abraham Atkins into the name of E. M. Atkins, as his representative, and that he mixed the said sum of stock with his own monies; and that on the 17th of June 1830 it was found by his executors John Cook and Joseph Cook mixed with his personal estate, and applied by them as such. The bill charged that Abraham Atkins, Atkins E. M. Atkins and John Cook and Joseph Cook had applied the dividends of the 2,250*l.* to their own use, and as part of the personal estate of Atkins E. M. Atkins; that no further claim had been made to the legacy of 20,000*l.* since the payment of the 25*l.* to Margaret Henderson; and that the plaintiffs were entitled to the 2,550*l.*, the residue thereof come to the hands of Abraham Atkins. The bill then charged that Abraham Atkins was a trustee of the 2,550*l.*, and that Atkins E. M. Atkins was a trustee of the 2,250*l.*, for the persons entitled to participate in the legacy; and that the assets of Abraham Atkins were liable for the 300*l.* so improperly parted with to P. Cherry; and that the estate of Atkins E. M. Atkins was liable at his death to pay the 2,250*l.* stock and the dividends received by him, or his representatives. That Abraham Atkins died possessed of considerable real and personal estate, which he devised and bequeathed, by his will, to his children, with remainder to his nephew, Edwin Martin Atkins, with

remainder to Atkins E. M. Atkins, son of Edwin Martin, for life, with remainders over, with remainder to his own right heirs, and the said Edwin Martin was Abraham Atkins's heir-at-law. That Abraham Atkins died without issue. That Atkins E. M. Atkins made his will, dated the 26th of November 1818, whereby he devised and bequeathed his real and personal estates (except estates vested in him in trust) to John Cook and Joseph Cook, upon trust to convert, pay debts and legacies, and invest the residue of the funds in the purchase of lands, and stand possessed of the same in trust for his children, in such proportions, &c. as the said John Cook and Joseph Cook should appoint, and in default, in trust for his children at twenty-one or marriage. That Atkins E. M. Atkins died in May 1825, leaving nine children surviving. That administration *de bonis non* to the estate of Abraham Atkins was granted to John Cook and Joseph Cook, limited to the lives of the sisters of Atkins E. M. Atkins. The bill then referred to a suit of *Atkins v. Cook*, to administer the estate of Atkins E. M. Atkins, in which John Cook and Joseph Cook, under the direction of the Court, brought up certain of the intermediate life interests (thirty in number) left by the will of Abraham Atkins, and three only of those who had not sold their life estates were now living, and two had died without having sold such interests. The bill then stated certain appointments by John Cook and Joseph Cook, under the direction of the Court, in favour of the children of Atkins E. M. Atkins in the suit of *Atkins v. Cook*; and a certain appointment to Edwin Martin Atkins of all the real and personal estate of Atkins E. M. Atkins; also the death of Joseph Cook, leaving Maria Cook his legal personal representative; and charged that John Cook and Joseph Cook had received the greater part of the real and personal estate of Atkins E. M. Atkins, which comprised a large part of the real and personal estate devised by the will of Abraham Atkins. That the appointees under the will of Atkins E. M. Atkins had direct notice of the plaintiffs' claim, and positive knowledge that the sum of 2,550*l.* stock and 2,250*l.* stock were part of the trust fund of 20,000*l.*; and also of the

breach of trust of Abraham Atkins and Atkins E. M. Atkins, and that he had mixed it with his own monies, and died leaving it so mixed. That, whether the appointees had or had not such knowledge, the trust funds of 300*l.* and 2,250*l.* were a charge upon the real and personal estate appointed under the will of Atkins E. M. Atkins, and were payable thereout? The bill prayed that an account might be taken of the dividends received by Abraham Atkins in respect of the 2,550*l.* stock, and of the dividends received by Atkins E. M. Atkins upon the 2,250*l.* stock, and also received by Joseph Cook upon the 2,250*l.*, and by them applied as part of his personal estate; and of any assets of the estates of Abraham Atkins and Atkins E. M. Atkins unapplied in the hands of John Cook and Maria Cook; for a declaration that the dividends, with unpaid interest, of the 300*l.* and 2,250*l.* stock formed part of the trust legacy of 20,000*l.*; and that the sums of 300*l.* and 2,250*l.* were a charge upon the estates which were liable to pay the same, both principal and accumulations; and for a sale, and payment to the plaintiffs, and to such other persons, if any, as should be found to have claims upon the legacy.

Two general demurrers were put in to this bill for want of equity and parties.

Mr. Baily, Mr. Glasse, Mr. Wickens and *Mr. Prior* appeared in support of the demurrer; and—

Mr. Green and *Mr. Drewry*, for the plaintiffs.

The principal points raised are fully stated in the judgment.

KINDERSLEY, V.C.—The principal point in the case is this. The plaintiffs say that they are entitled to proceed against the real and personal estates both of Abraham Atkins and also of Atkins Atkins; and being so entitled, they find some of those real estates—and indeed they say they find some of the personal estate at least of Atkins Atkins—in the hands of some one or other of those defendants who are the demurring parties—the first four defendants on the record. Now, the allegations in the bill seem to me—taking them of course to be true—to shew this state of

circumstances: that Abraham Atkins was the surviving executor and trustee under the will of Mr. Honynwood, and that Abraham Atkins had standing in his name at the time of his death 2,250*l.* stock, being the residue of the amount of stock which had been purchased with a legacy of 20,000*l.*, which, by the will of Mr. Honynwood, was given to these four executors, upon trust, to divide the funds at their discretion among the testator's relations. I need not go into the details of Mr. Honynwood's will, but the fund was to be divided amongst his relations. This sum of 2,250*l.* was the remainder of that large sum of stock, all the rest having been applied according to the trusts of the will, except a sum of 300*l.*, which it is said that Abraham Atkins had in his lifetime sold out of that stock, and paid to a person named Cherry, which is alleged to be an improper payment, and, therefore, the allegations amount to this, that Abraham Atkins had been guilty of a breach of trust; for such it would amount to according to this statement with regard to the 300*l.* stock. It was then said that he had standing in his name in the books of the Governor and Company of the Bank of England 2,250*l.* stock, which was trust-money. Moreover, it appears that Abraham Atkins, by a passage in his will, recognized the existence of a certain trust under the will of Mr. Honynwood, not specifying at all the fund to which that trust attached, but acknowledging only the existence of a trust; that is the effect of the language of the clause. Edwin Martin was the father of Atkins Atkins. That was the state of things at the death of Abraham Atkins. Now, with regard to the 2,250*l.* which remained standing in the name of Abraham Atkins at his death, he seems to have done, according to the allegation, nothing whatever improper. There seems to have been no impropriety in his having the fund transferred into his own name from the name of himself and the deceased trustees. He was the sole trustee of it; and, therefore, it appears to me that he was not guilty of any breach of trust or impropriety with regard to that sum of stock. He left it in the condition in which he ought to have left it; but, according to the allegation, he was guilty of a breach of trust

with respect to 300*l.* of the fund. That I must now take to be true. What was the effect of his being guilty of that breach of trust? What liability can it attach upon him with reference to the different portions of his property, apart from the lapse of time which has occurred, and apart from the devolutions of interest which have taken place? What would have been the effect of it, supposing, within a year or some short period after Abraham Atkins's death, a bill had been filed for the purpose of having the trust executed, and making his estate liable for the breach of trust? Abraham Atkins died in 1792. At that time, as we know, a simple contract debt of any person dying seised of real estate did not affect that estate in the smallest degree. Of course it might have been recovered from his personal estate; but his real estate—I mean in the absence of any charge in the will—remained untouched. Indeed it went to this extent, that a man might owe 100,000*l.* of debts, leaving 100,000*l.* worth of property in the shape of real estate, and not one of his creditors would get paid. That was the evil cured by the act which passed in recent times. Then there is a suggestion that this will of Abraham Atkins does in fact contain that which amounts to a charge upon his real estate; and the clause to which I have referred is said to amount to that. But it seems to me to amount to no such thing. The only effect of this clause is, not to create a charge upon the real estate, or any estate at all; for it does not profess to have that object, nor could it have that object, but merely to recognize the existence of an unperformed trust relating to a certain sum of money, of which a certain portion not specified was all that remained; and directing that that trust should be executed by his nephew Edwin Martin. Therefore it appears to me that the real estate of Abraham Atkins cannot be affected by the state of things which existed at his death, and that his real estate passed to the devisee without any liability to make good that debt. Now, his real estate, it appears, he devised, in default of any children of his own—and he had none—to Edwin Martin, for life, with remainder to Atkins Edwin Martin Atkins—in fact to him whom I will call Atkins Atkins—for life, and

with divers estates in reversion, with remainder to his own right heirs. And it appears from another passage in the will, that these life estates under the will of Abraham Atkins were no less than thirty. They seem to be given in classes; they descended to such a class, and so on, and there were no less than thirty of these persons who under this limitation took life-estates. The stock remained standing in the name of Abraham Atkins—I mean the stock representing the residue of this trust fund—long after his death; but according to the statement in the bill, the executors of Abraham Atkins from time to time received the dividends of the stock, and, I think, paid over these dividends to the Messrs. Cook. Thirty years, or thereabouts, after the death of Abraham Atkins, his executors having all died, administration *de bonis non* to his estate, with his will annexed, was granted to Atkins Atkins. That was in 1822; and then Atkins Atkins, finding this sum of stock standing in the name of Abraham Atkins, and being entitled to the personal estate of Abraham Atkins—I mean entitled to the interest—and being now the legal personal representative of Abraham Atkins, and finding that the executors of Abraham Atkins had, as the bill alleges they had, from time to time received all the dividends of the stock, and applied them as if they were part of the personal estate of Abraham Atkins; he seems to have arrived at the conclusion—whether rightly or wrongly, is not material to the present question—that this was part of the personal estate of Abraham Atkins, which he was entitled to appropriate, and which he did appropriate to his own use. Now, I apprehend that, subject to any question which might then have arisen with regard to the Statute of Limitations, if it had then passed, or with regard to the lapse of time in this court with respect to delay in making a claim, if a bill had been filed against Atkins Atkins after he got the transfer of that stock, that bill would have been successful; that is to say, Atkins Atkins would have been made liable for that stock as a trustee of the fund. He was not the express trustee; but there would have been a trust when he had become the legal personal representative of Abraham Atkins, and had got the trust fund in his hands.

Atkins Atkins then being the trustee, and having got this fund, but apparently not knowing that he was a trustee of it, by his will (which was dated in 1818) bequeathed his real estate and all his personal estate to John Cook and Joseph George Cook, upon trust out of the personal estate only (not the real estate) to pay the debts of Atkins Atkins; and then they were to stand possessed of the real and personal estate, upon trust for all and every the testator's children, for such estate, and in such shares and proportions, and so on, as the Messrs. Cook, from time to time, in their discretion, should appoint. The Messrs. Cook were the executors of Atkins Atkins, but they were not the executors of Abraham Atkins, because Atkins Atkins was only the administrator *de bonis non* of Abraham Atkins. It appears to me clear that, as there was no charge in the will of Abraham Atkins of his debts upon his real estates, so, in this will of Atkins Atkins, there is no charge of his debts upon his real estate. His real estate, as it appears, constituted part of the estate of Abraham Atkins, which he acquired in the manner stated in his will, viz., from his sisters, to whom the estates were devised. But he also acquired other real estates, irrespective of the real estates which were derived from Abraham Atkins. There is, then, this question: what estate of Atkins Atkins is liable to make good the trust-fund for which he was responsible? What is there to make his real estate liable? There is nothing to make Atkins Atkins's real estate liable, beyond what there was to make the real estate of Abraham Atkins liable. Nothing more whatever, for the statute to which I have referred as applicable had not then passed. His personal estate undoubtedly was liable; but his real estate, it is plain to me, clearly was not. And no person taking any portion of his real estate was, any more than any person taking a portion of Abraham's estate would have been, liable in that respect to make good any deficiency. The right, then, of the plaintiffs, so far as they have a right, is to pursue the personal estate of Atkins Atkins; and, of course, if some of the personal estate of Atkins Atkins had been converted into real estate, that real estate, not because it is real estate, but because it

represents part of the personal estate of Atkins Atkins, may be liable.

Now it appears, although I may assume that it is more accident than design in the bill that has brought this about, that a suit was instituted, called *Atkins v. Cook*, for the purpose of administering the real and personal estates of Atkins Atkins. There was a trust in the will of Atkins Atkins to lay out his personal estate, and nothing else:—not to lay out the rents and profits of the real estate, but to lay out his personal estate in the purchase of real estate, and that real estate, together with his original real estate, was to be applied in the way I have mentioned among his children, according to the discretion of the Messrs. Cook. The bill contained a statement that, by orders made in the suit of *Atkins v. Cook*, monies were from time to time laid out by the Messrs. Cook in purchasing the life-interests to which certain persons were entitled in property belonging to Abraham Atkins. It was contended that those monies so laid out were part of the personal estate of Atkins Atkins, and that, therefore, those life-interests so purchased represented part of the personal estate of Atkins Atkins. It was said that there had been appropriated to some of those four demurring parties sums of money charged upon the estates of Abraham Atkins, which included the life-estates thus purchased with the personal estate of Atkins Atkins, and which, therefore, constituted part of his personal estate; and, therefore, that there had been appropriated to these demurring parties, in effect, sums of money charged upon the personal estate, or a portion of the personal estate, of Atkins Atkins. Now, no doubt that is a very ingenious suggestion. It is somewhat fine; but I think that, subject to certain observations to which the matter is open, the thing can be traced in the manner suggested. But it is open to these difficulties—and they are difficulties which are connected with the observations always arising upon a demurrer and all pleadings—that the pleadings are to be taken most adversely to the pleader. I mean to say, if there be statements in the bill which are not clear, which are ambiguous, and which may admit of a different interpretation or of different views, the construction to be

put upon the bill must be that which is most adverse to the plaintiff whose bill it is, and in the same way in the case of a defendant's plea or answer. Now, in the first place, these purchases are not alleged to have been made out of the personal estate of Atkins Atkins. It is left to inference, and certainly I quite agree that the inference is strong; but the matter stands thus according to the allegation. The allegation is, that the trusts of Atkins Atkins's will were to lay out his personal estate in the purchase of real estate. Secondly, there is the allegation that there was a suit instituted against the Cooks to administer his real estates; and then it is alleged, and therefore I take it to be true, that by orders in that suit the Cooks were ordered to lay out, and did lay out, monies—not saying what monies—in the purchase of real estate; that is, not in the purchase of fee-simple estates in the ordinary way, but purchasing life-interests in a property already subject to the trusts of Atkins Atkins's will, namely, property which had come to him. That is a subject of strong inference; but probably—I do not say it must have been, but probably—it was part of the personal estate of Atkins Atkins that was so laid out. Still, it is the duty of the pleader to state the facts clearly if he intends to rely upon them, and to allege the facts distinctly. I do not believe he intended to rely upon them when the bill was filed; but if he intended to rely upon them at all, he ought to have distinctly stated them. I confess it does appear to me that I ought not to assume that these monies were part of the personal estate. They might have been. I admit it is most probable they were personal estate, but they might have been, as was suggested, part of the rents and profits of the real estate of Atkins Atkins. But although the rents and profits of the real estate were not directed by the will to be laid out, still the same persons were entitled to the rents and profits who were entitled to the corpus of the estate, real and personal; and, therefore, if there had been money in court not arising from personal estate, but arising exclusively from the rents and profits, the Court might, with perfect propriety, have ordered the application of those rents and profits in lieu of personal

estate, not got in, to be applied in the purchase of real estate. I am not at all saying it is a probable thing, it is only a possible thing. The Court probably would say that it was personal estate of Atkins Atkins. But that is not alleged. The whole argument rests upon this, that those purchases were made before the appointments to these parties which are relied upon, I think about the year 1835. Those appointments were made to William Atkins, Martin Atkins, and to Mr. Everett, the one in October 1844 and the other in August 1853. Now here again I think it is extremely probable that the purchases were made before those appointments. But what is there to shew me that? They may have been made last year, and the whole rests upon that; because, if they were made subsequent to the appointments, then the sums which are appointed are not charged upon the property, which represents the personal estate. Then, again, the pleader ought to have pleaded it; if he intended to rely upon it, he ought to have alleged it specifically.

Then there is a third matter, upon which I do not feel the case is so strong. I mean, it is not alleged that these tenants for life whose interests were purchased are alive. I must confess, if it turned upon that, and I decided in favour of the plaintiffs—not on the hearing of the cause, but on the demurrer—if a single one of them had been alive when the appointments were made—it appears to me that that would be sufficient; and even now there is no physical impossibility in their being still alive. It is a long period of sixty-seven years from 1792 to 1859, but still it is possible, especially as the tenants for life were persons who are described in classes, that some of them might have been a year old at the time of the making of the testator's will, and I think so far as relates to that I cannot assume that not one of them is living at this moment. But still it appears to me that, in order to establish the proposition contended for by the argument of the plaintiffs' counsel, namely, that part of the personal estate of Atkins Atkins has in some shape or form been appointed to or for the benefit of some of these demurring parties, there is nothing stronger than assumption; there is not any actual, posi-

tive and distinct allegation in the bill to that effect. Upon these grounds which I have mentioned, irrespective of any others, it appears to me the result is, that there is nothing in the bill to shew that the parties who are now demurring hold any property other than that which is real estate; and, as I have said, I see no grounds for coming to the conclusion, that any real estate, either that of Abraham Atkins or that of Atkins Atkins, is liable to any portion of the demand, however the claim may be in other respects well founded. On that ground I certainly think that I ought to allow the demurrer; but I think I should also allow the plaintiffs to amend their bill, not making the demurrer final. It may be that, if this matter were more looked into and more accurately stated, and means were properly furnished to counsel, there might be a case made out which would justify the claim against these defendants.

Then I must consider another ground of demurrer, which appears to me the most important ground of all, which is, the question that arises from lapse of time, and the argument upon that. Now it is quite clear that one of these parties who are demurring had appointed to them either real estate or money charged upon real estate, and the object is to make them liable. I am not now looking at the general question whether others may be liable, or whether there are persons now entitled to the personal estate of Atkins Atkins, and whether they would be liable: I do not touch that question. The question is, whether the real estate, or interest in real estate, of the parties who are now demurring, is liable? By the 24th section of the 3 & 4 Will. 4. c. 27, the time of limitation is fixed by reference to the time of legal limitations, that is, the time of limitations as to suits in equity is fixed by reference to the time with regard to actions at law. The 24th section enacts, "That no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity."

By reference back to the 2nd section, it is enacted, that "no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." Then if we refer to the 40th section, which relates to charges and legacies—that section says, "that no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid." Now it is quite clear that the right of these parties—I mean of the present plaintiffs and any other persons, if there be any, having a similar interest to them under this trust—accrued much more than twenty years ago. Their right, in fact, accrued at least as far back as the year 1792, and, I suppose, earlier than that. But their right at all events cannot be carried to a later period than the time, taking it at the very latest, when Atkins Atkins took possession of this stock, which was in the year 1825 or thereabouts—that is, much more than twenty years ago. Then how is it that these plaintiffs can be entitled, after waiting so long without making any claim, to come upon the interest which has been appointed to the defendants under Atkins Atkins's will? It was said that they are entitled to come because there is a trust; that this is not the case of a common debt, which indeed might be barred, but one of a trust. I admit that, undoubtedly, so far as relates to Atkins Atkins, he had an estate, that is, he had in his hands the very property—I cannot call

it estate, but the very property—which was the subject of a trust; and it appears to me, as between Atkins Atkins and these claimants, supposing them to be the parties entitled to the benefit of the trust, that there is a trust. There is a trust created by the trusts of Honynwood's will, "and the trustees and the survivors and survivor of them, and the executors and administrators of such survivor." Undoubtedly, too, at the time when Atkins Atkins died he was the administrator *de bonis non* of Abraham Atkins, the surviving trustee under Honynwood's will, and he had in his hands the trust fund which was to be administered. It appears to me, therefore, that there was a trust. But then the trust attaches upon the property which is the subject of a trust; that is, the 2,250*l.*, or whatever the sum of stock was that was in his hands, and any dividends that might have accrued. So far as relates to the breach of trust in misapplying it, that constitutes a debt. But it is said he had the identical trust fund, and that the trust was express. Now, what says the 25th clause of the same statute with regard to express trusts? "That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued according to the meaning of this act at, and not before, the time at which such land or rent shall have been conveyed to a purchaser for valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him." Then, it was said, this very trust stock being mixed up with the personal estate of Atkins Atkins, and his personal estate having been, as it was also said, applied in purchasing these life-interests, we must consider that the identical trust stock is represented, in fact, by that which has been appointed to these demurring defendants. Now it appears to me that this is not the case. There is clearly no express trust as between these demurring defendants. Even if these life-interests were purchased with that trust stock, there is no express trust between these persons and the *cestuis que*

trust claiming the benefit of the trusts of Honynwood's will. Therefore, it appears to me that the time is not prevented running by this 25th clause, which relates to express trusts; and consequently, as to this express trust, so far as relates to the demurring defendants, the statute is a complete bar—that is, that the time which has elapsed is a complete bar by virtue of the statute: and upon that ground the demurrer must be allowed. Therefore, as I have said, if there were any miscarriage in the statement, the correction of which would have been material, I should not refuse liberty to amend. If it turned upon merely the first part of the case, irrespective of the statute, I should give leave to amend; but it does not appear to me that any amendment consistent with truth can be made which will prevent what appears to me the complete bar of the statute so far as the defendants are concerned. I must, therefore, simply allow the demurrer.

M.R. } THE BANK OF LONDON v.
June 6, 7, 30. } TYRRELL.

Principal and Agent—Sale by Agent to Principal.

A solicitor acting for an embryo banking company agreed with R. for the purchase from C. of a large building and adjoining premises suitable for the company; R, through the solicitor, induced the company to purchase the building at a large increased price, which was divided between R. and the solicitor. The company took possession, and adapted the building to the purposes of a bank, and obtained a trade reputation. They subsequently discovered the circumstances under which the sale of the building had been made to them; and, upon a bill by the company stating that they could not relinquish the building, and that the adjoining premises would greatly facilitate their business,—Held, that the purchase by the solicitor was made as agent and for the benefit of the company; that the company was entitled to the profits made by the solicitor; and that the solicitor was a trustee for the company of the interest taken by him in the premises adjoining the building.

The bill in this suit was filed, by the

Bank of London, a company incorporated by letters patent, and carrying on business in Threadneedle Street, in the City of London, against Timothy Tyrrell, Edward Rudston Read, Sir John Villiers Shelley, John Griffith Frith, Sir Henry Mugeridge and Charles Joyce, the last four being trustees for the company. It prayed for an account of the profits made by Messrs. Tyrrell and Read upon the sale to the company of certain freehold premises known as the "Hall of Commerce," in Threadneedle Street; and it further prayed that they might convey to the company some adjoining premises, being No. 8, New Broad Street, which they had purchased at the same time with the Hall of Commerce.

The facts are stated in the judgment.

The Solicitor General, Mr. Selwyn and Mr. E. Macnaghten, for the plaintiffs, cited—

The East India Company v. Hinchman, 1 Ves. jun. 287.

Massey v. Davies, 2 Ibid. 317.

Bentley v. Craven, 18 Beav. 75.

Beck v. Kantorowicz, 3 Kay & J. 230.

The York and North Midland Railway Company v. Hudson, 16 Beav. 485; s. c. 22 Law J. Rep. (N.S.) Chanc. 529.

Mr. R. Palmer and Mr. Speed, for Timothy Tyrrell.—When Mr. Tyrrell purchased the property no agency to buy on behalf of the company existed; he never was at any time a holder of the property for the company. The company at no time could have taken the benefit of the original title, even assuming he was the agent for the company, and they cannot fasten a fiduciary title upon him, as not even a constructive agency to buy existed. There was no rule of equity that a solicitor could not buy from or sell to a client, and no case existed in which a solicitor had been required to give up the profit he had made from an estate.—

Hichens v. Congreve, 4 Russ. 562.

Taylor v. Salmon, 4 Myl. & Cr. 134.

The Great Luxembourg Railway Company v. Magnay, 25 Beav. 595.

Fawcett v. Whitehouse, 1 Russ. & M. 132; s. c. 8 Law J. Rep. Chanc. 50.

Lees v. Nuttall, 1 Russ. & M. 53; s. c. 1 Tam. 282.

Cane v. Allen, 2 Dow. 289.

Fox v. Mackreth, 2 Cox, 320; s. c. 4 Bro. P.C. Toml. ed. 258; 1 Lead. Cas. in Eq. 72.

Gibson v. Jeyes, 6 Ves. 266.

Edwards v. Meyrick, 2 Hare, 60; s. c. 12 Law J. Rep. (N.S.) Chanc. 49.

Driscoll v. Bromley, 1 Jur. 238.

Mr. Follett and Mr. Martindale, for Edward Rudston Read.

[The MASTER OF THE ROLLS.—A sufficient case has not been made against Mr. Read; but do you think you can persuade me to give him the costs?]

Mr. Follett.—If the bill had asked to set aside the contract, not a word could be said against the relief; but Mr. Read was asked, in effect, to give back the profits arising from his speculations, and in addition to that, to give up property in respect of which no contract existed. The bill alleged that Messrs. Tyrrell and Read concocted a scheme for disposing of the property to the bank at a profit; but Mr. Read denied the existence of fraud in the transaction. He had, however, omitted to name T. Tyrrell as one of the parties interested in the estate, and litigation arose in consequence.

[The MASTER OF THE ROLLS.—He has committed what is equivalent to perjury, and yet asks for costs. It is painful to have to observe upon facts which shock the moral feelings. I have to listen to many things upon which the least said is best, but when under circumstances like the present costs are asked for, it is different.]

Mr. Follett.—I can add nothing upon that view of the case.

The Solicitor General, in reply.

June 30.—The MASTER OF THE ROLLS.—The principal object of this suit is to make Mr. Tyrrell account for and repay the profits of a transaction in which he is said to have acted as the agent of the plaintiffs, and which were derived solely in consequence of his filling that character. The fact, or rather the extent, of the agency is disputed. There is little or no dispute about the principal facts of the case.

Shortly before the date of the transaction in question Louisa Campbell was the mortgagee from Mr. Moxhay, who was then dead, of premises in the city of London, having a frontage of upwards of ninety feet in Threadneedle Street and extending backwards about 140 feet, on one side to Old Broad Street, in which there was a frontage of 21 feet, and on the other side to Cushion Court. The largest and most valuable part of this property was the "Hall of Commerce." The amount due to Louisa Campbell on her mortgage was about 40,000*l.* The executors of Mr. Moxhay, being unable to discharge the mortgage, were compelled to allow Mrs. Campbell to foreclose the mortgaged property by a suit in equity. On the 20th of September 1854 she contracted to sell the whole property for 49,200*l.* to four persons, who bought on behalf of themselves and five other persons, on which occasion a deposit of 1,000*l.* was paid to her. These nine parties were interested in tenths, the defendant E. R. Read having two-tenths, and the other eight one-tenth each. E. R. Read contributed 200*l.* and each of the others 100*l.* towards the deposit. The purchase was speculative, the purchasers expecting to dispose of the property again at an increased price. In December 1854 Louisa Campbell was induced to extend the time for completing the purchase until June 1855. In January 1855 Mr. Scott, the present secretary of the bank, and Mr. Tyrrell projected a company, which resulted in the establishment of the Bank of London. Preliminary meetings were held, and on the 19th of January Sir John V. Shelley was applied to by Mr. Tyrrell to become a director and chairman of the company if it should be formed; he consented, and on the 5th of February he was requested to name other directors. On the 9th of February advertisements were issued of the formation of the company. On the 13th of February the first meeting of directors took place. Mr. Scott was appointed secretary and Mr. Tyrrell and his partners, Messrs. Paine and Layton, were appointed solicitors of the bank. About a week previously to this meeting E. R. Read had become the sole owner of the property purchased from Louisa Campbell by buying up the

shares of the other eight co-adventurers, for a sum of 150*l.* each. Immediately afterwards, E. R. Read made proposals to the company to sell to them that portion of the property known as the Hall of Commerce. After some negotiation upon the price a contract was finally entered into on the 5th of May 1855, by which the plaintiffs agreed to give E. R. Read the sum of 64,500*l.* On the 11th of August following the purchase was completed. Out of the purchase-money 48,410*l.* 4*s.* 2*d.* was paid to Louisa Campbell, the amount then due to her on her purchase-money, and the residue (subject to a deduction of about 7,000*l.* to abide the result of a claim) was paid to E. R. Read. This 7,000*l.* was paid, or was to be paid, to Mr. Tyrrell, who was no party to the contract or conveyance, and whose interest in the property was at that time wholly unknown to the plaintiffs. This fact they discovered at the end of April 1857, and they filed this bill in the December following. They contend that Mr. Tyrrell is not merely liable to account for the money so received by him, but also for the interest he has in that portion of the property bought from Louisa Campbell, which still remains unsold, that is, unsold by E. R. Read. Their right to this relief is rested on the evidence, which shews the dealings which existed between Messrs. Read and Tyrrell, respecting this property, and the relation in which the latter stood to the company.

On the 5th or 6th of February an interview took place between Messrs. Read and Tyrrell, in the course of which, it appears from the evidence given by Mr. Tyrrell, in cross-examination, in a cause of *Lacy v. Read*, which is made evidence in this cause, that the following subjects were discussed between them, namely, the formation of the company, the necessity of its having a place of business and the eligibility of the Hall of Commerce for that purpose. What passed on the same day between Messrs. Read and Tyrrell is set forth in the sixth paragraph of Mr. Tyrrell's answer. "On the 6th of February 1855 the defendant E. R. Read called and informed me of the particulars of the aforesaid agreements of the 20th of September and the 23rd of December 1854, and he also informed me that

the agreements had been entered into as a speculation, and that several of the persons with whom he was associated therein had not any means, and that the management of it had been very unsatisfactory to him, and that he had determined either to buy the shares of all his co-speculators or to sell his own, and that he had consequently offered to them either to buy or sell, at some price per share, the amount of which I do not now remember. He also stated that his co-speculators appeared to be afraid of their responsibility under the agreements, but that he considered the property might be made a good investment, provided money were spent upon it. I had long known the property, and I believed it to be of a value far exceeding the amount agreed to be paid to Louisa Campbell. But as past experience had proved that the large hall was too extensive for profitable occupation, I concurred in a suggestion made by E. R. Read that it might be advantageously converted into counting-houses. The defendant E. R. Read then proposed that I should join him in the speculation, if he should become the purchaser of the shares of his co-speculators, and I agreed so to do, if he procured the shares of his co-speculators at a reasonable price, and to carry out the scheme of converting the large room into counting-houses, and by the purchase of adjoining ground on the Cushion Court side of it, and fronting Broad Street, to lay into one large plot the frontage in Broad Street. Either at the same meeting or on the said 6th of February, or on the following morning, E. R. Read shewed me certain plans and estimates of his suggested alterations in the large room or hall, which had been made by a surveyor or architect named Wood, of which plans I entirely approved." On the 7th of February E. R. Read entered into the arrangement with his co-adventurers. On the following day (the 8th) Messrs. Read and Tyrrell again met, and then entered into a verbal agreement, which was not reduced into writing until the 10th of March. It was as follows:—"8th day of February 1855. Between E. R. Read, of Austin Friars, and Timothy Tyrrell, of Guildhall Yard, London. Whereas E. R. Read became the purchaser of the hereditaments mentioned in the agreement herein-

after specified, upon the terms and conditions therein stated; and whereas the purchase, though made in the name of E. R. Read, was made on the joint account of himself and T. Tyrrell, except as to the part coloured green on the plan to the said agreement, which is to belong to E. R. Read exclusively: now, it is agreed, first, that the purchase, except as aforesaid, was so made on a joint account as tenants in common; secondly, that the purchase-money, namely, 1,200*l.*, as appears by the agreement, and 300*l.*, together with the costs provided to be paid by the agreement, be borne and paid as follows: two fifth parts thereof respectively by E. R. Read, and three fifth parts thereof by T. Tyrrell; but all further costs and expenditure to be paid or contributed by them in equal moieties; thirdly, that if, in selling the property, it shall be deemed advisable to include the excepted part so coloured green as aforesaid, E. R. Read shall be entitled to the value thereof, over and above his half of the purchase-money for the residue; fourthly, that neither party shall sell or otherwise dispose of his share or interest in the property, without the consent in writing of the other of them; fifthly, that if, in the management of the property, the alterations, repairs, sale, lease, or other dealings with the same, any difference of opinion shall arise between the parties, the same shall be from time to time referred to the award and arbitrament of John Horatio Lloyd; and in the event of his decease, or declining or neglecting to act, then to the award and arbitrament of such person or persons from time to time as the Senior Master of the Queen's Bench for the time, on the request of either party, shall appoint, and the submission shall and may be made a rule of any of the Courts at Westminster on the application of either party." On the 9th of February E. R. Read wrote to T. Tyrrell, in answer to a communication from him, stating that the price of the Hall of Commerce was 102,000*l.* T. Tyrrell asked a fortnight before returning any answer, which was assented to. It was not till the 19th of March that the question of the sale was brought formally before the directors; but on that day T. Tyrrell, as the solicitor of the company,

charged the plaintiffs in his bill of costs for an attendance on E. R. Read with reference to the sale of this property. The negotiation proceeded. All the communications on the subject by E. R. Read were addressed by him to T. Tyrrell, and T. Tyrrell communicated to the company, through Mr. Scott, the secretary. On the 2nd of April the Bank passed a resolution appointing T. Tyrrell their agent to negotiate the matter of the purchase with E. R. Read, but limiting the price to 60,000*l.* The negotiation continued, and finally, on the 3rd of May 1855, at a meeting of the directors, the report of Mr. Paine, on behalf of the firm of Messrs. Tyrrell, Paine & Co., and that of Mr. Scott were laid before the directors with a draft agreement. On the 5th of May an agreement, in writing, between E. R. Read of the one part, and the directors of the other part, was duly executed, by which they agreed to become the purchasers of the Hall of Commerce, at the sum of 64,500*l.*, conditionally on the bank obtaining a charter of incorporation. This charter was obtained on the 13th of July 1855, and the agreement for purchase was carried into effect by an indenture bearing date the 11th of August 1855, between Louisa Campbell of the first part, E. R. Read of the second part, and the directors of the company of the third part, and in consideration of 48,410*l.* 4*s.* 2*d.* paid to Louisa Campbell, the amount then due to her under the contract for sale, and of 16,089*l.* 11*s.* 10*d.* paid to E. R. Read, making together the sum of 64,500*l.* the premises comprised in the agreement of the 5th of May were duly conveyed to the directors of the company in fee. Up to this time no suspicion of the interest of T. Tyrrell seems to have been entertained by any one, not even his partners; but it came to the knowledge of the plaintiffs in the following manner: on hearing of the sale to the company, Mr. Read's eight co-adventurers became dissatisfied with the arrangement entered into by them of the 7th of February 1855, and insisted on their right to participate in the profit, and three of them, before the completion of the purchase, gave notice of their claim to Messrs. Tyrrell & Co., the company's solicitors, for and on behalf of the company. In consequence of this notice, it was agreed

between Mr. Read and the company that the company should accept the conveyance from Louisa Campbell and E. R. Read, as already mentioned, provided the sum of 14,500*l.* was invested in Exchequer bills and set aside to abide the determination of the claim, of which notice had been given, and this was accordingly done. In December 1855 three of the original speculators filed their bill in the suit of *Davis v. Read* to enforce their right. That suit was compromised in November 1856, by payment of 1,050*l.* to them, together with their costs of the suit. Shortly afterwards, two other co-adventurers filed a similar bill against E. R. Read, entitled *Lacy v. Read*, which was also compromised on payment of 666*l.* 13*s.* 4*d.* and the costs of the suit. But in the course of that suit, and on the 29th of April 1857, Mr. Tyrrell, in a cross-examination by the plaintiffs, stated the particulars of his interest in the property under the agreement entered into by him with E. R. Read. The result was the institution of this suit in December following. On the first question, namely, of agency, I think it must be taken that Mr. Tyrrell acted as agent of the company. Throughout the proceedings E. R. Read communicates with T. Tyrrell for sale, not to him, but to the company about to be formed; he communicates with him, therefore, as a person who either possesses or was about to possess such relation towards the company then in the course of formation as enabled him to deal with the subject on behalf of that body. T. Tyrrell adopts this character, in which E. R. Read addresses him throughout the transaction in question, and in that character T. Tyrrell communicates to the secretary of the company the proposals made by Mr. Read. The circumstance that the company was not formed even provisionally until the 13th of February, that it was not till the 20th of April that the number of persons required by law to enable them to obtain a charter had executed the deed of settlement; and that it was not till the 13th of July that the company obtained its charter, are all facts which neither destroy nor weaken T. Tyrrell's character of agent towards the body of persons engaged in forming, and who afterwards formed, the company. He was the self-constituted

solicitor of the company before its complete formation; he was recognized as such when it was formed, and his claim upon the company for work and labour done on behalf of the company extends to a period earlier than its complete formation. The relation between them must be considered as commencing from that period at which he claimed a right to charge them with the remuneration due to him for services done on their behalf; and which right was admitted and sanctioned by the company, and was paid for accordingly. The general bill of costs against the company contains a general item amounting to twenty guineas, which is solely applicable to the month of January. The first regular items within any distinguishing date begin on the 13th of February. The particular bill of costs for the business relating to this purchase begins on the 19th of March. The general bill is thus entitled: "Messrs. Tyrrell, Paine & Layton, solicitors. Bill of costs, charges and expenses in and about the formation, and preliminary to the application for, and including the grant of letters patent to the Bank of London, pursuant to statute 7 & 8 Vict. c. 118. January and February." The first item is, "For very numerous attendances during these two months upon, and correspondence with Sir John V. Shelley, Mr. Scott, Mr. Alderman Muggeridge, Mr. W. Layton and other parties, proposing to establish a new joint-stock bank, and advice and conferences from time to time thereon; attending various other gentlemen, who, it was proposed, should act as directors; drawing and settling prospectuses previous to the meeting, at which it was determined to establish a bank under the name of the Bank of London, and that Mr. Scott should act as secretary thereto, 21l." This item relates to the month of January only, for although the words "January and February" are put, that is solely applicable to the month of January. Then there are two items, the dates of which I do not know.

The next item is put "13," which I assume to be the 13th of February. If it is the month of January, it only makes the case still more strong. At all events, it cannot be later than the 13th of February, and the earlier items must relate to the

month of January. The bill for this particular transaction is this:—"The Bank of London to Messrs. Tyrrell, Paine & Layton, in relation to the negotiations for the purchase of the bank premises, 19th of March. Attending upon Mr. Read on his proposing to us the Hall of Commerce for the bank. Discussing the terms and correspondence with that gentleman, and attending the secretary thereon, 13s. 4d." Then it goes on to various items, which are of a similar character. It is contended on behalf of Mr. Tyrrell that he could not be the agent for that which had no existence; and that as the company had no directors, and had not even held any meeting, or even had a nominal existence before the 13th of February, he could not be their agent on the 8th of February, when he became interested in this property. To this objection there are two answers. In fact there was no binding agreement between Messrs. Tyrrell and Read before the 10th of March; but even if this were otherwise, I am not disposed to concur in the argument of the defendant. One person may be made the agent of another by acts done *ex post facto*. If a person professes to act as the agent of A. without any authority for so doing, A. may, by recognizing him as his agent and sanctioning and adopting his acts done in that assumed character, constitute that person his agent for the time when he professed to act in that character, although he did so then without authority. It is therefore established that the relation of solicitor and client, not only existed between Tyrrell and the company, but as Mr. Tyrrell was adopted as the solicitor or agent of the company, he must be considered as having been the agent of the company in all matters in which he professed to act as such agent; that is, in all matters relating to the company which was afterwards formed, and consequently in all matters in which E. R. Read dealt with him as such agent, and in which he acted towards E. R. Read in that assumed character. The fixing of this period of time is material. Mr. Tyrrell's duties, therefore, in his character of agent, and his liabilities as such, date from the time when he first acted in any matters relating to the company, and

in this view it becomes comparatively immaterial that on the 2nd of April he was, by a resolution passed and entered in the books of the company, specially appointed their agent to negotiate this purchase, and that Mr. Tyrrell acquiesced in this resolution and acted under it. Under these circumstances, it was admitted, on behalf Mr. Tyrrell, that if the company had desired to set aside the transaction the sale could not stand, and they do not dispute the right of the plaintiffs to restore to Mr. Tyrrell the interest he may have in the property which they purchased from Mr. Read, and their right to receive back again so much of the price they paid as may be attributable to that interest; but they contend that the right of the plaintiffs is limited to this relief, that they must either adopt or repudiate the transaction altogether; and there can be no question that this, in ordinary cases of sale by an agent to his principal, is the equity to which the principal is entitled; at least it is so where the parties can be replaced in the same situation they were in before the sale took place. In many cases, however, this is impossible. It is so in the present case. Not merely have the plaintiffs set up their place of business on the premises purchased before they had notice of the defendant's interest, not only have they expended considerable sums of money in adapting the building to their own purposes, but the equity which they have against Mr. Tyrrell does not necessarily extend itself to Mr. E. R. Read, and certainly not to Louisa Campbell, between whom and themselves no such relation of principal and agent existed, and the latter of whom was entirely ignorant of the whole transaction. What relief, then, can the plaintiffs have against their agent, Mr. Tyrrell, in such circumstances? The defendant says, none at all, and *The Great Luxembourg Railway Company v. Magnay* (1) is cited to support it. The circumstances there existing and an illustration in the judgment are relied on, as establishing that if that case be law, the plaintiffs' equity is confined to the undoing of the transaction, as far as

(1) An appeal was intended in this case, but was not prosecuted in consequence of the insolvency of the defendant.

it can be undone, and that if the plaintiffs decline this relief, they can have nothing. I adhere to the view taken in that case, but there is a wide distinction between it and the present case. In that case the company sought to set aside the purchase of the concession made by the Belgian Government; it had been made to the defendant, who was afterwards appointed chairman of the company. The company, at his instance, bought this concession, being ignorant that he was the original *concessionnaire*. Upon the discovery of that fact they filed a bill impeaching the transaction. After the suit was instituted they assumed to be and acted as the owners of the concession, and sold it to a stranger for value. I held that they had adopted the transaction with full knowledge of the circumstances, and that they had thus rendered it impossible for them to give to the defendant what he had a right to require. There was, when the bill was filed, no difficulty in replacing the parties in the situation in which they were when the contract was entered into; but the subsequent acts of the plaintiffs had rendered this impossible. If in this case the property had belonged exclusively to Mr. Tyrrell, and if, after acquiring a knowledge of that fact, the company had sold the property or had altered it to suit their business, and made it such that it could not be restored to the defendant, I should then hold that their relief was barred. Similar observations apply to the illustration in the judgment in the case cited, and which, if repeated and commented upon, step by step, will conveniently illustrate both my meaning in that case and the conclusion in the present. The case suggested was, if the company purchasing apparently from a stranger an estate required for their business which really belonged to their agent, on discovery of that fact their equity would be to set aside the whole transaction, or to adopt it; and if after knowledge of that fact they either had parted with the property, or had so used or appropriated the property as to make it impossible to return it, they would have lost their right to relief. Take it one step further, and suppose that the company had appropriated and used the property in such a way as to make it impossible to return

it, while they were in total ignorance that it had been the property of their agent. In that case the view expressed was that the relief to which the company would be entitled as against the agent would be limited to the recovery of what, if anything, had been paid by the company over and above the full value of the property. But both of these cases proceed upon the assumption that the property purchased by the principal had originally been the property of the agent, either before he became such agent, or, if acquired since, that it had been so acquired in no character connected with or springing out of his agency; and accordingly this was as the matter stood in *The Great Luxembourg Railway Company v. Magnay*. The defendant there had not obtained the concession by reason of his being the agent or chairman of the company, or in any way by reason of advantages derived from his being connected with it. It was not necessary, therefore, in that case to pursue the case further. But in the case under consideration it becomes necessary to consider the next step, and to suppose that the agent, knowing the peculiar eligibility of the estate for the purposes of the company, and while he was agent, and for the purpose of selling it at an advanced price to his principal, had himself become the purchaser of the estate, and that in ignorance of this circumstance the company had purchased the estate from one whom they supposed to be a stranger, while, in fact, the agent was the real owner, and was entitled to and received the whole of the purchase-money paid by the principal. In such a state of things a new equity arises. It is not then a question about setting aside the transaction, neither is it a question of what is or what was the value of the property; but the question then is, whether the agent has not by means of his agency acquired this property for the purpose of making a profit out of it by a re-sale to his principal, and whether, if he succeeds in his object, he can keep that advantage to himself. If it were the case of iron or sugar bought by the agent and re-sold to the principal, the agent cannot keep the profit, why should he be better entitled to do so in the case of the purchase of an estate? The same principles apply to both cases, and the profit

to be derived from land so acquired and so re-sold is not to be retained by the agent any more than the profit to be derived from sugar, iron or any other commodity, provided it be well established that the profit made arises from the character of agent, and springs out of his employment as such. It is in this last view of the case that it becomes material to ascertain the time when Mr. Tyrrell first became the agent of the company, for if his interest in the property had been acquired a year previously, or if it had been acquired by devise, or descent at any time, the question on this point would have been concluded. The next question, therefore, to be considered is, whether the acquisition of his interest in the property from Mr. Read sprang out of and was attributable to Mr. Tyrrell's character as agent of the company. On this point an examination of the evidence brings the following conclusions:—That there was no binding agreement between Messrs. Tyrrell and Read before the 10th of March: the parol agreement was binding upon no one, for that if the company had not been formed the agreement of the 8th of February would never have been made a binding one; that the success which Mr. Scott and Mr. Tyrrell met with in the preliminary steps for founding this company was such as to lead them to the well-founded belief that the company would be shortly formed and successfully established; that this belief was imparted by Mr. Tyrrell to E. R. Read on the 5th or 6th of February; that in consequence Mr. Read made the arrangements of the 7th of February for purchasing the shares of his co-adventurers, and that, in consequence, he and Mr. Tyrrell entered into the parol agreement of the 8th of February, which was reduced into writing and made binding on them by the agreement executed on the 10th of March. I look in vain for any motive explanatory of these transactions, and the accompanying facts, except the desire to make use of Mr. Tyrrell's position with reference to the company, to induce the plaintiffs to purchase the Hall of Commerce. The property was of value; the plaintiffs also did not give more for it than it was well worth to them; but it must be nevertheless borne in mind that property of this description is

an object of acquisition to but a very limited number of competitors. The number of persons who require such a building for their own business is very small, and that number is much diminished when confined to those amongst them who have the means sufficient to enable them to make the purchase. In fact, the purchasers, unless for the purpose of speculation, are reduced almost exclusively to a public company. The difficulty of disposing of such a species of property at anything like its real value is established beyond question by the facts stated. For some years the representatives of the mortgagor were unable to raise the 40,000*l.* lent on mortgage of the whole property; they were compelled to let it be foreclosed. The mortgagee seems for some time to have been unable to dispose of it, and it was then only by speculators, who bought to sell again, and who, unless they could dispose of it to a public company, would, as seemed highly probable, gain little or nothing by their adventure. The opportunity of sale to a public company occurs but rarely. Here was an opportunity such as might not occur again for a considerable time. It was of the greatest importance to seize the opportunity and make the most of it. This is the key to the dealings between Messrs. Read and Tyrrell. Except for the advantages to be derived from Mr. Tyrrell's position, what motive can be assigned for Mr. Read voluntarily relinquishing nearly one-half of the profit to be derived from the increased price of the property? It would be contrary to every principle of human nature to suppose that he meant to make a valuable present to Tyrrell without receiving any equivalent for it. E. R. Read's motive was to convert T. Tyrrell, one of the founders of the company, the solicitor and confidential adviser of the company, into a zealous partizan, instead of an indifferent or a hostile adviser. What other principle can explain the compact entered into between Messrs. Tyrrell and Read, that the whole of their dealings should be kept secret? A compact which Mr. Read considered himself bound in honour to keep, although at the expense of a statutory declaration, and of evidence on oath, both at variance with the truth. The reason is obvious why the

concealment from the company of Mr. Tyrrell's interest was considered essential for the attainment of the object. If the company had known that Mr. Tyrrell was to derive a pecuniary advantage from the sale, they certainly would have distrusted and rejected his advice, and they possibly would have closed the negotiation for purchase with Mr. Read altogether. These are the circumstances that convince me that the dealings between Messrs. Tyrrell and Read sprang out of the peculiar position the former held towards the company, and that but for this he would have obtained from Mr. Read no interest whatever in the property. To the argument, therefore, that the interest was acquired by Mr. Tyrrell before the company was formed, I attach but little weight. It was acquired with a view to the company then in the course of formation, and the interest was acquired by reason of the influence which, if the company was formed, Mr. Tyrrell, as one of the original founders, must necessarily possess over the directors, the greater part of whom must have been either named or approved of by him, in conjunction with Mr. Scott and their first nominees. I am of opinion, therefore, that the share of the purchase-money received by Mr. Tyrrell over and above the sum expended by him must be treated as profits derived by him from his dealings, in his character of agent for the company, with Mr. Read, and that he must account for this to the company. The next question is, how far do these profits extend? The plaintiffs say, that if the principles contended for prevail, the share which Mr. Tyrrell takes as tenant in common, in the unsold portion of the property purchased from Louisa Campbell, must also be regarded as property derived by him from the transaction. On this part of the case I have some hesitation. It may be contended, that all that the company can obtain is, that they should have the property at the price at which Mr. Tyrrell might have obtained it for them, if he had no interest in the matter, and if he had exerted himself to the best of his ability to obtain it from them for that price. So regarding it, I doubt certainly whether it would have been obtained from E. R. Read at a less

sum than that which he received for it; but I cannot safely found my decision on this, which is mere matter of speculation. I consider that the profit which Mr. Tyrrell derived from his position as agent was the profit he derived from his dealings with Mr. Read, and this profit is the net value of the interest he takes in the hereditaments purchased from Louisa Campbell. The plaintiffs might with propriety, acting in a liberal spirit, disclaim all interest in the unsold portion of the property; but if they insist upon it, they are entitled to a declaration that Mr. Tyrrell is a trustee for them of that interest in the unsold portion of the premises which he takes under the agreement of the 10th of March 1855, and which bears date the 8th of February of that year. The costs must follow the event. I disposed of the case against E. R. Read at the hearing: further consideration confirms the conclusion. There is no principle to justify any relief against him. He dealt with the company as a stranger, and between him and the company no other relation exists; but it is equally impossible, seeing how he has acted in the course of the dealings, to give him any costs. Against him, therefore, the bill will be dismissed.

KINDERSLEY, V.C. } NORTHEN v. CARNEGIE.
May 5, 9. }

Settlement — Estate pur autre Vie — General and Special Occupant — Resulting Trust — Occupant of Incorporeal Hereditaments.

If an estate is given to A. simply during the life of B, and A. dies before B, any person getting possession of the land after the death of A. will be entitled to hold it as the general occupant; but if an estate is limited to A. and his heirs during the life of B. a general occupant is not permitted, but the heir will take as special occupant, and not by descent.

Semble — If an estate is given to A. and his executors and administrators during the life of B, and A. dies first, the executor would be capable of taking the estate as special occupant. In the case of an incorporeal hereditament limited to A. simpliciter

pur autre vie, an executor or administrator may be a special occupant, but there can be no general occupant.

If A, having an estate to himself, his heirs and assigns, during the life of B, conveys the legal interest to trustees, their executors, administrators and assigns, and the trustees die in the lifetime of the cestui que vie, the executors of the trustees will be special occupants, and A. will have no interest in the legal estate.

If A, tenant pur autre vie, parts with the beneficial interest contingently, and the contingency does not happen, then there will be a resulting trust in favour of A. of the interest which he has not effectually parted with.

This suit was instituted for the purpose of having a construction put upon a settlement, and for a declaration as to the rights of the parties interested.

By a settlement, dated the 4th of February 1812, reciting a lease dated the 9th of January 1788, from the Bishop of Lichfield, granting to Vernon Cotton, his heirs and assigns, the prebendary of Eccleshall, excepting the parsonage, lands, tenements, &c., to hold to Vernon Cotton, his heirs and assigns, during the lives of Mary Ann Northen, Elizabeth Cotton, and Abraham Barlow, and the lives of the survivors and survivor, subject to certain payments to the bishop and vicar; and after reciting that the said Vernon Cotton, being willing and desirous to promote his said children in the world as much as possible during his lifetime, had proposed and agreed to make the assignment thereafter contained, and to which they had consented and agreed; it was witnessed that, in consideration of natural love and affection, the said Vernon Cotton assigned to John Cotton and John Harris, their executors, administrators or assigns, the said prebend, messuages, &c., to hold to them during the lives of the said Mary Ann Northen, Elizabeth Cotton, and Abraham Barlow, and the life of the survivor, as to the messuages, &c. of the said prebend, to such uses as Vernon Cotton should by deed or will appoint, and subject thereto to the use of Vernon Cotton for life, in case their lives should so long live, and after his decease to pay the rents to such persons

as after declared; and as to the tithes and other emoluments upon trust to pay one-third of the rents to Francis Hicken Northen and Mary Ann his wife, or any after-taken husband of Mary Ann Northen, and for the life of the survivor, and after the death of the survivor to pay such one-third equally to the younger children of Francis Hicken Northen and Mary Ann his wife, or any after-taken husband who should be living at her death, and if there should be one only younger child, or one child, to pay the same to such one or only younger child, his executors, administrators or assigns respectively at twenty-one or marriage. There were then trusts as to the remaining two-thirds in favour of Elizabeth Cotton and Harriett Cotton in the same terms.

The settlement then proceeded as follows:—"But in case any one or more of them, the said Mary Ann the wife of Francis Northen, Elizabeth Cotton and Harriett Cotton, shall happen to die without leaving children or child as aforesaid, then the part, share or proportion of her or them so dying shall go and be paid or assigned and transferred, in equal shares, to the survivors or survivor of them, in such manner as the parts or shares, or part or share of the parents or parent are or is directed to be paid, assigned or transferred. And it was provided that, in case the said Mary Ann, the wife of the said Francis Northen, Elizabeth Cotton, and Harriett Cotton, or any of them, should die leaving one or more sons, the eldest of such sons and such only son should be reckoned the eldest child, or if they or any of them should die leaving daughters only, then the eldest of such daughters should not be reckoned as one of the younger children, and should be excluded from all benefit to arise under the trust aforesaid."

Vernon Cotton made his will, dated the 12th of January 1813, attested so as to pass real estates, and thereby devised to the trustees of the last-recited indenture, the property subject to his appointment, upon the same trusts as were thereby declared, or such of them as should be capable of taking effect at his decease, and appointed his three sons-in-law executors. Vernon Cotton died on the 12th of April 1817, leaving his three daughters, Mary Ann,

Elizabeth and Harriett, his co-heiresses, him surviving.

Mary Ann Northen had no son, but four daughters, Harriett Elizabeth, Frances Hicken, Mary Ann, and Ellen.

Harriett Elizabeth married the Rev. Henry Turton, and had issue Francis William Turton and other children, and died in 1834, in the lifetime of her mother, leaving Francis William Turton her heir-at-law.

Mary Ann Northen died in 1841.

Frances Hicken Northen was still unmarried.

Mary Ann married Edward Wilson, and both she and her husband died in 1858, she having survived her husband and died intestate, leaving John Wilson Wilson her heir-at-law.

Ellen married Sir Edward Harry Vaughan Colt.

Harriett Cotton married twice: first John Bagshawe, and had two daughters, Harriett Bagshawe and Rose Bagshawe; secondly, Henry Stephens Belcombe, by whom she had six children, four died in her lifetime unmarried, and the two younger, Mariana Percy Belcombe and the Rev. Francis Belcombe, were still living. Harriett Belcombe died in March 1849, and her husband in December 1856, leaving Francis Edward Belcombe his heir-at-law.

In December 1852 Harriett Bagshawe died, unmarried and intestate.

Rose Bagshawe made her will, dated the 22nd of November 1855, giving all her property to Swynfen Thomas Carnegie for his absolute use and benefit. Rose Bagshawe died on the 23rd of June 1856.

Elizabeth Cotton married William Meeke, who changed his name to Taylor, survived her sisters, and died in November 1853, without issue.

William Taylor died in October 1855, and at the death of Elizabeth Taylor the co-heirs of Vernon Cotton were Francis William Turton, Frances Hicken Northen, Mary Ann Wilson, Ellen Colt and Francis Edward Belcombe.

The following questions were raised upon the construction of the settlement of the 4th of February 1812, whether Francis Edward Belcombe was entitled as one of the younger children of Harriett Belcombe at her death, and whether upon the death

of Elizabeth Bewley Taylor without issue, her third part either became subject in equal moieties to the like trusts as were then subsisting concerning the other two-thirds, or whether, being undisposed of, it became vested by special occupancy in Francis William Turton, Frances Hicken Northen, Ellen Colt, Mary Ann Wilson, and Francis Edward Belcombe as co-heirs-at-law of Vernon Cotton. Swynfen Thomas Carnegie, Mariana Percy Belcombe, and Francis Edward Belcombe, also raised questions with respect to the proper distribution of the shares in the trust premises given to Harriett Belcombe and her children, and a moiety of the share given to Elizabeth Bewley Taylor and her children. Francis E. Belcombe, Francis W. Turton and Frances H. Northen contended, that no greater interest than a life interest was given to the grandchildren of Vernon Cotton, and the ulterior interest in the trust premises was undisposed of.

The Vice Chancellor, in his judgment, referred to the principal questions and arguments in the case.

Mr. Baily and *Mr. Hobhouse*, appeared for the plaintiffs.

Mr. Glasse and *Mr. F. White*, for the defendant Carnegie; and

Mr. Shapter, *Mr. J. J. Lewis*, *Mr. Bury* and *Mr. Broderick*, for other defendants.

The following authorities were cited:—

Lomas v. Wright, 2 Myl. & K. 769;

s. c. 3 Law J. Rep. (N.S.) Chanc. 68.

Kendal v. Micfeild, Barnar. 46.

Bearpark v. Hutchinson, 7 Bing. 179;

s. c. 9 Law J. Rep. C.P. 1.

Doe d. Long v. Prigg, 8 B. & C. 231;

s. c. 6 Law J. Rep. K.B. 296.

The Commissioners of Charitable Donations v. Cotter, 1 Dru. & W. 498.

Crowder v. Stone, 3 Russ. 217; s. c. 7 Law J. Rep. Chanc. 93.

Leeming v. Sherratt, 2 Hare, 14; s. c. 11 Law J. Rep. (N.S.) Chanc. 423.

Aiton v. Brooks, 7 Sim. 204.

Brown v. Jones, 1 Atk. 188.

Eyre v. Marsden, 4 Myl. & Cr. 231;

s. c. 7 Law J. Rep. (N.S.) Chanc. 220; 2 Kay, 564.

Smith v. Osborne, 6 H.L. Cas. 375.

Fitzroy v. Howard, 3 Russ. 225.

Doe d. Jeff v. Robinson, 8 B. & C. 296; s. c. 6 Law J. Rep. K.B. 273.

Williams v. Jekyl, 2 Ves. 681.

Campbell v. Sandys, 1 Sch. & Lef. 281.

Wortham v. M'Kinnon, 4 Sim. 485.

Ripley v. Waterworth, 7 Ves. 425.

KINDERSLEY, V.C.—This is a case somewhat out of the ordinary routine of cases which come before this Court; for it involves questions and raises disputes concerning principles certainly not often the subject of consideration here. It appears to me that, although there is considerable room for discussion and argument in the matter, and although the case has had that discussion, and the Court has had the advantage of hearing the arguments of counsel upon it, the matter results in what I think does not admit of any very serious doubt. The facts of the case are simple enough. Mr. Vernon Cotton had three daughters; and, on the 4th of February 1812, he executed a voluntary settlement for the purpose of settling upon those daughters and their families certain property of a peculiar character. That property consisted of what is commonly called prebendal property, that is, ecclesiastical property, which was held by him under a grant from the Bishop of Lichfield and Coventry, by which grant the bishop granted to Mr. Cotton a certain prebend with its appurtenances. Those appurtenances consisted partly of tithes and partly of messuages and lands. They were granted, together with a property called Eccleshall, to hold to him, his heirs and assigns, during the lives of the persons named, *cestuis que vie*, and the life of the survivor of them, paying certain rent. That was the property which Mr. Cotton determined to settle by the instrument of the 4th of February 1812. The only recital contained in that deed, from which we can collect the intention of the settlor on any point whatever, is a recital which, after referring to the grant to him of this prebendal property, states as follows:—"And whereas the said Vernon Cotton, being willing and desirous to promote his said children in the world as much as possible during his lifetime, hath proposed and agreed to make such assignment as is

hereinafter contained, on their entering into the covenants hereinafter also contained, and to which they have consented and agreed." Now, of course, very little, if anything, can be derived as to the intention from that recital. But Mr. Cotton having vested in him this property, *pur autre vie*, and it being limited to him, his heirs and assigns, for the lives and life of the *cestuis que vie*, and the survivor of them, the first consideration that presents itself (about which, I apprehend, there can be only one question involving any difficulty) is this—what was his interest in it with reference to this point? Supposing he had died, leaving the *cestuis que vie*, to whom would that property have gone? It was limited to him, and his heirs and assigns. Now, the general doctrine with regard to estates *pur autre vie* is simple enough, and is pretty well known; at the same time it involves a very abstruse law, when you come to apply it to certain specific cases. With regard to the lands, I think there is no question, so far as this, that if the lands are given to A. simply during the life of B, and A. dies during the life of B, at common law anybody—at least subject to the question of the effect of the statutes—who got possession of that land after the death of A. would be entitled to hold it against all comers, and would be called the general occupant. But if, as in the present case, the land was limited to A. and his heirs during the life of B, a general occupant is not permitted; nobody has a right to take possession of it as a general occupant; but the heir takes it. But how does he take it? And this is a point on which I think it is quite right that the Court should adhere to strict principles, and should not get rid of those principles by using inaccurate language. The point is this—that an heir can take by descent an estate of inheritance only; and it is a most inaccurate expression to talk of a descendible freehold. When I say it is inaccurate, I know the expression is very frequently used, and provided you take care not to involve a dereliction from principle in using the expression, there is no objection to it; but the danger in using the expression is, that it does, or may, involve a departure from principle. The

heir general takes by descent an estate of inheritance only in fee simple, and the heir in tail takes by descent an estate of inheritance in fee tail only. Then in what character is it that, if the limitations be to a man and his heirs during the life of another, the heir takes it? He takes it, no doubt, because he is heir; that is to say, he takes it because he sustains the character of heir. But does he take it by descent? Not in the least. He does not take it by descent. He takes it in the character which the law calls for convenience that of the special occupant; that is to say, in the character of the party designated and pointed out by the settlor or testator, as the case may be, to take the property on the event happening of the grantee dying in the lifetime of the *cestui que vie*. And I think it most essential to maintain this principle, that the heir in such a case takes not by descent, but merely as the person pointed out to take as special occupant, and in that character only. I do not think there is any reason to doubt about that, except this, that the expression "descendible freehold" is an expression with which we have all been familiar. It has been frequently used, but I think it is Lord Eldon, in the case of *Ripley v. Waterworth*, who points out that it is an inaccurate expression, and that the heir does not in such a case take by descent at all. The freehold does not descend to him. He does not take *quà* heir. It is true he could not take it if he were not heir, because it is directed that the heir shall take it; but he does not take it *quà* heir, as an heir takes by descent. Then comes another question regarding lands. Supposing lands are limited, not to A. and his heirs during the life of the *cestui que vie*, but to A, his executors and administrators, during the life of the *cestui que vie*. This question has been raised, and has caused a great deal of difference of opinion. I believe that Judges of great eminence are ranged on both sides. I believe that *dicta* in different cases may be found on both sides. The question is this, supposing the gift to be to A. and his executors and administrators during the life of B, if A. dies during the life of B, does the executor take it, or is it a case in which

anybody may take it as general occupant? Is it the same thing, in short, as if it had been simply a gift to A. during the life of B, without saying anything about heirs and executors at all? Some have held that the executor cannot take as special occupant; others have held that he can. The reasons assigned (I am now speaking, without occupying time unnecessarily by referring to a number of authorities)—the main, if not the only reasons why it is contended that the executors shall not take as special occupants in such cases, are these:—it is said the executor is merely to take the personal estate; the executor is not to take the realty; he is not to take freehold property; then how can the executor take land? I confess I think that that reason is founded upon a complete misapprehension. It is founded upon the same misapprehension as has given rise to the expression “a descendible freehold,” when the heir is mentioned. When the gift is to A. and his heirs during the life of another, as I have said, the heir does not take it by descent as heir; and so when the gift is to one and his executors during the life of another, if the executor is to take it, the executor will take it, not in his character of executor—that is, not by devolution from the testator upon him as executor, but he will take it, as the person named by the grantor, as the special occupant.

And why not? He is taking it not because he is executor, taking an estate from his testator; but he is taking it in the same kind of way as, if you used the expression “descendible freehold,” the heir must be considered to take that estate. That is, the heir does not take that estate by descent from his ancestor, but as special occupant, so the executor takes the estate not by devolution on him in the ordinary course, but as special occupant. Therefore, I confess, I do not see the force of that reason. There is another reason, which I think is dwelt upon by Lord Redesdale, in a case where he suggests this difficulty. Now, although I need not say that any difficulty coming from such a Judge as Lord Redesdale deserves the utmost respect and deference, I must venture to observe, that I cannot see the force

of the difficulty. While I have no doubt that his views are better than mine, I am bound honestly to express my own opinion. He says, that if the limitation be to one and his executors and administrators during the life of the *cestui que vie*, there is this difficulty in saying that if A. dies during the life of the *cestui que vie*, his executor or administrator can take it by special occupancy. For he says, there must be some interval; neither the executor nor the administrator can take it *instantly* on the death of the grantee, because some little time must elapse before you can ascertain whether the executor will become executor. He is not bound to become executor, whereas the heir cannot help being heir—he may not take the estate, but he cannot help being the heir. The executor, however, may choose to say, “I will not be executor.” And so in the case of an administrator, some time must elapse before there is an administrator, as an administrator can only be appointed by the Ecclesiastical Court, or now by the Court of Probate. I cannot see the force of that reasoning; I see no more difficulty or objection to the view I take than to this case, which may commonly occur, and in which there has never been felt to be any difficulty. Supposing a man, by his will, devises all his estates to his own executors and administrators, not naming them, but devising the estates to his executors or administrators on certain trusts. Of course, there is just the same difficulty there. Some little time must elapse before you determine whether the executor will take them; and, in the case of an administrator, before the administrator is appointed. But there has never been the least doubt as to that being perfectly valid. So if he were to give it to the executors or administrators apart from any trust, there being then no executor or administrator—where is the difficulty? I do not see the difficulty. It is raised, however, by Lord Redesdale, and his difficulty, I have no doubt, is a sound and serious difficulty. But is that a reason why an executor or administrator ought not to be regarded as being capable of being a special occupant? Now, that is a question which it does not appear to be necessary

for me to determine for the purpose of deciding the case before me. At the same time I think I should not be wrong in stating that if it were necessary to determine that question, in the conflict of opinions entertained on the subject, my own opinion is, that it would be highly advantageous to hold that it is competent to an executor or administrator to take as special occupant. In other words, that if lands be limited to an individual and his executors during the life of the *cestui que vie*, the executor, in the event of the grantee dying in the life of the *cestui que vie*, should be capable of taking as special occupant; and I do not know, I confess, how to get over the difficulty which would exist if the law is not to be so laid down. I think it is very common for conveyancers in settlements (it used to be, in my own personal recollection, most common) to make the limitation to the trustees to preserve contingent remainders and their heirs during the life of the tenant for life. But sometimes a difficulty arose about finding the heir, or the heir was an infant; and so the practice began to prevail (and, I believe, still prevails, whether universally or not I have not now sufficient experience in the practice of conveyancers to know)—but the practice arose of limiting the estate to the executors of the trustees to preserve. Now, what would be the effect if it were to be held that executors could not take as special occupants? Supposing both the trustees died in the lifetime of the tenant for life, where has the estate to preserve contingent remainders gone? I must own it would be fraught, to my mind, with very serious danger if it should be held that an executor or administrator cannot take as special occupant. But, however, as I have said, I think, for the mere purpose of determining the present question, it is not necessary that I should express a conclusive opinion upon that point.

Then this question has arisen, whether, if the property which is the subject of the limitation *pur autre vie*, instead of being lands, be an incorporeal hereditament (such as a rent or tithes, or other incorporeal hereditament), can there, in the case of such a property, be a special occupant, or any occupant at all? There are *dicta*

which would lead one to the supposition that, in the opinion of some parties, it is impossible to have either a general occupant or a special occupant of property lying in grant—that is, of an incorporeal hereditament. Now I believe the effect of the authorities is clear—and I confess upon this I do not feel any doubt at all—that though it is perfectly true that if an incorporeal hereditament be limited to A. *simpliciter* during the life of B, and A. dies in the life of B, there can be no general occupant of that incorporeal hereditament, as there may be a general occupant of a corporeal hereditament, that is, of lands; there is nothing at all to prevent there being a special occupant of such an incorporeal hereditament. It seems quite unnecessary, for any purpose either of convenience or of adherence to general principles, to hold otherwise. When you consider the reason why there cannot be an occupant, I think it is clear that it means there cannot be a general occupant. The reason is only applicable to the case of a general, and not to the case of a special, occupant. The reason is—without going very minutely into it—substantially this, if a party, in defending himself against a real action, had to plead, he must either have pleaded a right in himself and his ancestors (which, of course, a general occupant could not do, as he does not derive his estate from any ancestor of his at all), or else the party must have pleaded what is technically called a *que* estate, that is, *quorum status* the person whose estate he has. And in order to shew that he had the estate of another person, he must have shewn that he had got that estate. If it were an estate which could only be passed by deed as an incorporeal hereditament could only be passed, and could not pass by mere livery, then, inasmuch as he was merely in as general occupant and not by virtue of any deed to shew, he could not plead in a *que* estate. I believe it will be found that that species of doctrine—whether I have enunciated it with complete accuracy or fullness or not—is the sort of technical reasoning founded on the old feudal doctrines, and is the reason upon which the proposition that there cannot be a general occupant is based. But

that reason does not apply in the smallest degree to a special occupant. A special occupant cannot plead the gift of an estate to himself or his ancestors; but he can plead in a *que* estate, because he can produce the deed which made him special occupant—that is, which made the limitation to him and his heirs, or his executors, as the case may be. Therefore, I do not feel the smallest doubt that there may be a special occupancy of an incorporeal hereditament. And, moreover, I should say, if it were necessary to decide the question—which I do not think it is—that an executor or administrator may be—that is, that it ought to be the decision of the law finally, that an executor or administrator may be a special occupant of a corporeal hereditament. If that be so, I think that an executor or administrator may be special occupant of an incorporeal hereditament. Now, as I have said, it is of very little importance to decide—I mean for the purpose of this case—whether an executor or administrator can be a special occupant either of corporeal or incorporeal hereditaments. If, indeed, both the trustees to whom Mr. Cotton conveyed had died, living the *cestuis que vie*, inasmuch as he granted it to those trustees and their executors and administrators—if the executors and administrators could not be special occupants, what must be the consequence? Suppose some general occupant seized the estate, I think there would be considerable difficulty. I do not say what the effect would be. You would have to contend that that general occupant was converted into a trustee for the daughters of Mr. Cotton. It is not necessary to go into the details of the question, but very serious difficulty would arise in so holding; and the only reason why I mention it is, that I do not feel it right to pass over any question which has been the subject of argument, without expressing an opinion upon it. In point of fact, the trustees are dead; all the *cestuis que vie* are dead, and a new lease of the property has been granted to Mr. Northen, Mr. Bewdley Taylor and Mr. Belcombe, their heirs and assigns; and therefore the question does not arise.

Then comes this question: the limita-

tion by the original grant was to Mr. Cotton, his heirs and assigns, and he conveyed to the trustees, their executors, administrators and assigns. I do not think there has been any substantial controversy on the effect of that. I have not the smallest doubt that Mr. Cotton then parted with his whole interest, so far I mean as the legal estate is concerned, and the effect then was simply this—that if matters had still remained in that position—if there were special occupants, the special occupants would be the executors of the trustees. In short, the event of the trustees dying in the lifetime of the *cestuis que vie* would give no interest to Mr. Cotton in the legal estate. Then the remaining question with regard to one portion of the property which is now the subject of controversy is this. The gift of the beneficial interest was in this form: the trustees were to hold the property (subject to a question to which I shall advert presently) in trust as to one equal third part to pay the rents, issues or profits to Mr. and Mrs. Northen and to any after-taken husband of Mrs. Northen, who was one of the settlor's daughters, during their lives and the life of the survivor of them: "and from and after the decease of such survivor, to pay the same unto and equally amongst all the younger children of the said Mary Ann by the said Francis Northen, or any after-taken husband as should be living at the time of the decease of the said Mary Ann; or if only one younger child, or one child only, upon trust to pay the same to such one younger or only child, their, his or her respective executors, administrators and assigns, respectively at the age of twenty-one years, or day of marriage." That is as to the first third. Then, as I understand, although it is not very fully set out in the bill, the limitation as to the second is to Elizabeth, precisely in the same language; and the remaining third is limited for the benefit of Harriett Cotton, the third daughter, and her husband and children, precisely in the same terms. Now, of course, in creating that trust, as to two at least of the daughters who at that time were unmarried, I mean Elizabeth and Harriett, it was contingent whether they would have any children,

and therefore the settlor, as to those two-thirds at least (I do not know how it stood with regard to Mrs. Northen, whether she had then any children or not—I assume she had), but as to Elizabeth, the beneficial gift, the equitable interest, was to her for her life, to any husband she might have for his life, and for the life of the survivor, and then the gift was to children if there should be any. There were none. Of course that was a contingent gift; therefore the settlor had only parted with the beneficial interest contingently on there being children to take; and if there were no children, what was the effect of it? The effect of it unquestionably was, that, so far as he had not parted with it, it remained in himself. It was what is called a resulting trust. But we must not be led into the supposition that a resulting trust is anything more than merely what remains in a man, of the interest which he has not effectually parted with. A resulting trust does not create a new interest when the events turn up in a certain way, but it is simply this: a man parts with his interest in property only contingently; the contingency does not arise on which it was to be parted with, and therefore it remains in him, precisely as it was before the creation of the trust. That appears to be founded on well-known and plain principles. It is not necessary to advert at length to the authorities on a doctrine so clear as that of resulting trust or resulting uses. Where the estate to serve the uses is given to the trustees, but the use is not parted with, it results back and remains in the grantor. In either case it is simply that he retains in himself a certain portion, be it the whole estate or a portion of the estate; he retains in himself a certain interest which he has never parted with at all. I may just advert to one case, to shew that the principle is beyond all controversy. *Lomas v. Wright* was decided by Sir John Leach, the Master of the Rolls (I happen to recollect it because I was counsel in it). It was a very peculiar case; but Sir John Leach begins his judgment in this way: "If in a grant or devise," because of course it makes no difference whether it is by grant or devise, "if in a grant or devise there be a limitation in fee, which is wholly

void, no estate passes, and the use remains in the grantor or results to the heir of the testator. So, if the void limitation be not of the fee, but of a partial interest only, as an estate for life, the use of such partial interest in like manner remains in the grantor or results to the heir of the testator." In short, it is hardly necessary to cite any case for a proposition which is so elementary as that. Then, in this case Mr. Cotton had parted with the whole legal interest. That I conceive is clear. The whole legal interest was out of him; but if he had not parted with any portion of the beneficial interest, whether it were that he had not parted with it at all, even contingently, or had parted with it contingently, and the contingency had never arisen, in either event it would remain where it was. Now the one-third share which was intended for Elizabeth has by reason of her death in the year 1853, leaving no issue, come to be disposed of, and then these questions arise. Is it parted with? First, it is said it is parted with, because it goes to the survivors by the very terms of the deed. I did not think it necessary to call on the counsel for the other parties to argue that question. I am of opinion, upon the argument that was addressed to me, that I cannot determine that the word "survivors" is to be read "others." The events were, that both the sisters died before the third, therefore they were not in the strict sense survivors. But, assuming the question to be whether I can read that word "others,"—no doubt there are many cases in which the word "survivors" has been read "others"—I think the present doctrine is—though I cannot help thinking it would be much more convenient if there were a greater disposition to read the words "survivors" as "others" than there is—the doctrine is, that you must use that term in its ordinary and primary sense, unless you are satisfied that there is something in the will or the instrument which uses the term, that prevents your using it in the primary sense, and requires the application of the secondary meaning to it. It appears to me that in this case, so far from there being any ground which leads to the conclusion that the settlor must have meant to

use that term in the sense of "others," the very language used raises a strong indication of a different intention. It is not a case where the gift was to an unascertained class, which might consist of a single individual or of two individuals, or of three, or of more than three; but it is applied to three persons *nominatim*. The "survivors or survivor" spoken of, must be the "survivors or survivor" of those three persons when either of them dies without leaving issue. Now, if it was meant to use the words "survivors or survivor" in the sense of "others or other," you ought only to use the plural; because it was not certain whether there would only be one other, as in the case of a gift to a family of children. For example, there might be only two; then, if one died, there might be one survivor. But where there are three persons actually named, if one dies leaving no issue, there must be two others. But the language here used, putting aside the difficulty I will mention presently, is this:—"In case any one or more of them, Mary Ann, Elizabeth and Harriett, shall happen to die without leaving children or child as aforesaid, then the part, share, or proportion of her or them so dying shall go and be paid or assigned or transferred in equal shares to the survivors or survivor." It ought to be only "to the survivors"; there must be the two in the sense of the word "others." The use of those words in the plural and in the singular leads me to the supposition that what was in the contemplation of the parties executing the settlement was, that it was to apply to this contingency—that when one died leaving no children, there would be two surviving, in which case you would have the word "survivors" applicable; or there might be only one surviving, in which case you would have the word "survivor" applicable. But it never was meant to apply to the case where one died without leaving any issue, but both the others had already pre-deceased her. Besides that, there is a difficulty in the language which is used. It seems to me that the framer of this instrument in giving (to his clerk probably) instructions to copy in some form, gave him a wrong form, and you have a form applicable to a totally different state of matters. The language

is this: "In case any one or more of them, the said Mary Ann, the wife of the said Francis Northen, Elizabeth Cotton and Harriett Cotton, shall happen to die without leaving children or child as aforesaid, then the part, share or proportion of her or them so dying shall go and be paid or assigned and transferred in equal shares to the survivors or survivor of them, in such manner as the parts or shares, or part or share, of the parents or parent are or is directed to be paid or assigned and transferred." He got a clause of survivorship from some instrument, a will or instrument providing for future children, and put in those words, substituting children for parents. It appears to me that in the first place there is nothing on which I can found the conclusion that the intention was to use the words "survivors or survivor" in any than their simple and ordinary and primary sense. Instead of that, I think I find to a certain extent—I do not say it is conclusive—an indication of a contrary intention. Then if "survivors" cannot mean others—in other words, if the families of Mary Ann and of Harriett cannot take the share of Elizabeth under the term "survivors or survivor,"—it is, in effect, undisposed of. Then it appears to me that the plain principle must be applied. It remains in Mr. Vernon Cotton just as the estate which he had at the time when he was making this grant. But how had he that? He had it in such a manner as that, if he had died in the lifetime of the *cestui que vie*, it would have gone to his heir as special occupant. I think, therefore, that I must hold that the share of Elizabeth goes to the co-heiresses. The three co-heiresses would be Mary Ann, Elizabeth and Harriett. The share of Elizabeth would of course go to her, and, if she died without issue, would go to her sisters as co-heiresses. I understand that that is not in controversy. Of course the co-heiresses will take that share between them.

[The Vice Chancellor then adverted at some length to the question above referred to—being the claim of Mr. Francis Belcombe not to be excluded by the terms of the instrument from taking a share in the third share of Harriett, and after holding that Mr. Belcombe was of

necessity excluded by the intention of the parties from taking any such share, which was divisible among the daughters of Harriett, continued as follows :]—

It was also contended that the younger children under this limitation take only for their respective lives; and the case of *Doe v. Robinson* has been cited, and another authority or two upon the subject, for the purpose of shewing this. No doubt they establish this proposition, that if a man having an estate vested in him during the life of a *cestui que vie* devises those lands to B. without saying his heirs, executors, or anybody else—the question is, does the testator intend to give his whole interest to B, or does he only intend to give it to B. for B.'s life? In *Doe v. Robinson* there were no words of inheritance—no words importing that it was to go to executors or administrators; but the property was simply given as a gift to B. There the whole question was, what did the testator intend? And Mr. Justice Bayley pronounced the decision of the Court, saying :—“ If he had a fee-simple estate, and he had so given it to A. without more, what are you to suppose he intended? Only to give him a life estate.” Therefore it was held that he gave, and only meant to give an estate for his life; and that because there were no words of inheritance. If, however, you can find from the other parts of the will that he meant to give A. more than merely an estate for his life, you can give it to him, although you have not the words “ heirs and executors.” If you can find from the context of the will that the testator meant to give him all the estate that the testator had *pur autre vie*, he would take it by virtue of the intention of the testator expressed in his will; but where not only you find that he has not used those words of limitation which would shew his intention, but you cannot find any such intention in the other parts of the will, what are you to say? That he did not intend it for more than his life. What have you here? And does that apply to the present case? This is not a case where either by the will or by the deed, Mr. Cotton was simply giving A. these lands which he held, without any words either

of inheritance or devolution. It is a case in which, having of course the whole legal and equitable estate in himself, he first of all (as it is admitted on all sides) parts with the whole legal interest—but for what purpose? For the purpose of creating beneficial interests in that property, of which he had parted with the legal interest to the trustees. And then, not satisfied with expressing that, after the deaths of his children their children are to take *simpliciter*, he goes on to declare that they are to leave it to them and their executors and administrators. It is said, yes, but he ought to have said, “ during the life of the *cestui que vie*,” and because he has not said that, therefore no interest can pass. I do not think that the case of *Doe v. Robinson*, and other cases cited, really apply to this case at all. Here I have the most unquestionable indication of the settlor's intention, and the question is, what is the meaning of the settlement? The father is saying, “ My object is to make a provision for my children in my lifetime.” What does he mean by making a provision for those children? Making a provision for them, not only during their lives, but for their families after them; and he shews that that is his intention, for in carrying out the settlement he only gives life interests to his children; but then, as any father would, he considers that if he is providing for them, having parted with the whole legal interest, the question would be, did he mean to part with only a beneficial interest during the lives of his own children and the lives of the children's children, and then reserve an interest to himself? I apprehend it is quite plain what the intention is, and that the words limiting the interest to the executors and administrators shew that the testator meant that the trustees were to continue to pay the rents and profits arising from the property after the deaths of the children's children, to the executors or administrators of those children. It appears to me, therefore, that their representatives are entitled to the shares which they held so long as they lived.

KINDERSLEY, V.C. }
 March 17, 26. } SHORE v. SHORE.

Administration of Estate—Tenant for Life and Remainderman—Receiver.

A testator left the whole of his personally to his son absolutely, and his real estate to his son for life, with remainder to his grandson. His debts were to be paid out of his personally, and then out of his realty in aid of the personally. The debts consisted principally of money borrowed in order to make advances to his son, who was a banker. The son kept down the interest upon the debts out of the income of his life estate in the realty for eleven years, and then the bank failed. A dividend was subsequently paid, which was sufficient to satisfy a large portion of the debts:—Held, that the tenant for life was not entitled to be recouped out of the real estate for any sums which he had paid in keeping down the interest upon the debts.

A receiver having been appointed both of the real and personal estate, it was held, that the expenses of such receiver must be borne by the tenant for life.

This suit was instituted for the administration of the estate of Samuel Shore, and for enforcing the trusts of his will. The cause came on for hearing in January 1857, and is reported 26 *Law J. Rep.* (N.S.) Chanc. 386.

The case was now heard upon further directions.

The testator, by his will, dated the 6th of August 1836, bequeathed his personal estate, subject to the payment of his debts, funeral and testamentary expenses, to his son, Offley Shore; he then gave five legacies of 10,000*l.* each to his five daughters, which he charged upon his real estate; he then devised all his real estate to his son Offley Shore and others, upon trust to raise by sale or mortgage of a competent part thereof so much money as would be sufficient to pay the above-mentioned legacies to his daughters, and also so many of his debts as his personal estate might be insufficient to discharge. He then directed that in case any surplus should remain from such sale or mortgage as aforesaid, his trustees should invest such surplus,

and stand possessed thereof upon the same trusts as were in his will declared concerning the real estates remaining unsold, and which were by his said will subjected to the payment of his debts. The first trust of the unsold real estates was for Offley Shore for life, without impeachment of waste, with remainder over, for the benefit of the plaintiff, who was his eldest son; and the testator appointed Offley Shore his sole executor.

The testator died in November 1836, and his will was duly proved by Offley Shore in April 1837.

Offley Shore was a banker at Sheffield, and had borrowed from the testator on behalf of the bank several large sums of money, which the testator himself raised by mortgage and otherwise for the purpose. Offley Shore, as tenant for life of the real estate, kept down the interest upon the testator's mortgage and other debts out of the rents of the real estate, until the 16th of January 1843, when the bank in which Offley Shore was a partner, became bankrupt. On the 11th of May 1843 a receiver was appointed of the rents and profits of the testator's real estate, and the receiver was also directed to proceed to get in the outstanding personal estate. It was then found that the chief part of such personal estate consisted of the debt due from Offley Shore's bank, amounting to 75,000*l.* In March 1844 a petition was presented to the Court of Bankruptcy for leave to prove for the above sum against the bankrupts, and a dividend of above 30,000*l.* was declared upon the debt. On the 5th of April 1847 a decree was made for the sale of the testator's real estate, or of so much thereof as should be necessary to supply any deficiency that might, on settling the accounts, be found to exist in the personally. Portions of the real estate were accordingly sold, and the whole of the debts due from the testator, and the legacies charged upon his real estate were then paid out of the monies arising from the sale of the realty and personally in the hands of the receiver. Until this payment had been made the whole income of the real estate had been absorbed in keeping down the interest; and the question now raised was, whether some portion of the produce of

the real estate ought not to be treated as applicable to recoup the tenant for life the interest so paid by him out of his life estate.

Mr. Glasse and *Mr. Osborne*, for the plaintiff, the tenant in remainder, submitted that the *corpus* of the personalty ought to be applied in payment of the capital, and not the interest of the debts, and no part of the realty could be applied to recoup the tenant for life what he had paid. The personalty did not, in fact, belong to the bankrupt until the debts were paid; the surplus only belonged to him. Offley Shore was, in fact, the principal debtor, and it was owing to his failure to pay the debts, that there had been the loss of interest, and he could not now claim any equity in his own favour.

Mr. Baily and *Mr. H. G. Bagshawe* appeared for the assignees of the tenant for life, and contended that the remainderman was not entitled to take the whole of the produce of the real estate, because the tenant for life had lost all the income, which, in fact, he had paid towards keeping down the interest on the debts, and thus relieving the realty. If the personal estate had been got in, it would have been applicable in the first place to pay the interest and then the *corpus* of the debts, which would have reduced the amount of the debts as well as the interest, and the tenant for life would have had some portion of the interest on the real estate.

The following cases were cited:—

Coote v. Lord Milltown, 1 Jo. & Lat. 501.

Sitwell v. Bernard, 6 Ves. 520.

Entwistle v. Markland, Ibid. 528, n.

March 26.—KINDERSLEY, V.C.—The bankruptcy of Offley Shore has given rise to many difficult questions, upon which there is very little direct authority. By the bankruptcy all interest was stopped from running upon the debt due from the firm. If the estate of the bankrupt had been sufficient to pay the debt in full, and there had been a surplus, then there would have been interest also on the debt, but this was not the case. The first dividend upon the debt having been received, it now

becomes a question how far and in what way the Court can interfere with respect to the administration of the personal estate in order to work out the equities as between the tenant for life and the remainderman of the real estate. The argument that, in point of fact, the tenant for life is the principal debtor, whose failure has occasioned the loss of the interest on the debts which ought to have relieved his life interest in the realty, would appear at first sight to be irresistible; and if the matter merely rested on that, it would be impossible for me to hold that he would have any right to derive a benefit from his own default. Offley Shore is not only tenant for life himself, but he is the sole executor; and it is the fault of the executor that the debts were not got in. As executor he was bound to get in the personal estate; but, in fact, I am precluded from deciding on this ground from what took place when the cause was before the Court on a previous occasion. It was then insisted that Offley Shore had laid out large sums of money in lasting improvements, which should be borne by the tenant in remainder; and a claim was made on that account for a sum of 14,000*l.* as against the *corpus* of the estate. On the other hand, there was a claim against Offley Shore as defaulter, and that his life estate in the realty should be applied in discharge of debts, and an arrangement was made that the one claim should be set off against the other. After that arrangement, it would be a violation of the spirit of the order then made in abstract honour and equity, that Offley Shore should be put upon the same footing as if he was a simple executor. Where personal estate is given to one for life, with remainder over, the common equity administered daily as to charges by mortgage and otherwise, is that the income pays interest on the debts, and the *corpus* pays the capital; and so in real estate liable to debts in aid of personalty where there is a tenant for life and remainderman, the life estate pays the interest, and the remainder pays the capital. But in this case the personalty is given absolutely, and the realty is given to one for life, with remainder over; and the question is, whether the Court will interfere in case the personalty

is insufficient to pay the debts, in order to work out the equities between the tenant for life and remainderman, with respect to the mode in which the personalty has been applied? As a general rule, in ordinary cases where the Court is called upon to determine the question it will, although the personal estate is given to one absolutely, administer it in such a manner as to make the income of the personalty pay the interest of the debts, and the *corpus* of the personalty the principal, because by that means you ascertain how much of the deficiency of the personalty falls on the tenant for life, and how much on the remainderman.

Now we come to the real question in this case. In 1847, that is, eleven years after the death of the testator and four years after the bankruptcy, a dividend was paid, and by that means a portion of the personal estate was got in; and the question is whether, under these circumstances, the whole of that sum is to be applied exclusively in payment of debts. If that amount had been producing income, the income would have gone to pay the interest, and it is said that if it is now applied in payment of the principal of the debts, the tenant for life will get no benefit. The remainderman says it is *corpus*, and, as such, should be applied in payment of the principal of the debts. It has been contended that there being debts carrying interest, and the bankrupts having now paid a certain sum on account of debts owing to the estate, that money should be applied, first, in repaying to the tenant for life all that he has paid for interest on the debts, and after payment of all the interest, in payment of the capital. No doubt as between debtor and creditor, if A. owes B. a debt consisting partly of interest and partly of principal, and B. receives part payment, he has a right to say he will consider this to be in payment of interest, and not of capital. But here the question is between tenant for life and remainderman; and it is obvious that this contention of the tenant for life is in direct violation of the principle, that the Court will in administering the personalty apply the income in payment of interest and the *corpus* in payment of

capital; and therefore it is impossible to maintain it.

The question then that remains is, whether the 30,000*l.* is to be treated as applicable altogether in discharge of the debts, or am I in any way to apportion it?—whether there is any equity for apportionment, and if so, how it is to be apportioned? Is there to be a *pro rata* apportionment? No doubt, if it were a case in which the general principles of equity required some such administration, the Court would find its way to do it. In the ordinary case, where personal estate is given to one for life with remainder over, by reason of difficulty in getting in the personalty, or from some other cause, it often becomes necessary to apply some apportioning principle of equity for the purpose of determining how to work out the intention of the testator as to the income the tenant for life should enjoy. In many cases, if you give to the tenant for life the whole income which has accrued, you give him more than he ought to have; for the property may be bearing what may be called an abnormal interest. On the other hand, some property may not be bearing interest at all. In such cases the Court will, in order to work out the intention of the testator, apply some principle to ascertain what is to be regarded as the income of the tenant for life. It is often very difficult to apply that principle, and the point has given rise to many differences of opinion. In *Coote v. Lord Milltown*, Lord St. Leonards adverted to the necessity of resorting to equity in some particular cases, and there are other cases, such as *Sitwell v. Bernard*, where the question has been discussed. In order to see how far the principle of those cases can be applied, we must look to the circumstances. During the interval between the testator's death and the bankruptcy everything was done that ought to have been done, except getting in the *corpus* of the personal estate and paying off the debts; but the interest on the debts due from the estate was kept down by Offley Shore. When the bankruptcy occurred, part of the personal estate which had been bearing interest ceased to do so; and until the bankruptcy it was quite unnecessary to apply the principle.

Suppose a case where personal estate is given to one for life, with remainder over, and after six or seven years a portion of the personal estate becomes suddenly unproductive, would the tenant for life be entitled to say that, although there was no necessity to resort to the equity at the testator's death, yet, when there was personal estate got in, which was entirely *corpus*, he was entitled to have some of that *corpus* as part of his income? No case has ever occurred in which the tenant for life has been held entitled to have that made good out of the *corpus*, and no such claim could be maintained. There is, no doubt, in this case some hardship, but I cannot apply to it any such principle as that which has been contended for. Suppose the converse of the case, and part of the personal estate had been in the hands of bankers, yielding regular interest, which had been received by the tenant for life; if suddenly the *corpus* of the debt was lost, it would be impossible that the remainderman could come upon the income which has been received by the tenant for life. Upon full consideration of the case, I must decide against the assignees of the tenant for life.

There remains but one other question, which is, whether the receiver's poundage should come out of the rents and profits, *i. e.* out of the life interest, or be in some way apportioned. It is contended on the part of the tenant for life that it is for the benefit of the remainderman, as well as for the tenant for life, that the receiver was appointed. And the same question has been raised with regard to the expenses of passing the receiver's accounts. It is said it was for the benefit of both parties, and that the costs should be apportioned between the parties. I cannot say that there is not a certain plausibility in the contention; but such a claim was never made before; and it may be answered in this way, that if it becomes necessary to have a receiver, the estate for life is inherently subject to it, and it is the right of the remainderman to have the receiver and to have the ordinary expenses of such appointment paid out of the life estate.

LORDS JUSTICES.
July 28, 29. }

COLLINS *v.* BURTON.

Voluntary Settlement by an uncertificated Bankrupt—Right of Creditor subsequent to the Bankruptcy to sue—Costs.

P. B., in 1840, became bankrupt, and did not obtain his certificate, and in 1849 had a grant of leasehold property made to him by the Crown. In the same year he settled that property on his sons and his daughters (then unmarried), and their children, but declared no trust in favour of their husbands. The daughters afterwards married, and one of them had children. *C. C.* was a simple contract creditor of *P. B.*, on a debt subsequent both to the bankruptcy and the settlement, and he filed a bill on behalf of himself and all other unsatisfied creditors of *P. B.*, against the assignees, the trustees of the voluntary settlement, the sons of *P. B.*, and the two daughters and their husbands, and the infant children of one of them, to set aside the settlement. One of the Vice Chancellors made a decree in the plaintiff's favour, but considered that the husbands had no present interest, and that the wives and children were mere volunteers. On appeal to the Lords Justices,—Held, that the plaintiff had no right to sue, he having no judgment, and not being in process of obtaining any, and their Lordships dismissed the bill, with costs, both of the appeal and of the original hearing.

This was an appeal from a decision of Vice Chancellor Stuart, by which he had made a decree in the plaintiff's favour. The facts of the case were, that Philip Barnes (who carried on the business of builder at Norwich) was, on the 5th of December 1829, declared bankrupt, and on the 9th of March 1830 obtained his certificate, but no dividend was ever declared, the debts being 1,500*l.* In March 1840 he was discharged under the Act for the Relief of Insolvent Debtors from debts to the amount of 5,000*l.*, and on the 25th of the same month he was again declared bankrupt, and Mr. Graham was appointed official assignee. On the 10th of August his last examination was adjourned *sine die*, and he never obtained his certificate. The debts proved were 1,000*l.*

On the 14th of May 1842 he was again discharged from prison, under the Insolvent Debtors Act, his debts amounting to 4,900*l*. In this state of circumstances he became entitled to parcels of building ground at Hastings, for a term of ninety-nine years from the 5th of July 1849, under a grant from the Crown, to himself, his executors, administrators and assigns, dated the 31st of December 1849.

By indenture dated the 12th of September 1850, made between Philip Barnes of the first part, Harriet Ann Barnes and Elizabeth Sedley Barnes of the second part, and Philip Edward Barnes and Robert Mace of the third part, in consideration of natural love and affection for his children, Philip Barnes assigned to Philip Edward Barnes and Robert Mace, their executors, administrators and assigns, the parcels of land comprised in the Crown lease for the residue of the term of ninety-nine years, upon certain trusts in favour of his daughters, the said Harriet Ann Barnes and Elizabeth Sedley Barnes, and their respective children, and of his sons Philip Edward Barnes, Robert Barnes and John Henry Barnes, but no trusts were declared in favour of the husbands of his daughters. Harriet Ann Barnes intermarried with Mr. Taylor on the 22nd of November 1851, and Elizabeth Sedley Barnes intermarried with Mr. Sargeant on the 10th of July 1852.

Two or three years after the date of the settlement Philip Barnes became indebted to Charles Collins in a sum of money by simple contract, and he filed the present bill on behalf of himself and other unsatisfied creditors of Philip Barnes, whose debts had been incurred since the date of the second bankruptcy, praying for a declaration that they were entitled to be paid out of the property comprised in the indenture of the 12th of September 1850; that the property might be sold, and the proceeds administered; also that, if necessary, the indenture of settlement might be declared void as against the assignees under the second bankruptcy, and also against the plaintiff and the other subsequent creditors; and for a receiver of the rents and profits, and an injunction against the trustees of the settlement. The defendants were Burton, the creditors' assignee,

and Graham, the official assignee under the second bankruptcy; the trustees of the settlement; the sons of Philip Barnes; and the two daughters, Mrs. Taylor and Mrs. Sargeant, and their husbands, and the infant children of Mr. and Mrs. Taylor.

When the case was heard, before Vice Chancellor Stuart, on the 9th of June, in making a decree in the plaintiff's favour, his Honour referred to the arguments urged in the case, in delivering the following judgment:—"The case is not only clear, but gross. Barnes was an uncertificated bankrupt, and he had also taken the benefit of the Insolvent Debtors Act, his creditors getting nothing, and to this day having got nothing. In this state of circumstances he acquires valuable property under an agreement with the Crown. Having acquired this property, he settles part of it upon two of his daughters and their children. The question is, as to the rights of these two daughters and their children, and the two husbands whom these two daughters have married since they acquired their rights under the voluntary settlement—what rights these persons have against the assignees of the bankrupt and the plaintiff and his other creditors; and I am clearly of opinion they have none. It has been suggested that they were purchasers for valuable consideration. It is impossible that the daughters and their children can have been purchasers for valuable consideration; but it is said that their husbands married them on the faith of the settlement being valid, and that *they*, therefore, were purchasers for valuable consideration. That is the way Mr. Osborne puts it, *because* the husbands contracted a marriage on the faith of this being a valid settlement. If the husbands were now in possession of any part of the property, they might possibly, upon the authority of some of the cases, say they were purchasers for valuable consideration. It is not necessary to enter upon that, because the husbands have no present interest; the wives and children, who were mere volunteers, are volunteers still. One can hardly conceive any possible ground upon which the defence in this case can be founded, unless it be that topic which was insisted on very much by Mr. Osborne, that the present

plaintiff has no right to sue. That involves a question of a very different kind—a question of some interest and importance. The plaintiff was a mere simple contract creditor, and was not a creditor at the date of this voluntary settlement. It is well settled as the doctrine of this Court, that, in order to set aside a settlement as a fraud against creditors, the person who complains must be a person who was a creditor at the time, and whose interests and rights were interrupted by the effect of the settlement. The present defendants say, with perfect truth, that he was not a creditor at the time, and it was asked upon what ground there can be cause to set aside this voluntary settlement? But that is not the whole argument in this case. There are before the Court the assignees of the bankrupt, and the right of the assignees to set aside the settlement, and to have this property applied to pay the debts of the bankrupt is perfectly clear. The right of the plaintiff in consequence of the bankruptcy, upon the doctrine on which *Tucker v. Hernaman* (1) was decided, is, that out of assets acquired by the bankrupt since his bankruptcy, his creditors have a right to be paid. It is very true, if the bankruptcy had not intervened, they would have had great difficulty in establishing their claim. But the bankruptcy having intervened, and the assignees being before the Court, and the plaintiff having a primary right to payment, though in a sense not a primary right to sue, the plaintiff is in the position of a person coming here to recover property which is held by the assignees in trust for him and the other creditors. This is a case in which the right to sue is plain and cannot be disputed. The primary right to sue is in the assignees, and the primary right to payment is in the plaintiff. I am, therefore, of opinion that I must declare that this settlement, as against the creditors of the bankrupt and the plaintiff, is fraudulent and void, and must be set aside; and that the property included in it ought to be sold. I give no costs against the defendants, who are innocent parties. The accounts of the

creditors and the rest can be arranged at chambers. I can give the trustees no costs."

From this decision the parties interested under the settlement appealed.

The case was argued at considerable length, but the questions are so fully discussed in the judgment that further reference to them here is unnecessary.

Mr. Bacon and *Mr. Jolliffe*, for the plaintiff, supported the decree.

Mr. Osborne, for the appellants.

Mr. Malins and *Mr. Southgate*, for the assignees.

Mr. Jolliffe was heard in reply.

The following cases were cited:—

Payne v. Mortimer, ante, 716.

Kirk v. Clark, Prec. in Chanc. 275.

The East India Company v. Clavell,
Ibid. 377; s. c. 1 Gilb. Rep. 37.

Brown v. Carter, 5 Ves. 862.

Tucker v. Hernaman, *ubi supra*.

Holmes v. Penney, 3 Kay & J. 90;
s. c. 26 Law J. Rep. (N.S.) Chanc.
179.

George v. Milbanke, 9 Ves. 190.

Richardson v. Smallwood, Jac. 552.

Daubeny v. Cockburn, 1 Mer. 626.

Maunsell v. White, 4 H.L. Cas. 1039.

Jones v. Powles, 3 Myl. & K. 581;
s. c. 3 Law J. Rep. (N.S.) Chanc.
210.

LORD JUSTICE KNIGHT BRUCE. — *Mr. Jolliffe* has very properly conceded, reasonably and unavoidably conceded, that if there had not been any bankruptcy, and no passing through the Insolvent Court, on the part of Philip Barnes, the present bill could not have been maintained; because it is by a general simple contract creditor of Barnes's, on behalf of himself and other simple contract creditors, the plaintiff not alleging that he has obtained any judgment, decree or order, or that he is in the process or course of obtaining any. The question is, whether the bankruptcy—for we need only look to that—the second bankruptcy, makes any difference. There were two bankruptcies and two insolvencies. There was a certificate made under the first bankruptcy; the ques-

(1) 4 De Gex, M. & G. 395; s. c. 22 Law J. Rep. (N.S.) Chanc. 791; 1 Sm. & G. 394.

tion is, whether the second bankruptcy makes any difference. The bankrupt is uncertificated under it, and incurred debts afterwards, and amongst the debts so incurred was the debt of the present plaintiff; and he suggests that the assignees under the second bankruptcy owe him a duty—the duty of pursuing the settled property, of which it is the object of this suit to defeat the settlement, for the purpose of enabling payment to be made to him. Now, I do not see that any such duty exists. In the first place, the property is so circumstanced, is of such a particular description, that the assignees are not bound to take it; they are entitled, if they will, to reject it. But still more, the case made by the bill is one of a title to have this property applied to the payment of those creditors, of whom the plaintiff is one, adversely to the assignees, in the sense of being paramount to them. I cannot conceive, therefore, that the assignees owe, on the statements of this bill, this plaintiff any duty whatever; at all events, such a duty as would enable the plaintiff, by reason of its non-performance, to associate those who claim under the impeached settlement with them as co-defendants, as joining in effect and substance in a breach of trust. There can be no such case. With regard to the substantial merits of the case—what is it? The bankrupt incurs a simple contract debt whilst he is uncertificated; but before he has done so, two or three years before he has incurred this debt, though after the bankruptcy, he has settled certain property. *Prima facie*, a creditor whose debt originated after the settlement, can have no right to complain of it, even independently of the difficulty of the general creditor of a living man not having obtained a judgment, decree or order seeking to make his property available to it. Generally speaking, a creditor cannot complain of an act done by the debtor with respect to his property, except for the purpose of obtaining the execution before the debt accrues. There may be special and particular circumstances which may enable a creditor to complain of an act done before his debt accrued, but there are no such special or particular circumstances here;

and I am at a loss to see any ground, direct or indirect—any ground, primary or secondary—upon which the present plaintiff is entitled, upon the allegations in this bill, even assuming for the purpose of the argument the truth of every one of them, to sue those who claim under the settlement. Whether he has a right to sue the assignees is, in truth, an immaterial question of which we need not dispose, because the assignees are friendly to him, and co-operate with him, and there is no dispute between them. I am of opinion that, if every word in this bill were proved, it would not sustain this suit. I think there are many words which, although proved, do not assist the plaintiff's case.

LORD JUSTICE TURNER.—I am of the same opinion. There is nothing to entitle the plaintiff to any personal rights which are asked by virtue of the debt which is due to him, or any judgment which this plaintiff may have obtained. He is suing here on behalf of himself and all the other creditors in bankruptcy, not founding himself on any judgment that he has recovered in the bankruptcy. What is the state of the case? This is a bill by persons who claim adversely to the assignees and whose title is adverse to the assignees against persons who also claim an adverse title to the assignees. I confess I have never heard of such a bill being maintained in this court. It is attempted to maintain it on the ground that the assignees are trustees for subsequent creditors, and that the settlement trustees are trustees for the assignees. Those positions fail on both points. Whether in this court they might not maintain a bill by subsequent creditors for a right to sue in the name of the assignees, that is not the question before us. But clearly, till this Court has made its decree constituting and declaring the priority of the subsequent creditors over the creditors under the bankruptcy, the assignees are not trustees for the subsequent creditors; and equally clearly the trustees of the settlement are not trustees for the assignees until the Court has set aside the settlement. Both positions, therefore, on which the plaintiff seeks to maintain this bill altogether fail, and this bill must be

dismissed, and I think dismissed with costs, except as against the assignees, of the hearing originally, and upon the appeal.

Mr. Jolliffe.—The plaintiff appears before your Lordships in the performance of his bounden duty to support the decree made in his favour, and your Lordships will scarcely so far depart from the ordinary practice of the Court in such circumstances as to make him pay the costs, although you differ from the learned Judge in the court below.

LORD JUSTICE KNIGHT BRUCE.—Yes; the tendency of modern decisions has been more and more that way; and in the Judicial Committee it has now become the general rule, unless something is said expressly to the contrary; I also believe it has been done here more and more of late years. The opposite practice has been given up in the Judicial Committee for the last ten years, and even more.

KINDERSLEY, V.C. }
March 19. } DAY v. DAY.

Administration of Estate—Calls upon Railway Shares.

A testator, by his will, gave (after the death of his wife) any shares in railways, mines or other undertakings that might belong to him at his decease, to his second son, and in case of his death without issue the same to revert to his two other children. The testator was possessed of railway shares upon which, after his death, calls were made. The calls were paid by his widow, as executrix, and the company had power to make further calls. The residue was not sufficient to meet these calls. The Court directed a sale of the shares by the executrix, who was to retain the sums already paid by her for calls, and to invest the residue in consols, the dividends of which were to be paid to her for life; without prejudice to the question out of what fund the calls already paid were ultimately to be borne.

This suit was instituted for the administration of the estate of Edward H. Day,

the plaintiff being his widow, Mary Day, and the defendants the children and grandchildren of the testator interested under the will. A question was now raised upon an adjourned summons from chambers, as to the payment of calls upon certain railway shares comprised in the bequests of the will. The testator, by his will, dated the 18th of July 1856, directed his debts to be paid by his executors. He then gave to his wife his freehold, leasehold and other property for her life, and after her decease he gave, devised and bequeathed a freehold house, specifically mentioned, to his eldest son, Edwin Day, and his lawful heirs. To his second son, Horace, and his lawful heirs, the testator gave and bequeathed his leasehold house at Brixton, and to him he also gave any shares in railways, mines or other undertakings that might belong to him at his decease, and in case of the death of his said son without lawful issue, what he devised to him was to revert to his eldest son Edwin and his daughter Ellen, and their respective lawful issue, in equal shares. To his daughter Ellen and her lawful issue he gave and bequeathed certain houses therein mentioned, and the residue of all money, furniture and other property not specified in his will. The testator appointed three persons his executors, who renounced the trust; and letters of administration, with the will annexed, were granted to the plaintiff, the widow of the testator.

The testator died on the 4th of June 1858, leaving his three children mentioned in the will, surviving.

The testator, at the time of his decease, was possessed of or entitled to certain real and personal estate, including a number of railway shares, in various companies, of considerable value, and amounting to more than sufficient for the payment of all his debts, funeral and testamentary expenses.

After his decease two calls were made upon some of the railway shares, which were paid by the plaintiff, amounting respectively to the sums of 70*l.* and 175*l.*, and the railway company had power to make further calls, to the extent of 2*l.* 10*s.* per share, every three months. Upon the accounts in the suit being taken before the chief clerk, a question was raised out of

what fund the calls were to be paid, or whether they were to be sold by the administratrix.

Mr. Walford appeared on behalf of the plaintiff, and submitted that the railway shares ought to be sold, and that the calls already paid by the widow should be repaid to her. There were three classes of cases where the Court had directed a sale of property either belonging to infants or subject to trusts, for the purpose of raising a fund to satisfy particular payments: first, for the purpose of paying fines upon renewal of leases; secondly, for paying costs of a suit; and, thirdly, for paying premiums upon policies of insurance. The principal authorities in support of this construction, were—

Allan v. Backhouse, 2 Ves. & B. 65.

Garmstone v. Gaunt, 1 Coll. 577; s. c.

14 Law J. Rep. (N.S.) Chanc. 162, and other authorities there referred to.

Vickers v. Scott, 1 Jur. 402.

Hill v. Trenery, 23 Beav. 16.

KINDERSLEY, V.C. said he thought the Court had power to direct a sale of the shares, and that it was the most desirable course to be taken under the circumstances. An order was accordingly made that the plaintiff, as the administratrix of the testator, should be at liberty to sell the railway shares referred to in the summons, and out of the monies arising from such sale, to pay all the costs and expenses attending such sale, and then to retain thereout the sums of 70*l.* and 175*l.* paid by her for calls on the said shares, as appeared by her affidavits and to invest the residue of such purchase-monies in the 3*l.* per cent. consols. in the name of the Accountant General, in trust in this cause, the dividends to be received by the plaintiff from time to time until further order; this order to be without prejudice to the question by whom, out of what fund or property, or in what manner the calls so paid by the plaintiff ought ultimately to be borne.

[IN THE HOUSE OF LORDS.]

1858.	{	THE HON. ARTHUR
July 1, 2, 5.		THELLUSSON, ap-
1859.		pellant, v. LORD
Feb. 10, 11, 14, 16;		RENDLESHAM AND
June 9.		OTHERS, respon-
		dents.

Will—“*Eldest Male Lineal Descendant*”—*Primogeniture or Age*.

A testator (who at the time of making his will had three sons living), after devising estates to trustees, and directing accumulations, &c., appointed a time at which the estates were to be divided into three portions, and one was to be conveyed to the “eldest male lineal descendant” then living of the testator’s eldest son. At the appointed time two persons were living who filled the character of “male lineal descendant.” One was a youth who was eldest in point of primogeniture: the other, his uncle, who was eldest in point of age:—Held, that, under the words of the will, the former was entitled to have the estate conveyed to him.

This was an appeal from the Court of Chancery; and the question was, whether, according to the true construction of the will of Peter Thellusson, who died on the 21st of July 1797, the appellant, who was born on the 10th of December 1801, and was the only surviving son of Peter Isaac, first Lord Rendlesham, the testator’s eldest son, answered the description of the “eldest male lineal descendant” of the testator’s son Peter Isaac, or whether the respondent, Lord Rendlesham, who was born on the 9th of February 1840, and was the only son of the appellant’s elder brother Frederick, third Lord Rendlesham, answered that description.

The testator, Peter Thellusson, devised all his real estates to trustees, upon trusts, and gave the residue of his personal estate to the same trustees, upon trust to invest the same in the purchase of real estate of inheritance upon the same trusts. These trusts were, in substance, to accumulate the rents and profits during the lives of his three sons, Peter Isaac, George Woodford, and Charles, and of their sons, and the issue of such sons of the testator’s three sons living at or born in due time after his death, and

after the death of the survivor of such several persons to make an equal partition of the trust premises; and he directed that the whole thereof should be divided into three lots of equal value, or as near thereto as possible; and that one of such allotments should be conveyed to the "eldest male lineal descendant" then living of his eldest son, Peter Isaac Thellusson, in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living (who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was thereby directed to be limited) of his son Peter Isaac Thellusson, successively in tail male, with remainder in equal moieties to the eldest and every other male lineal descendant or descendants of his sons George Woodford Thellusson and Charles Thellusson; that another of such lots should be conveyed to the use of the eldest male lineal descendant of George Woodford Thellusson, with like remainders over; and that the third and remaining lot should be conveyed to the use of the eldest male lineal descendant of Charles Thellusson, in like manner.

Charles Thellusson the younger, a son of the testator's youngest son Charles, was the last survivor of the testator's sons, and of such of their sons as were living at or born in due time after his death. He died on the 5th of February 1856, and, there not having been any issue of such sons of the testator's sons living at or born in due time after the testator's death, the period for partition then arrived, but in consequence of the failure of male lineal descendants of George Woodford Thellusson, the testator's second son, the trust property became divisible into two lots only, the first of which was, by the direction of the testator's will, to be conveyed to the "eldest male lineal descendant" of the testator's eldest son, Peter Isaac Thellusson, the other to the "eldest male lineal descendant" of the testator's youngest son, Charles Thellusson.

The appellant claimed, as eldest male lineal descendant of the said Peter Isaac Thellusson, to be entitled to have one of the lots conveyed to him.

The respondent, Lord Rendlesham, on the other hand, contended that, though he was younger than the appellant in age, he

was the eldest male descendant of the said Peter Isaac Thellusson, according to the true construction of the testator's will, as being son of the appellant's elder brother, and therefore older in blood.

There was a clause in the will, regulating the presentation to the advowsons, which were in the gift of the testator. As this clause was referred to in argument, as affording an illustration which might assist in arriving at the testator's real meaning in the phrase "eldest male lineal descendant," it is here inserted.

"And with respect to the said advowson, and any other advowson, right of patronage and presentation belonging to any other estate that may hereafter be purchased by my said trustees, or the survivors or survivor of them, or any future trustees or trustee to be appointed as hereinbefore mentioned, I order and direct that my said trustees do and shall, when and as the same shall respectively be or become void or vacant, present a fit and proper person thereto, who shall for that purpose be nominated by one of my said sons in rotation, the eldest having the first nomination, and the like nomination to be made by the eldest male lineal descendant of my said three sons respectively, in the order and rotation aforesaid, *if he be capable by law of making such nomination* when the church becomes vacant, or in due time afterwards; otherwise the eldest male lineal descendant of the next brother is to present to such living; and in case it shall so happen that when such living or livings shall respectively become void, or in due time afterwards, *no male lineal descendant of any of my said sons shall be capable of presenting thereto*, I direct my said trustees, or the survivors or survivor of them, or such future trustees or trustee for the time being, to present to such living or livings respectively."

When the case came before the Master of the Rolls, his Honour intimated an opinion that the question had, in fact, been already decided by the Lord Chancellor and by this House in the various suits which had already been instituted with relation to this will; and that unless he was to overrule the decision in *Oddie v. Woodford* (1), which he felt he had no

(1) 3 Myl. & Cr. 584; s. c. 7 Law J. Rep. (N.S.) Chanc. 117.

authority to do, he must act upon and be bound by it. His Honour therefore made a decree, declaring that Baron Rendlesham was the person who, at the time of the decease of Charles Thellusson, answered the description in the will contained of the "eldest male lineal descendant" of the testator's eldest son (2).

This was an appeal against that decree.

The case was twice argued: in July 1858 and in February 1859, and on both occasions, in the presence of the Judges.

Sir R. Bethell and *Mr. Selwyn*, for the appellant, contended that the words of the will must receive their ordinary meaning; and that "eldest," therefore, must be treated as first in age of those lineal male descendants who were living at the time when the division of the property was to take place. This was plainly the intention of the testator in the advowson clause, and must be taken to have been his intention throughout. They cited and commented on the following authorities:—

Doe d. Winter v. Perratt, 5 B. & C. 48; s. c. 9 Cl. & F. 606; 4 Law J. Rep. K.B. 246.

Sugden's Law of Property, 271.

Scarisbrick v. Skelmersdale, 4 You. & C. Exch. 79; s. c. 1 H.L. Cas. 167.

Livesey v. Livesey, 2 H.L. Cas. 419.

Oddie v. Woodford, 3 Myl. & Cr. 584; s. c. 7 Law J. Rep. (N.S.) Chanc. 117.

Crossly v. Clare, Amb. 397.

Grey v. Pearson, 6 H.L. Cas. 61, 78; s. c. 26 Law J. Rep. (N.S.) Chanc. 473.

Mr. Rolt and *Mr. R. Palmer*, contra, commented on these authorities, and mentioned in addition,—

Chapman's case, Dyer, 333, b.

Hunt v. Dorsett, 5 De Gex, M. & G. 570, 575.

Raleigh's History of the World (Oxford edit.), ch. 9, s. 1.

Mandeville's case, Co. Litt. 26, b.

Wright v. Atkyns, 17 Ves. 253; s. c. 19 Ves. 299.

Towns v. Wentworth, 11 Moo. P.C. Cas. 526.

Bengough v. Edridge, 1 Sim. 173; s. c. 5 Law J. Rep. Chanc. 113.

Trevor v. Trevor, 1 H.L. Cas. 239.

(2) 23 Beav. 321.

The Solicitor General (*Sir H. Cairns*) was heard for the next-of-kin, to contend that this provision of the will was void for uncertainty. He cited *Gooch v. Gooch* (3).

Mr. G. L. Russell, *Mr. Faber*, *Mr. Bromehead*, *Mr. Renshaw*, *Mr. Young*, *Mr. Macnaghten* and *Mr. Chapman Barber* appeared for other parties.

The LORD CHANCELLOR (who, though presiding, had taken no part in the hearing, as he had been, while at the bar, counsel in the cause) put the following questions to the Judges:—

First, whether the devise by the testator of his lands, tenements and hereditaments, after the decease of the several persons during whose lives the rents and profits of the same are directed to be accumulated (if it had been a devise of legal estates) to the eldest male lineal descendant then living of Peter Isaac Thellusson, George Woodford Thellusson, and Charles Thellusson respectively, in tail male, is capable of an intelligible construction, or is void for uncertainty?

Secondly, if at the time directed by the testator for the division of the estate into three lots, and for conveyances to be made thereof, Peter Isaac Thellusson had had three sons, all of whom were dead, and the eldest of the three sons had left a son under age, and the second son had left a son of twenty-one years of age, and the third son had left a son of thirty years of age, and supposing it had been a devise of legal estates, which of the sons of the three sons would have been entitled to one of the lots?

April 16, 1859.—BYLES, J.—My Lords, it would savour of presumption in me to apologize to your Lordships for the brevity of my replies to the questions propounded by your Lordships to the Judges; but lest I should be thought guilty of disrespect, or want of duty to the House, I may perhaps be pardoned for stating, that almost immediately on the conclusion of the arguments I was compelled to leave town for the Northern Circuit, from which I have but just returned, and only received your Lordships' summons at a late hour yesterday afternoon.

In answer to the first question, and for the

(3) 3 De Gex, M. & G. 366; s. c. 21 Law J. Rep. (N.S.) Chanc. 238; 22 Ibid. 1089; 14 Beav. 565.

reasons given in answer to the second, I am of opinion that the devise is capable of an intelligible construction, and is not void for uncertainty.

In answer to the second question, I am of opinion that the words "eldest male lineal descendant then living" indicate the person who at the period of distribution should answer the description of heir male of the body.

The learned counsel for the appellant contend, that they indicate the one of all the descendants in the male line who should be the most advanced in years. Call, they say, all the male lineal descendants into a room, and choose the eldest person there. He is the eldest male lineal descendant in the popular and obvious sense of those words. A plain unlettered man, they add, would think this the natural and obvious construction of the words; and the question is, not what construction a lawyer would give to the words, but what a plain man, such as the testator, would understand by them.

But here seems to me to lurk the capital fallacy in the appellant's argument. In what language is this will written? Is it written in popular and colloquial English, or is it written in the technical, I had almost said the scientific, language of the law? It is not necessary to look beyond the four corners of the instrument to see that it is conceived in language strictly and eminently technical, that it is penned by a lawyer, that it is addressed to lawyers, and intended to be understood by lawyers in a legal and technical sense.

It may be, and no doubt was the fact, that the testator was not a lawyer; but, if so, he must have retained a lawyer, and in that case the true question is not so much, What did the testator mean? as, What did the penman whom he retained to express his intentions mean? A testator who retains a conveyancing counsel to draw his will, disposing of large property, with various and complicated provisions, has a very obscure, cloudy, and imperfect conception of the details of the instrument; but his counsel has a very clear and perfect one; and the testator is bound by the intention of his counsel, to be collected from the will. His counsel is, as it were, his translator, and the formal existing translation of the testator's instructions into technical language is the only will. It is the language of a lawyer addressed to lawyers. Its technical sense is its strict primary acceptance.

It seems to me, therefore, that the question is, not what an unlettered layman meant, or what an unlettered layman would understand by this devise, but what a lawyer meant and what a lawyer would understand.

Now, could any lawyer, looking at the will, deem it probable that the testator, or his counsel, in founding a family, meant, (without any clear indication of such an intention) to disre-

gard the ordinary course of limitation when indicating the first taker, though he religiously adhered to that course in the subsequent limitations; and not only so, but that, instead of the ordinary and usual course, he should substitute a novel, gratuitous, capricious, and unreasonable one; that he meant that the estate should go, first, perhaps, to a very distant descendant, then to a very near one, and then, perhaps, to an intermediate one?

No doubt, if the language of the devise clearly indicates an intention so capricious and unreasonable, that intention must prevail. But surely, when one considers that this is a will framed by a lawyer, and addressed to lawyers, the intention must appear very plainly. Now, does the language indicate such an intention?

What is the meaning of the word "eldest" in the phrase "eldest male lineal descendant"? The word *eldest* may have different meanings, but its meaning here is most satisfactorily ascertained, if it can be collected from the will itself; and it seems to me, not only that it can be collected, but that it is clearly shewn by the will itself. The word "eldest" is correlative to the words "second, third, and fourth," and the words "second, third, and fourth" are the correlatives of the word "eldest." If so, then the word "eldest" means *first*, and the phrase "eldest male lineal descendant" means "first male lineal descendant." Now, if the words had been "first male lineal descendant," at least the appellant's interpretation regarding the personal age of the individual could have found no place.

But, besides this, in the strict propriety of the English language, the word "eldest," (though its etymology be the same,) is not synonymous with the word "oldest"; for the word "eldest" does not necessarily or even primarily import eldest in personal age. According to Dr. Johnson, its primary meaning is "oldest, that has the right of primogeniture," and its secondary meaning is, "the person that has lived most years"; and surely this primary sense of the word is as agreeable to the context as any other. Therefore it should seem that the word "eldest," here taken in its strict and primary acceptance, means "eldest" in the order of primogeniture, not eldest in personal age.

But even supposing the word "eldest" to be synonymous with oldest, it is by no means clear that it is to be taken out of its place, and read with the word "descendant," as if it immediately preceded that substantive, and qualified it, and it only. On the contrary, it may well and more naturally be considered as part of a compound adjective, composed of the three words, *eldest*, *male* and *lineal*. So read, it qualifies the word *lineal*, as well as the word descendant, denoting no less the oldest line than the oldest descendant in that line.

It has been objected, that if the penman of the will had meant heir male of the body he would have said so. But the formulæ using this term which have been presented to your Lordships are far more circumlocutory and less compendious than the testator's expression, and perhaps at the time the will was drawn the use of the word *heir* was not deemed preferable for safety and perspicuity, it being the testator's intention to create estates by purchase.

The parenthesis which excludes from the right to a conveyance the heirs in tail male of the donees in tail male is a precaution quite consistent with this construction, for without that precaution the trustees might have been called on to execute conveyances granting estates by purchase in remainder to a multitude of persons, who, looking to the possible future cases of forfeiture by the ancestor, or debts of the ancestor, and fines levied, might deem it advantageous to have an estate tail in remainder by purchase as well as an estate tail by inheritance.

The clause relating to the right of presentation seems to me to fortify this construction. Lord Eldon seems to have thought that it contemplated a supposed disability from infancy. If so, then the testator seems to speak of an infant as eldest male lineal descendant, though in the next line there be a male lineal descendant of full age.

For these and other reasons of minor importance it seems to me, even if the case were not affected by any authority, that the construction for which the respondents contend is obviously and clearly the true construction.

But the authorities to which your Lordships' attention has already been directed seem to me to lead to the same conclusion.

WATSON, B.—My Lords, in answer to the first question submitted to the Judges, I am of opinion that the devise is not void for uncertainty, but capable of an intelligible construction. The construction of wills and of all written documents is by law vested in the Judges, who are bound to put a construction and interpret the true meaning of all words in the English language used in any written document. Much doubt and difficulty often occur in ascertaining the proper meaning of words; but whatever doubt or difficulty occurs, the Court or Judge is to ascertain and determine the sense in which particular words or phrases are used. It is not because there is much obscurity or difference of opinion in the construction of a will that therefore it is void. In this particular case I think that the devise in question is perfectly intelligible. Indeed I consider that the objection on the ground of uncertainty is determined by the case of *Thellusson v. Woodford* (4).

(4) 4 Vcs. 227, 326.

In answer to the second question submitted to the Judges, I am of opinion that the son of the eldest of the three sons, as mentioned in the question, would be entitled to one of the lots. The scheme and object of the will are unusual. It is to create an accumulation of a large property, and then to divide the fund into three shares, to be distributed equally between the three sons of the testator at the termination of the accumulation upon the death of the last life. The plan was eccentric; but the will, framed for the purpose of effectuating it, does not betray any eccentricity, but elaborately works out that object. The clause on which this question turns abounds with legal phraseology, and contains all the legal terms used for the limitation of estates. The conveyance is to be made of one allotment "to the eldest male lineal descendant then living" of Peter Thellusson. Looking at these words, it is difficult to think that the testator meant the eldest in point of age. The words "eldest descendant," or "eldest male descendant," might, if the rest of the will supported it, bear such a construction. But effect must be given to the word "lineal"; and, taking the words "eldest male lineal descendant," I think it means the descendant who takes in the ordinary line of descent. It is worthy to be observed, that in no part of the will are the words "male descendant" or "eldest male descendant" used without the word "lineal."

The remainder to the second, third, fourth, "and all and every other male descendant or descendants then living, successively in tail male," is most important, in this view. Hence it would appear that the testator used the word "eldest" as synonymous with the word "first," and it would then be read "first male lineal descendant," and would render the sense intelligible.

It has been urged that these words might be read, the second in point of age, and the third in point of age. But there is nothing in this or in any other part of the will to shew that the words of number were used in any other than in their ordinary sense, and as they are commonly used in limitations in deeds and wills. It is to be observed that the testator limited estates in tail male in his lineal descendants, and in the devise over he designates the extinction of such estates as "failure of male lineal descendants." In fact, the testator's object was, that there should be, as near as could be, estates tail male in each lot in his three sons.

My Lords, I do not think the advowson clause throws any light on the case. Although the precise point has never been directly decided, although in *Thellusson v. Woodford*, and *Oddie v. Woodford*, it was not necessary to decide this, the main question on the will, yet we have the opinions of Mr. Justice Buller and Lord Eldon on the points now in question, and

which are entitled to the greatest possible consideration.

For these reasons, and for the reasons and opinions expressed by those great lawyers, I have come to the conclusion that the son of the eldest son mentioned in the second question would be entitled to this lot.

BRAMWELL, B.—My Lords, in this case, as in others of a similar description, the question is, what intention has the testator expressed by the words he has used; in effect, what is the meaning of those words, that is, the natural and primary meaning?

Now I do not agree with Sir Richard Bethell, that this will is to be construed without reference to legal learning, for the will was drawn by one who undoubtedly had a knowledge of the craft. But I agree that the case ought to be considered without any prepossession, professional or otherwise, arising out of the ordinary practice of preferring the person who would be heir male to all others. Indeed the scheme of the will makes any other disposition quite as probable. I take that to have been, to found three families, owners of large property; and for that purpose to postpone the period of enjoyment as far as possible, the testator having no care or concern for any individual in particular, so that the more uncertain he made the person who was to take, the more likely he made it that its enjoyment would not be anticipated, and so the larger would be the property to descend. But I think this argument in itself of the smallest value, and worthless, when it is borne in mind that the uncertainty would have been still greater had he named the *youngest* male lineal descendant as taker. And a consideration of at least equal force points the other way, viz., one or more of his descendants might acquire (as is the case) a title. If the testator thought of this, he probably would have wished the fortune to go with it. But perhaps this did not occur to him; perhaps he did not wish the two to go together. This is mere speculation.

The words themselves then must be construed. They are, "eldest male lineal descendant." The person or thing named is a descendant. The other words are used to indicate a quality or qualities which he must possess. Now "male lineal" has been construed to mean as though it were one word, signifying "male in a line of males." With this construction I entirely agree; and I agree that it may be read as though it were a compound word, "male line." It remains to construe the word "eldest." It may seem a very simple mode, but I cannot help considering the case thus:—"eldest" is an adjective; it describes a quality; it must belong to some substantive. What substantive is there in this sentence? One only, "descendant"; with that then it ought to agree. It is true that if "male lineal" is read "male line"

another substantive is introduced; but it is used adjectively to describe a quality, and surely it is not a reasonable construction, when there is a substantive in a phrase ready for an adjective to agree with, to hold that the adjective, instead of agreeing with it, agrees with a substantive, produced out of another adjective, and itself used adjectively. The phrase seems to me like this, "a strong iron bridge"; that means a strong bridge made of iron, not a bridge made of strong iron; and the meaning would be the same if the phrase were a "strong iron-made bridge," the words "iron made" being connected, like "male line," and containing in like way a substantive. I have been asked, Suppose a man said he went over a "Scotch iron bridge," what would he mean? I answer that must depend on circumstances. If, speaking in India, he said he had done it on that day, he must mean a bridge of Scotch iron; but if the conversation had been about the iron bridges of different countries, and he said that he had done it a year ago, I should understand that he meant a bridge in Scotland. It seems to me, therefore, that the natural construction of the phrase is to couple "eldest" with "descendant," and read it as though it were "eldest and male lineal descendant."

Then the primary meaning of "eldest" is oldest; most old, most aged; nor do I think any of the instances given shew that the word is used in any other sense; eldest man or descendant is the one who has existed for the greatest number of years. Eldest male line is that male line which has existed the greatest number of years. Eldest parent may mean eldest in age, or eldest *quâ* parent. But though, therefore, "eldest" in the phrase "eldest male line," if coupled with line, may well be said to be used in its primary sense, so also "eldest" must be so construed when coupled with "descendant." This, therefore, would go to shew that the phrase meant "that descendant in the male line who is oldest in age or years."

I understand Lord Eldon thought this to be the natural meaning of the phrase, standing by itself. Is there then anything in the context inconsistent with this? It is said that the subsequent mention of two, three, four, and other male lineal descendants shews that "eldest" is used synonymously with "first," and that first means worthiest, that is, the heir. To this I do not agree. The first word used is "eldest." I take the next word, "second," to mean second eldest, and so on. It is said, "second eldest" is not grammar; there can only be one "eldest." I do not agree in that. I suppose it would be good grammar to say, "A, B. and C are the three oldest men in the parish." If not, is it right to say "the eldest three"? No; for that supposes some division into threes. Must we then have a long periphrasis to describe the idea? Would it be wrong to say, "that Wel-

lington and Napoleon were the greatest generals of this century"? But the objection, if well founded, vanishes by reading "second" as meaning "second in age." It is said that this is to interpolate a word there, viz., "eldest" or "age." Even if so, that is as legitimate as to turn "eldest" into "first"; but the objection is altogether unfounded. In the first place, the word is not interpolated by this construction; that is to say, it is not said the *word* ought to be there; it is only said that "second" is *equivalent* to "second eldest." But further, the respondents' construction does *interpolate* a word; they read the phrase "eldest male lineal descendant" as though it were "eldest male line eldest descendant," or, rather, "first male line eldest descendant." It is in vain to say that the law would add that second "eldest" for him. Perhaps so; and had the testator said he meant his "descendant in the eldest male line," probably the law would have intended that to mean "the eldest descendant"; but such an expression is not a natural one. The natural expression, if the testator had meant what the respondents say he did, supposing he had used something like the phrase in question, would have been "eldest male lineal eldest descendant." I find nothing, therefore, inconsistent with what seems to me the obvious and natural construction. So I should have thought some of the phrases suggested by the appellant's counsel more natural than the one in question to express the intention that the respondents contend for. But, on the other hand, I cannot see why, if the testator meant what the appellant says he did, he should not have said "eldest male descendant in a male line."

Is there then anything else in the will to explain this phrase? I think the parenthesis affords a clue. No doubt it may have been put in *ex majori cautela*, but it is to be taken to be operative, and consequently to except what otherwise would have been included. Then, but for the parenthesis, "eldest male lineal descendant," "second and third" might have included grandfather, father, son; while an uncle would have been fourth, and his son fifth. Now, it is not conceivable that the testator considered the son of an eldest son to be "second" in preference to his uncle, older than himself. How could such a son make a male line second to his father's? The respondents read the will thus:—"The first male line descendant is to take; that is, the eldest descendant of the first male line, then the second male line, that is, the eldest descendant of that line; but for my parenthesis I should mean by this the heir male of my eldest son as the first taker, and his eldest son as the second, because that is the natural meaning of second male line." But it is not the natural meaning. The testator, therefore, must have made the parenthetical exception

because he had some other meaning, and not that which the respondents contend for.

Again, if eldest male lineal descendant is to be read first male lineal first descendant, the word "first" doing double duty, so second should be read "second male lineal *second* descendant," which cannot be.

Again, the advowson clause affords a clue to the meaning of these words. The testator, after providing for the eldest male lineal descendant in each son having successively the right of nomination, says, the trustees are to present, if "no male *lineal* descendant" of any of the sons shall be capable, not saying, no "*eldest male* lineal descendant." It would seem, therefore, that he thought that if no eldest male was capable, then no male would be. Now, the only reason, right or wrong, which could have suggested this to him, was that an infant could not present, and that if the eldest male lineal descendants were infants, all the rest must be, which could only be on the supposition that eldest meant eldest in point of age.

But I do not much rely on this. I take the phrase itself, and endeavour to find out its natural meaning, without any prepossession, professional or otherwise. I take that to be the right course. I know no better rule to be acted upon in these cases than that stated by Lord Cranworth, in *Grey v. Pearson*, nor a stronger illustration of its application than *Trevor v. Trevor*, where words used by a testator had their natural meaning given to them, though that meaning led to unusual results, which, *a priori*, would not be expected. It seems to me that the natural and ordinary sense of the words here used, is that which I attribute to them, and that the respondents' construction is unnatural and forced, and without sufficient reason for its being preferred. I cannot do better on this point than refer your Lordships to Lord Eldon's argument, the very elaboration and ingenuity of which to my mind makes it suspicious.

I have not referred to authorities. No question of law is involved, and the rule of construction to be applied is not doubtful.

I answer then your Lordships' second question first; viz., I think the son of the third son would have been entitled. Of course I answer the first, that I think the devise is capable of an intelligible construction, and not void for uncertainty. Nor can I say, contingently, that if my answer to the second question is not adopted, it would be so void, as I should say it must then mean what the respondents say it does. I should only think it void, if I had determined that it had one of these meanings, (as I feel sure it has,) but had no reasonable certainty which meaning it had.

My Lords, this is the opinion I have formed. I offer it with no confidence in its correctness.

Indeed, I think the nature of the case precludes a positive opinion. No legal principle is in issue, and the question cannot be decided by authority. The matter to be determined is, which of two interpretations is to be given to words that may have, though they are not the fittest to express, either meaning.

WILLES, J.—My Lords, upon the first question put to the Judges I am of opinion that the devise is capable of an intelligible construction, and is not void for uncertainty. What that construction is will appear by my answer to the second question.

Upon the second question, I am of opinion that the son of the eldest son would be entitled.

It appears to me that the expression "the eldest male lineal descendant then living" is not a mere description of the individual as descendant oldest in point of age and of the male sex. Such a construction would exclude altogether from consideration the word "lineal," or would treat it as superfluous. It is therefore a construction to be rejected, if the language used be capable of being otherwise construed, so as to give effect to the word "lineal": and the language is capable of being so construed by reading it as a description or rather definition of the individual who is to take, by reference, not merely to his personal qualities, but also to those of a line which he is to represent, viz., as "eldest male descendant of the eldest male line." So to interpret the phrase does no violence to the words used, and it is necessary so to interpret it, in order that one of those words, "lineal," should work somewhat, and be not "idle and frivolous," contrary to the maxim, *verba aliquid operari debent; verba cum effectu sunt accipienda*.

It can hardly be a matter of serious doubt that the words do to some extent contain a definition of the line which the individual is to represent. He is to be male of a line of males. The word "male" applies to the individual and also to the line. This is an effect of the use of the word "lineal," expanding the operation of the word "male," and causing it to apply to the line which the individual is to represent as well as to the individual himself, and so to restrict the class in which the individual is to be sought to males deriving through males.

If, then, the word "lineal" have the operation above referred to upon the preceding word "male," so as to make that word describe the line as well as the individual, it must equally have that operation upon the word "eldest" which precedes "male," and so make "eldest-male" describe the line as well as the individual. "Male" may be applied to an individual or to a line; so equally may "eldest." No peculiar elective affinity exists between the words "male" and "lineal," or the ideas which they express, to make the latter, as it were,

select, and seize upon the former, and detach it from the other portion of the compound adjective "eldest-male-lineal," and so convert it alone into a description of the line in which the individual is to be sought, as well as of the individual himself, leaving the other descriptive word, "eldest," to designate only a personal quality of the individual, apart from and independent of such line. Why, then, should this limited effect be arbitrarily imposed upon the word "lineal" by an artificial construction, when the result would be to reject that which ought rather to be sought after, viz., a definition, open to no doubt, of the very individual who is to take, by reference to a known and usual mode of selection, and unnecessarily to adopt a strange mode of selection by accident, open to doubt and litigation, from amongst a crowd. I say accident, and accident, moreover, not tending to effect any intention of the testator, because there is no limit of age mentioned, and the accumulation during a minority might even advance the object apparently in view.

The only consistent mode of construction, therefore, is to give the word "lineal" equal effect upon each part of the description, "eldest male," and to hold that the conjoint effect of the words "eldest male-lineal descendant" is to express and designate the "eldest male descendant of the eldest male line."

This is an intelligible construction. It avoids the absurdity and the uncertainty of the other constructions which may be suggested; and it is sanctioned by the great authority of Lord Eldon, who, considering the case from a different point of view, gave his opinion at large upon the construction of this will, in a judgment which is, I venture to think, as conclusive, and, allowing for inaccuracies of tradition, as clearly expressed a document as I have ever had the advantage of reading—*Oddie v. Woodford*.

I therefore conclude in favour of the son of the eldest son.

CROMPTON, J.—My Lords, I think that the devise in question is capable of an intelligible construction, and is not void for uncertainty, and that in the event suggested in the second question the son of the eldest son, though younger in years, would take in preference to the sons of the younger brothers.

If the phrase "eldest male lineal descendant" stood alone, I should be very much inclined to think that it meant the first in male lineal descent, as I think the word "eldest" in such a disposition, and with reference to such a subject-matter, and used in such a phrase, points to the eldest in descent, and not to the "oldest" in years; but when considered as a part of one entire set of limitations to the eldest male lineal descendant, with remainder to the *second, third, &c.* male lineal descendant

successively in tail male, it seems to me clear that the word "eldest" is used in the sense of "first," and as correlative to the words "second," "third," &c.

Suppose that the limitations now in question had begun with a devise to the *second* male lineal descendant, with remainder to the *third*, *fourth*, &c. successively, there could, I think, have been no doubt that the order of succession was meant by the numerical words "second," "third," &c. And it seems to me that the words "second," "third," &c. clearly shew that the word "eldest" is used, in a sense which it may well bear, as the first in succession, according to the authorities referred to at your Lordships' bar. Either it must be so construed, or else the word "eldest" must be inserted after every numeral, and it must be read second eldest, third eldest, &c.; and this appears to me to be straining the words much more than would be done by construing the word "eldest" in a sense in which it is often used in such matters, as meaning first in the order of succession. The word "eldest" being correlative to the word "second" must either be construed to be "first," so as to have the same numerical meaning as the words "second," "third," &c., or else the word "eldest" must be inserted after every numeral. And I cannot help thinking that if the testator had in his contemplation the relative age of the descendants, *inter se*, the words "second eldest," &c. would have been used.

The construction I adopt seems to me much more consistent with the rest of the will and with common sense than the other construction, and also more consistent with the previous determination of your Lordships' House; and it is supported by the very strong authority of most eminent Judges, who have considered this will judicially, and whose opinions in matters of this kind are entitled to the greatest weight.

The will, however justly to be disapproved of, is not an inconsistent will, or a will without certain defined objects, which are, to make the property as large as possible, by continuing the accumulation as long as the rules of law would permit, and afterwards to constitute three large family estates in the line of the testator's three sons. And every provision in the will is consistent with the intention of the estate going in the line of the three sons in the usual course of succession to landed estates.

The testator's object seems to me clearly to have been, to give an estate tail to the person who would have taken it if he could have limited the estates so as to go in the usual course of strict settlement, and as this would have prevented the provision for accumulation, he postponed the vesting of the estate tail as long as he could; but I see no reason to suppose that he had any intention that the estates should not go in the regular line of family

descent. The necessity for the postponement to effect the object of accumulation seems to me sufficiently to explain the object of the testator in this respect; and, judging from the general object of the will, I should say, that the construction that eldest means first, is a much more probable one than that by which the line of succession is altogether disregarded, and the very fantastical notion introduced, of the oldest in point of years among all the descendants of each son taking in succession according to the number of their years.

It seems to me that, both in common sense and according to your Lordships' former decision, and especially when reference is had to the succeeding limitations to the sons in numerical succession, the phrase is not to be construed by searching for the descendant who is oldest, who is a male, and who is lineal; that is, the person who answers the description pointed out by each of these epithets, or else the party claiming through a female must have been entitled. He was oldest, he was a male, he was lineal, and he was a descendant. This House, however, most properly looked at the meaning of the phrase taken together as applicable to the subject-matter, and held that the expression meant in the male line of descent.

In such a phrase, "eldest" seems to me clearly to mean the eldest descendant in the eldest branch or line, and the phrase does not seem to me by any means an inapt one to express that the testator meant the eldest in that sense. And I do not think the phrase can fairly be applied to a person who is not eldest in lineal course of descent. If it were not for the doubts that have been expressed on this occasion, I should have thought it superfluous care to express by the repetition of the word "eldest" that he was to be eldest in the eldest line.

It was said, indeed, that the devise might have been to the party who should be heir male at the period of distribution. But there seems to have been quite sufficient cause for avoiding that mode of limitation, by reason of the doubts that had existed with reference to that expression. And the other modes which have been suggested at the Bar as more proper conveying modes of effecting the purpose, as far as I could follow them, certainly appeared to me very much involved in words, and of great complexity, and by no means so simple or natural a way of expressing what seems to be the intention as the one actually used.

When your Lordships' House has decided that the phrase in question relates to the course and line of descent so as to exclude males claiming through females, though male, though lineal, and though descendants, and when, on the first occasion when this will received a judicial consideration, the two learned Judges and the Lord Chancellor evidently construed

the phrase as I am now doing, and when that most eminent person in matters of this kind, Lord Eldon, in coming to a decision, adopted the same construction, and acted upon it as the main *ratio decidendi* of the very question before him, and that decision was confirmed by this House, I own that I think the weight of authority very great in this case.

Lord Eldon appears to have taken great pains in considering the question; and I do not think his judgment entitled to the less weight from the expressions which he uses as to the case being one of difficulty. There is, moreover, great weight, I think, in the observation made by Mr. Rolt, that Lord Eldon's difficulty arose from the period of distribution being delayed until the death of certain female issue, and that he solves the doubt he had by the conclusion he arrived at with reference to the construction of the phrase now under your Lordships' consideration, and as to which he appears to me to express a clear and decided opinion on the very point now before this House.

The counsel for the appellant relied greatly upon the parenthesis in the clause in question. This appears to me in no respect to support their argument, but, if anything, to be in favour of the other view. It says, in effect, the conveyance shall be made in tail male to the eldest lineal descendant, and then there shall be remainders to the second, third, &c.; but mind, when I say remainder to the second, I do not mean you to limit the estate in remainder, *exempli gratia*, to the son of the party who takes the first estate, as he would take as heir in tail under the estate tail which I wish to constitute.

The parenthesis was perhaps in strictness of words necessary, supposing the construction to have no reference to the relative ages, for the son might be the second male lineal descendant after his father, the first; and therefore the testator says, the remainders are not to be made to such descendants as would take the estate tail by descent as heirs in tail; and this proviso seems to me rather to favour the case of the respondents, as if, according to their argument, the meaning is, the first, second, &c., without relation to age, it was very probable that the first and other takers might have sons, probably younger than many of their uncles, or members of the collateral branches, who would, though younger, have been the next in the line of male lineal succession.

I cannot see that the advowson clause, so much relied on by the appellant, throws any clear light on the question before your Lordships. In that clause provision is made for the nomination to the advowsons before the time for the division of the estates; and as it could not be ascertained to which of the three families the advowson would belong, and which would have the right to the particular presentation, and as the value of such right of presentation

would not properly be the subject of accumulation, the testator gives it in rotation amongst his sons, and after his sons' death to the parties who should be his male lineal descendants, one representing each line, although the period for the accumulation ceasing had not arrived. It is to go in rotation amongst the three sons whom the testator may be supposed to have known to be capable of nominating; but if they are dead, then it is to go in rotation amongst the three persons who then fill the character and relation of eldest male lineal descendant, and if one of these three is incapable he loses his turn, and it goes, not to the next in order in that line, but to the representative of the second or next line. If the want of capacity is to be understood as referring to infancy only, it would seem to be rather in favour of the respondents' construction, as it would seem to suppose that the person being male lineal descendant was likely to be an infant.

But, my Lords, I confess that the construction attempted to be put upon this will appears to me to make its provisions so fantastical and absurd that your Lordships ought not to adopt it, unless forced by a most clear manifestation of the testator's intention expressed on the face of the will. The construction, as illustrated at the Bar, by supposing that all the descendants are to be put into a large room, and that the oldest in years is to be picked out, and the second oldest, and so on, seems to me to warrant the remark of Lord Eldon, that it went far to make him hold up his hands and say, "Could it be possible he meant this?" What kind of a settlement is to be made? You are to take the oldest, say an uncle of the direct male lineal descendant, being the tenth brother of the father of the real lineal descendant, and then you may jump back to a cousin or son of the fifth brother of his father; go again to an uncle, the second brother of the father; and then jump again to a remote aged cousin. Well might Lord Eldon remark on the strangeness to conveyancers of such a settlement.

We are told, indeed, that our minds are not to be in the conveyancing groove, and it is thrown out that the less we attend to the opinions of persons who have been in the habit of construing wills and marriage settlements the more likely we are to be right, and we are warned particularly against paying any respect to the extraordinary legal attainments of minds like Lord Eldon's. But, my Lords, I utterly protest against the doctrine that in construing a will of this or any other description we are to divest our minds of all conveyancing knowledge, and more especially of the knowledge which every tolerably informed person has of the mode in which property descends in this country. Not that I think that any peculiar legal knowledge is required for the construction of the clause in question, for I believe that

ordinary persons reading, either in a will or deed, or a novel, that an estate was to go to a man's eldest male lineal descendant, and so on in succession to the second, third, and fourth, &c., would understand that it was to go according to the lineal course of succession, and would never fancy the meaning to be that it should go to the oldest man among the descendants. And this would, I think, be the ordinary primary common-sense meaning which a person of ordinary understanding and information would put upon the phrase.

My Lords, we have heard a great deal about taking words in their plain ordinary sense, and I quite agree to that rule, when properly understood and rightly applied; but that rule means that words are to be taken in their plain ordinary sense with reference to the subject-matter in the instrument to be construed. Taking hold of a particular word, and giving it the meaning which it most often bears, will lead into great mistakes, if we do not remember that the rule must refer to the meaning it bears with reference to the subject-matter. Construing "eldest" in a disposition like the present in the sense of oldest in years *inter se* appears to me to resemble the observation of the clown in the old play, who, in answer to the inquiry, "Which is the Queen's High Constable?" replies, "Why, the *tallest* man, to be sure"; and numerous illustrations might be given of the use of epithets generally bearing a particular meaning, which, in reference to another subject, have always what may be called in one sense a secondary or derivative meaning, but which, when applied to a particular subject-matter, can only be understood in such secondary or derivative sense.

I think, then, that with reference to such a disposition as the present, the words "eldest male lineal descendant" would be understood either in a popular or legal sense, as clearly pointing out the eldest or first in the line of male descent; and that if there could be any doubt, the way in which the remainders are limited to the second, third, fourth, &c. in succession in numerical order clearly shews that numerical succession is intended, and demonstrates that by the "eldest" is meant the first, as used in relation to the second, third, fourth, &c. immediately following; and I think that the argument in favour of this construction is not weakened, but if at all affected is strengthened, by the parenthesis, and that the clause as to advowsons does not weaken the argument in favour of the respondents' construction. I think also that, looking to the whole will, the construction by which the estate goes, as it would have done if the estate tail had commenced earlier in the course of succession, is the one in accordance with the general scope of the will. And I think that the construction according to which all the parties are to be

collected, and the remainders limited according to the relative age of the descendants, and the estate is to jump about from one of the branches to another in the way proposed, is so fantastical, unheard of, and inconsistent with the clear intention of the testator to make three family estates to descend in tail male to the descendants of each of his three sons, as not to be fit to be adopted by your Lordships, without the clearest possible words incapable of any other rational construction.

For these reasons I answer your Lordships' questions by saying, that I think the devise in question capable of an intelligible construction, and not void for uncertainty; and, secondly, that in the event supposed in the second question, the son under age of the eldest of the sons of Peter Isaac Thellusson would have been entitled to one of the lots.

MARTIN, B.—Assuming the devise upon which the questions proposed by your Lordships arise not to be void for uncertainty, the point is, whether the words eldest male lineal descendant living at the death of certain persons described in the will designate the male lineal descendant then eldest in blood inheritable by descent, or the male lineal descendant then eldest in age. It was contended on behalf of the respondents, that the point has been concluded by the judgment of this House in *Oddie v. Woodford*. It seems to me quite clear that it was not. The litigation in *Oddie v. Woodford* was upon what has been called the advowson clause. One claimant was Henry Hoyle Oddie, the grandson and only male descendant of George, the testator's second son, through a daughter, who therefore combined in himself eldership both in blood and in age. The other claimant was Charles, the eldest son of the testator's third son, Charles, who also combined in himself eldership in blood and in age. It is therefore impossible that it could then have been judicially decided, and the opinion of Lord Eldon was of necessity extra-judicial.

The rule of law as to the construction of wills was agreed on at your Lordships' Bar. The cases of *Scarisbrick v. Skelmersdale*, *Livesey v. Livesey*, *Towns v. Wentworth*, and *Grey v. Pearson*, were referred to. The rule approved of and adopted in all these cases is in truth the second proposition laid down by Sir James Wigram in his *Treatise*; viz., "That when there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other sense than their strict and primary sense, and when the words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words in the will shall be interpreted in their strict and primary sense, and in no other, although they may be capa-

ble of some popular or secondary interpretation."

No direct authority has been found, nor was one likely to be. Lord Eldon, in speaking of this will, says, "Mr. Thellusson took into his head what never entered into the head of any one before."

As regards the will itself, it seems to me to have been prepared with great care by a person well acquainted with the subject, and, therefore, of the character to which the above rule of construction ought to be strictly applied.

The expression "eldest male lineal descendant" has not been found in any will which had been the subject of judicial construction before the date of Mr. Thellusson's will, and appears to have been deliberately adopted. The words upon which the construction is to be given are repeated three times, and the expression "eldest male lineal descendant" is used in every place where it is at all applicable.

Where it first occurs, the words are words of purchase. They are a *descriptio personæ*; the description of an individual who is to take as purchaser an estate in tail male at a future period of time. The first question is, what is their strict and primary sense or meaning? The description is composed of a substantive and three adjectives. The meaning of the substantive "descendant" is clear. It means, as regards the first of the two parts into which the property is now to be divided (and the question is the same as to both), all who proceed from the body of Peter Isaac, the eldest son, and includes both the claimants. If authority were required for this it will be found in *Crossly v. Clare*. The three adjectives "eldest male lineal" have been dealt with in the argument in two ways: first, separately; and secondly, conjointly. The words "male lineal" have already received a judicial construction in this House, viz., that they describe a male through a line of males; thus far, therefore, the point is concluded. But this description also includes both claimants. They are both males through lines of males. The question now under consideration, therefore, depends upon the meaning of the word "eldest." It seems clear that its primary meaning is oldest in age; the dictionaries are generally to this effect, and the legal authorities are the same. Lord Eldon says, in *Oddie v. Woodford*, *primâ facie* it denotes age; so also the *Termes de la Ley*. In Lord Coke's Commentary upon the 245th section of *Littleton*, he states that the *enitia pars*, or part of the elder in coparceny, belongs to the eldest in age at the death of the ancestor, and if the eldest daughter dies in the lifetime of the parent, leaving a child, the eldest daughter living at the time of the death shall have the choice, and not the child of the eldest daughter. So also in the *Case of Tanistry* (5), where the

(5) Sir John Davis' Reports, 55.

question was, as to a custom that land should descend "to the eldest" and "most worthy man of the blood and name of him who died seised," it is said, that eldest means priority in point of time.

It therefore seems that the words "eldest male lineal descendant," in their strict and primary sense, taken *simpliciter*, and as of themselves, mean the male descendant in a line of males who was eldest in age at the appointed period of time. But it was argued that the three adjectives together meant as a *descriptio personæ* the individual who was then heir of the body of Peter Isaac in tail male. None of the words, however, are technical words. The word "lineal" has no peculiar meaning in the law. A meaning and construction have been already given to it by a judgment of this House. No case was cited where any such construction was ever given; and in my opinion, taken in their strict and primary sense, the above is their meaning; and it will be seen hereafter that Lord Eldon more than once states that this is their primary meaning.

It was argued that if an estate was devised to A. and his eldest male lineal descendant, it would give A. an estate in tail male. Assuming this to be the legal construction of such a devise, the words would be words of limitation, not words of purchase; and the distinction between words more strongly pointing to eldership in blood than "eldest male lineal descendant," where used as words of purchase or as words of limitation, is pointed out in Lord Coke's Commentary upon the 2nd section of *Littleton*, 10 b. He says, if there were two brothers, A. and B., and B. had two sons, C. and D., and died, and C. died, leaving issue, and an estate for life were made to A., remainder to his next of blood in fee, D. would take the remainder, because he was next of blood, and capable, by purchase, although the issue of C. was next of blood inheritable by descent.

The next question which arises upon the application of the above rule or canon of construction is, whether it appears from the context that the testator used the words in other than their strict and primary sense. The clause of the will consists in a direction "that the property shall be conveyed to the use of the eldest male lineal descendant then living (that is to say, living at the termination of the accumulation) of my son Peter Isaac in tail male, with remainder to the second, third, fourth, and all and every other male lineal descendant or descendants then living (who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate was thereby directed to be limited) of my said son Peter Isaac successively in tail male." These words will be found in page 27 of the joint Appendix, and certain of them, upon which much argument and reasoning were

urged, are printed in a parenthesis. Whether they were so written in the will is not stated. The present question is, whether the context affords aid to either of the constructions contended for, or is equally consistent with both.

The respondents contend that the words and context together express the intention that at the appointed time an estate in tail male by purchase should be given to the male descendant of Peter Isaac, eldest in blood inheritable by descent, which limitation was to include all the descendants of this individual, born or unborn; that the second estate tail should be given to his second brother, if he had one, and so on to his other brothers, and his uncles and male cousins, descendants of Peter Isaac by seniority in blood, inheritable descent being always observed; and that it was immaterial whether the first taker was an infant, and the next a man of full age; and the alleged natural favour towards the elder in blood was urged in support of this view.

On the other hand, it was contended that the context shewed that the intention was that at the appointed time all the male descendants of Peter Isaac should be marshalled; that the eldest in age should be ascertained, and an estate in tail male conveyed to him, which was to include all his descendants, born and unborn; that the second estate in tail male should be limited to the next eldest descendant, excluding the issue of the first taker, and so on; and it was urged that this was probably the intention of the testator, he being a foreign merchant engaged in trade, and not likely to have, and, indeed, shewing by his will that he had not, any prejudice or feeling in favour of eldership in blood.

Some argument was adduced upon the word "successively"; but, according to either construction, the taking would be in succession, or one after the other. The word "successively" has no technical meaning; it generally means a numerical succession. Every succession may be described as numerical.

It was assumed, on the argument, that the words in the parenthesis are parenthetical, and it may be so; but whether they are or not, and, notwithstanding all the reasoning which has been addressed to them, it seems to me that their meaning is clear, and equally consistent with the one construction or the other. In my judgment they mean that no descendant of a purchaser shall take by purchase, and they were introduced possibly for two reasons: one, that it would be absurd to give an estate to A. and the heirs male of his body, and then an estate to his eldest son B. and the heirs male of his body; the other, that if the words second and third, &c., could be held to include the unborn child of an unborn child, it might possibly be construed to create a perpetuity, and so defeat the intention of the testator.

The remainder of the context is second, third, fourth, and all and every other male lineal descendant or descendants then living. The adjectives "second," "third," "fourth," &c., are descriptive of persons. They are descriptive of persons, in the same way as eldest is descriptive of a person. The limitation or succession does not start from the person designated the "second," but from the person designated the "eldest." The next person to take after him is the second. The present question is, second in what? The answer surely is, second in that in which the eldest, as eldest, is first; and if that be in age, the second is second in age. If it be eldest in blood inheritable by descent, second is second in blood inheritable by descent. This is the natural and usual mode and form of expression; and to have repeated the word eldest after second and third, and so on, would not have been in accordance with the ordinary way in which men express themselves, either in writing or in speaking.

I therefore think the context affords no real aid. If the words "eldest male lineal descendant then living" means eldest in blood, "second" means second eldest in blood; if they mean eldest in age, "second" means "second eldest in age"; and in my judgment, therefore, the whole question depends upon and is concluded by the meaning of the first words; but the opinion of Lord Eldon was to the contrary, and it is entitled to the greatest weight, and it would be unbecoming in any one to differ from it, except for what to his own mind are most satisfactory reasons.

I have read the judgment several times, and the leading vice (if I may be permitted to use the expression) of his opinion upon the present question is, that throughout he seems to consider it impossible that the testator could have had the intention imputed to him by the appellant. In p. 622 of the judgment, after stating what he deemed to be the *highest improbability possible*, he put the intention which the appellant contends the words of the will express, and states it to be an improbability still higher.

He says, indeed, that it was a state of limitation which Mr. Thellusson might by possibility contemplate, but that if he did he was the first man in the world who ever did. He never seems to me to have fairly taken into his consideration the two constructions, and applied his mind to the consideration of the true question, viz., whether the words of the will expressed the one or the other. It is sufficient to suggest this as a general observation.

I do not mean to comment at length upon the judgment, but to confine myself to the statement of Lord Eldon's opinion upon the present question, and his reasons for it. He says, in page 616, that he had not been able to satisfy himself that the word "second" means the second eldest male in the ordinary sense of

the word eldest male; but so far as I can collect he gives no reason why what he himself calls the ordinary sense is to be departed from. He then says, the question will be whether, to give consistency to the whole of the description, that is, not merely to look at the general description of the first person who is to take, but at all the descriptions of all the persons who are to take, the word eldest is not to be taken as synonymous with the word "first." Now here his Lordship plainly states that the general description of the first person who was to take, viz., "eldest male lineal descendant then living," means eldest in age. He then proceeds to state his opinion, that "eldest" should be taken as synonymous with "first." Now in this I submit his Lordship departs from the true rule of construction, and from the rule as laid down by himself in this very judgment. If the word eldest means *primâ facie* eldest in age, the synonyme for it is not "first," but "first in age"; and he substitutes for a synonyme what is not a synonyme. He then comments upon the word "successively," upon which I have already remarked. He then says, "that brings it back again to the question, What is meant by the words 'eldest' or 'FIRST' male lineal descendant?" Now it seems to me to be contrary to principle and legitimate construction to introduce the word "first" in this way, and if a synonyme is to be introduced at all it ought to be the true one, viz., *first in age*. He then proceeds to state, that substituting first for eldest, first male lineal descendant means first in blood. For the reasons given, I cannot agree with him, and I think there is nothing in the context to aid in the disputed construction.

There also seems to me to be nothing in the general scope and object of the will to aid it; but I certainly think the testator did not contemplate, as was suggested by the learned counsel for the respondents, that any of the intermediate descendants should be promoted to the peerage. His expressed wish is, that his sons should continue to carry on business; and there are several other expressions in the will which clearly shew that he had no desire that they should be promoted to a rank in life above that of his own.

There was much discussion at your Lordships' bar as to what form of words or expression would probably have been used by a conveyancer to express and carry out the two different intentions imputed to the testator. I think this is a matter entitled to some weight. Suppose the testator to have given instructions to the conveyancer, that he desired that there should be conveyed to the individual who was heir in tail male of the body of Peter Isaac at the end of the accumulation an estate to him and the heirs male of the body of Peter Isaac, (which is the intention and object for

which the respondents contend,) *Mandeville's case* would at once have suggested to any lawyer the mode of effecting and carrying it out. Mr. Fearne's book was then, as now, in the highest estimation, and in general use. At page 80 (7th ed.) he discusses and explains this case, and the limitation in it, and points out how it did effect this very supposed object and intention. It is also difficult to conceive why, if this was his intention, any remainder should have been directed at all. An estate to the heir male of the body of Peter Isaac, *habendum* to him and the heirs male of the body of Peter Isaac, would create an estate which would go in precisely the same course of succession, be barrable by the same means, go to the same individuals, and have the same extent and duration of continuance as all the estates, including the remainders, comprised in the direction in the will. The answer made to this at the bar was, that it was then doubtful whether the person to take by purchase as heir male of the body of Peter Isaac must not also be heir general; and Mr. Hargrave's Note to *Coke Litt.* 24 b. was cited. This difficulty could have been obviated by a very few words, viz., that by heir male was meant the individual who would then take an inheritance by descent.

But, on the other hand, suppose the testator to have instructed his conveyancer that what he desired was, that his property should accumulate for the longest possible period; that he meant to ignore, as it were, all his intermediate descendants; that the individuals who were to enjoy the property would be unknown to him; that he was indifferent who should enjoy it, provided they were descendants in the male line; that he disregarded their relationship to each other, and desired to act as a father to all the then living male descendants of his three sons respectively, and do, as people generally do, give the first estate to the *eldest*; and therefore he desired that at the end of the accumulation an estate in tail male should be conveyed to the then eldest living male descendant of Peter Isaac, and the same as to his two other sons, with remainder to the next eldest, and so on; I would ask what general words, using them in their primary, natural, and ordinary sense, could more appropriately express this intention? And this may possibly explain the parenthesis, if any explanation of it be sought for. According to the argument on behalf of the respondents, the parenthesis is idle and unnecessary, and merely expresses what was expressed before; but in the latter supposition the conveyancer might well have said to Mr. Thellusson, "Do you mean that after having limited an estate to the eldest male descendant in tail male, if his son should be older than the next collateral, that an estate in tail male is to be limited to him?" Mr. Thellusson would have naturally said, "No; that it would be

absurd to do so," and then the parenthesis would be essential to express his intention.

There is a passage in the judgment of Mr. Justice Buller, in 4 *Ves.*, p. 326, worthy of attention, upon this point. His Lordship says, "the person who settled this will did not know how to limit to an heir male by way of purchase." It never seems to have occurred to his Lordship that the testator might have directed, and the conveyancer intended, that the estate should not be so limited. In truth his Lordship begs the whole question. He conceives in his own mind what the testator meant, and then complains that the conveyancer has not expressed it. I apprehend the true legal mode of construing a will or any other written document is to ascertain from its words what it means, and give effect to the language used, unless to do so be contrary to law.

An argument was also urged upon the advowson clause. The testator directed that the trustees, upon a vacancy in a living, should present a person who should be nominated to them by one of his sons in rotation, the eldest having the first nomination, and the like nomination to be made by the eldest male lineal descendant of his three sons respectively in the order and rotation aforesaid, if he be capable by law of making such nomination, when the church became vacant, or in due time afterwards; otherwise the eldest male lineal descendant of the next brother was to present; and if it should happen that when such living became void, or in due time after, *no male lineal descendant of any of the sons should be capable of presenting*, then he directed that his trustees should present.

This argument is founded upon the presumption that the incapacity contemplated by the testator was one supposed to arise from infancy. Lord Eldon thought it pretty clear that the testator had the notion that infancy incapacitated (p. 606); and observing that the incapacity is confined to the descendants, excluding the sons, it seems to me that there is little doubt but that Lord Eldon's view is correct. The expression "eldest male lineal descendant" is here made use of to describe an individual (other than his three sons) living during the period of the accumulation, and the provision is made in the contemplation of that individual being an infant; now, if the testator meant by the expression "eldest male lineal descendant" what the respondents impute to him, he would naturally, in the event of the individual so designated being an infant, have directed the presentation to go to the next eldest in blood of the same stock, and not to the descendant of the next brother. But if the testator meant by that expression what the appellant imputes to him, if the eldest individual of one stock was an infant all the other descendants of the same

stock would necessarily be infants also, and then the eldest male lineal descendant of the next brother would be the proper and natural person to have the presentation. But it seems to me that the latter part of the clause puts this point in a stronger light. The trustees are to present, *if there be no male lineal descendant of any of the sons capable of presenting*. This includes all the male descendants of all the sons, and contemplates them all being incapacitated by infancy, and seems very strongly to prove that by the expression eldest "male lineal descendants" the testator meant to designate the eldest in age.

The result is, that in my opinion the question depends upon the meaning of the word "eldest." I think there is nothing in the context which aids the disputed construction. The context is equally sensible and consistent with either. If "eldest" means eldest in age, "second" means second eldest in age; if "eldest" means eldest inheritable by descent, "second" means second inheritable by descent. The word "descendant" is plain; "lineal descendant" equally plain. It is an expression in common use. A.B. is "a lineal descendant," or "the lineal descendant," of some eminent man. It is an emphatic expression, denoting *direct descent*. The strict sense and the popular sense concur. The remaining word is "eldest." The appellant satisfies it in its strict and primary sense, and such meaning is sensible with reference to extrinsic circumstances. The word may be capable of a popular or secondary interpretation; but I can find nothing in the will to justify a departure from the strict and primary one, and it is for the respondents to establish it. According to Lord Coke, there are two kinds of eldership in blood, viz., next of blood inheritable by descent, and next of blood capable by purchase. The appellant is the next in blood in the latter sense, and I think the respondents fail to establish that the testator expressed in the words used by him his intention that the first purchaser should be the male lineal descendant of Peter Isaac living at the end of the period of accumulation who was then eldest in blood inheritable by descent, and this they must do to entitle them to your Lordships' judgment.

I have much considered the arguments on behalf of the respondents. However it may be disguised, they all involve either an alteration in the words of the will, as was made by Lord Eldon, or an addition to them, using the word eldest twice, or adding "of the eldest line" to the words "eldest male lineal descendant." To do either is contrary to the rule of legitimate construction.

It may be that the meaning I give these words leads to an unexpected result; but the litigant parties have the right to the application of the legal rule of construction, and the result

is certainly not more contrary to the popular notion than the construction given by this House to the will in *Trevor v. Trevor*.

My answer to your Lordships' first question is, that the devise is not void for uncertainty; as to your second, that the son of the third son would have been entitled to one of the lots, under the circumstances stated in the question.

I have to apologize for the great length of my judgment; but knowing that some of my learned Brothers with whom I have long been in the habit of considering legal questions differ with me, I was anxious that the grounds of my opinion should be fully stated, in order that the error, if any there be, may be clearly observed.

WILLIAMS, J.—In answer to your Lordships' questions, I have to express my opinion as to the first, that the devise is not void for uncertainty, but is capable of an intelligible construction; and as to the second, that the son of the eldest of the three sons would have been entitled if the devise had been of legal estates.

In construing the expression "eldest male lineal descendant," I am of opinion that the word "eldest" does not mean eldest in point of age at the time the conveyance is to be made; but that it means first in ordinary succession in the male line.

I think there is no weight in the argument that the natural and ordinary meaning of the word "eldest" is eldest in point of age, and that it is unjustifiable to substitute such a meaning as a conveyancer or other lawyer whose mind is habituated to established rules of descent and conventional limitations of real property would be led to adopt. The will is confessedly not the natural language of the testator himself, but the professional language of the conveyancer who was employed to draw it. Surely it is difficult to maintain that in construing such a will the same sense ought to be imputed to its language as if the subject of construction were a document of an ordinary kind, framed in natural language, and treating of untechnical matters.

Looking at the will as a whole, it seems to me plain, that but for the testator's desire that the property should accumulate, his wish would have been that his three sons should share it as tenants in tail male respectively, and that the purpose of the will was to limit the estates on that principle, as far as was practicable, after the accumulation had taken place. He meant, in short, that his estates should be enjoyed in tail male respectively, but to defer the period of enjoyment; and in carrying such an intention into effect he did not mean that the ordinary succession in the male line should be disturbed. His intention that it should prevail is, in my judgment, sufficiently evidenced by the limitation to the eldest, with remainder to

the second, third, fourth, "and all and every other of the male lineal descendants then living of his sons successively in tail male." In other words, I fully agree with the opinion already frequently expressed by others, that the word "eldest," being employed relatively, and opposed to the subsequent limitations to the second, third, fourth, &c., is used as synonymous with the word "first," and that as the remainder over to the second, third, fourth, &c. is not expressed to be according to seniority of age or priority of birth, or the like, the proper inference is that the testator meant to use the word "eldest" as meaning eldest in point of succession; more especially as to construe it to mean eldest in point of age might lead to a series of limitations of the most strange and improbable kind.

I do not propose to state more fully the reasons on which my opinion is founded, nor to deal with the particular arguments which have been adduced by counsel at your Lordships' bar; because, having been very recently apprised of your Lordships' wish that the opinions of the Judges should be given on this day, I have not been able to perform that task in a way which I think would do justice to myself, or render any assistance to your Lordships.

WIGHTMAN, J.—My Lords, the answer which I propose to give to the first question put by your Lordships is, that the devise by the testator, as stated in that question, is capable of an intelligible construction, and that it is not void for uncertainty. And to the second question, that in the case supposed the son of the eldest son of Peter Isaac, though under age, would have been entitled to one of the lots, in preference to the sons of the second and third sons of Peter Isaac, though of full age.

As the reasons for my answers to both the questions are in effect the same, I shall proceed to consider them together.

The questions turn upon the meaning to be attributed to the words "eldest male lineal descendant of Peter Isaac Thellusson," as used in the will.

It has been decided, and is agreed, that by the words "male lineal descendant" is meant a male descendant through a line of males, to the exclusion of a male descendant through females, and that whoever is to take is to take as a purchaser in tail male. So far the parties are agreed, but they differ as to the meaning to be attributed to the word "eldest," as used in the will, in connexion with the words "male lineal descendant." For the appellant it is contended, that it is used in the will in what is called its ordinary and primary meaning of comparative age, and not, as contended for by the respondents, in the sense of priority of descent over other male lineal descendants, or eldest according to the law of primogeniture.

Many references were made in the course of the argument to dictionaries and other books of authority, to shew that the word "eldest" might be and had been used in both senses, according to the subject in respect to which it was introduced; and the question, therefore, is, in which sense was it used in this will?

There is no doubt but that the words used in a will are to be understood as used in their ordinary sense and meaning, unless their use in such sense would not be consistent with the context of the will, or would lead to some illegality or absurdity, and they are capable of some other meaning which would be more consistent with the context, and clear of all illegality or absurdity, in which case they are to be understood as used in such other sense and meaning.

In the present case it was said for the appellant that the whole will was of so extraordinary and whimsical a character, that it might well be that the testator did mean and intend that when the period of accumulation ceased all the male lineal descendants of his son Peter Isaac should be assembled, and the oldest man amongst them selected as the object of his bounty designated by the will. The person so selected was to take in tail male, with remainder, as was contended for the appellant, to the second eldest, third eldest, and fourth eldest male lineal descendant of Peter Isaac then living (who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was directed to be limited) successively in tail male. It is difficult to give any intelligible meaning to such a construction as would add the word "eldest" in the remainder clause to the words second, third, and fourth male lineal descendants successively; but if capable of being carried into effect, as contended for by the appellant, it would or might require from time to time a re-assembling of the lines of male descendants, and on each such occasion selecting the oldest man amongst them, creating no small amount of uncertainty and confusion, which it can hardly be supposed that the testator intended, if the words used by him are capable of a different meaning.

The construction contended for by the respondents appears to me far more in accordance with the general scope and context of the will, and so much more reasonable, that I cannot but think that it is the true construction, and ought to be adopted.

The testator, of foreign extraction, having made a large fortune as a merchant in England, and having three sons, appears to have been desirous of being the founder of three great families in point of fortune, and especially of landed estate, and to that end, by his will, leaves the bulk of his fortune to trustees, to accumulate during the lives of certain classes and persons living at his

death, or born in due time after, and in the mean time the annual proceeds to be laid out in the purchase of land, and when the period of accumulation ceased, the accumulated property was to be divided into three lots, one for the eldest male lineal descendant then living of his son Peter Isaac in tail male, with remainder to the second, third, fourth, and every other male lineal descendant of his son Peter Isaac then living (who should be incapable of taking as heir in tail male of any of the persons to whom a prior estate was by the will directed to be limited) successively in tail male. All the limitations are in tail male; and supposing the testator to have intended that one lot should go to the heir in tail male of his son Peter Isaac, it is not easy to suggest any form of words that would better answer that intention. To devise the lot in express words to the heir in tail would be objectionable, and the words used are certainly capable of such a construction as would fulfil the intention of the testator.

Whoever drew the will was obviously well acquainted with legal and conveyancing language and phraseology, and too much effect must not be given to the rule that the words used in wills are to be understood in that which was called their ordinary and familiar sense. In the will in question the word "eldest" is used in connexion with the words "male lineal descendant," and, placed as it is, was not, as it seems to me, intended by the person who drew the will to mean "eldest" in point of age, but eldest in lineal descent, or, in other words, of the eldest line or branch. It is a rule that the same words in different parts of a will are to be construed in the same sense, unless the general intention requires a different construction.

In the advowson clause the same words are used, in connexion, however, with other terms rendered necessary by the nature of the property which would require to be dealt with before the period of accumulation would cease. The right of presentation is given by the testator to one of his sons in rotation, the eldest having the first right, and the like right is then given to the "eldest male lineal descendant" of his three sons respectively in the order aforesaid, if he be capable by law; otherwise the eldest male lineal descendant of the next brother is to present. In this clause the testator shews that he did regard priority of line and primogeniture, for the first right is given to his eldest son, and then the like right is given to the eldest male lineal descendant of his three sons respectively, in the order aforesaid, if he be capable by law. By the words "in the order aforesaid" the testator appears to have meant that the eldest male lineal descendant of his eldest son shall have the first right, in preference to the eldest male lineal descendant of his second or third son. If this be so, and the testator has

in terms in this clause preferred the male lineal descendant of his eldest son to the male lineal descendants of his second and third sons, it can hardly be that this preference should not prevail amongst the male descendants of the eldest son themselves, but that the oldest man amongst them should have the preference, and not the eldest in line.

If, then, the construction of the words "eldest male lineal descendant" in the advowson clause is that contended for by the respondents, it would seem to follow as a consequence, that the same words in the other parts of the will would have the same meaning. In an early part of the will the testator directs that his premises at Plaistow shall be sold, and says that if sold by private contract any of his three sons (a preference being given to the eldest in the choice, and in case of his refusal to the second son,) shall be at liberty to become the purchaser; that being another instance to shew that he was by no means indisposed to give a preference and advantage to primogeniture and the oldest line of descent.

That which is called the remainder clause was the subject of much comment during the argument. The words are, "remainder to the second, third, fourth, and every other male lineal descendant then living (who shall be incapable of taking as heir in tail male of any of the persons to whom a prior estate is hereby directed to be limited) of my son Peter Isaac successively in tail male." The construction put upon that clause by the respondents appears to me to be the true one, and that the word "successively" is hardly compatible with the construction that has been suggested, that the remainder is to second eldest, third eldest, and so on. The words are descriptive of those who are to take after the first taker by purchase, not as purchasers, but in ordinary succession in the male line. And the words in the parenthesis appear to me to have been introduced, it may be, *ex abundanti cautela*, to provide that those who took in succession under the succession clause should not take as purchasers, but by way of limitation in succession, as suggested by Lord Eldon, in the case of *Oddie v. Woodford*.

Many cases were cited upon the argument, to which I forbear to refer; for, as has been truly observed, the provisions of this will and the language used in it are so peculiar, that no case upon the construction to be given to other wills can at all assist in the construction of this.

The will itself has, however, come in question in two cases. In the first of these cases, reported in 1 *New Reports*, and 4 *Vesey, jun.*, the general validity of the will, which was said to be void on the ground of remoteness, came in question. The case was carried to the House of Lords, and judgment given, as it had been in the courts below, in favour of

the validity of the will. No objection appears to have been taken to the will upon the ground of uncertainty as to the persons who were to take under it when the period of accumulation ceased. As that objection, if it be one, might have been taken then, and was not, it may well be doubted whether it is competent for any one claiming through or under those who were parties to that suit to take it now. I am, however, of opinion that there is no uncertainty in the will as to the person who is to take at the time when the accumulation ceases, for the reasons which I have already given.

In the second of the cases in which this will was in question, reported under the name of *Oddie v. Woodford*, the proper construction to be given to the language of the advowson clause, and incidentally to that of the devising clause, was considered both in the Court of Chancery and in the House of Lords; and, as far as the opinions then given by Lord Eldon and the other learned persons before whom the case was heard have any bearing upon the questions proposed by your Lordships, they are decidedly in favour of the construction put upon the language of the devise by the respondents.

Upon the whole, it appears to me that, upon the most reasonable construction that can be given to the terms of the devising clause, in connexion with the other clauses and language of the will, the word "eldest" used in it as descriptive of the person who is to take a lot as a purchaser when the time of accumulation ceased does not mean the oldest man amongst his male lineal descendants, but that the testator meant and intended that the person who would be the heir-at-law of Peter Isaac in tail male should take one of the lots as purchaser by the designation of his eldest male lineal descendant.

June 9. — LORD CRANWORTH, after stating the will and the questions that had arisen upon it, said that it was plainly the testator's object, by an unprecedented accumulation, to create enormous wealth for the purpose of founding three families, but beyond that there was nothing to be discovered in the will indicating any capricious intention as to who should take the property. On the contrary, everything shewed that the testator had the ordinary rules of succession in his mind. The gift was confined to males—the persons benefited were to take in tail male only. The first choice of the estate, after the trustees should have made the division, was given to the representative of the eldest son, and to him, too, was given the first preference in presenting to the living. And the suc-

cession of the sons after the deaths was to follow the same rule. The construction contended for by the appellant would contradict the whole of this arrangement, and would postpone the estate of the present Lord Rendlesham to that of his uncle, they being the only male lineal descendants of Peter Isaac, to whom estates by purchase were limited by the will. Had there been more than two persons to take, the anomalous nature of the way in which they were to take (could the appellant's construction have been adopted) would have been more apparent. It was impossible to suppose that the testator could have intended that there should be such a shifting of the possessors of the estates as must follow the adoption of the appellant's construction. It was no answer to this objection to say, that every devisee in succession would be tenant in tail male, and so might acquire the fee, for there might happen many circumstances which would prevent him doing so, and, at all events, it was not to be supposed that the testator had created capricious limitations in the belief that their capriciousness would be rendered inoperative by the act of the first taker. On the other hand, as the testator must of course have wished that the limitations he had created should be observed, there could be little doubt that the tendency to alter limitations that were of the ordinary kind and not capricious, being less than the tendency to alter those that were capricious, would of itself suggest to him a preference for limitations of the former kind. Reading the will, therefore, with every inclination to follow the rule that words must have their ordinary meaning assigned to them, he felt no doubt that the meaning to be given to these words must be that which was the ordinary construction of such a devise, and the estate must be held to go to the person who at the specified time was heir male of the body of Peter Isaac. The words were technical—they were used technically, and they must have their ordinary technical meaning assigned to them, and taken to mean descent in the male line according to the ordinary course of law. The decision of Lord Eldon on the advowson clause was exactly in point with the construction to be put on the clause now under

discussion. The word "eldest" did not mean oldest in point of age, but must be taken to mean "first," namely, the person first entitled to succeed according to the ordinary rules of descent. The decree of the Court below must therefore be affirmed.

LORD ST. LEONARDS concurred—expressing a strong opinion that the question as to the alleged uncertainty of the devise had been concluded by the decision which took place in 1825. As to the other question, what was the meaning of the words? he was of opinion that, as they were the words of a lawyer, they must receive a lawyer's construction. But in truth there was not an educated man in the country who, knowing what the ordinary modes of settlement were, would not put the same meaning upon them. It was true that "eldest," as a mere word, might have two interpretations; it might mean eldest in point of age without reference to primogeniture. But in reference to settlements, it never did mean that. This will was a settlement of real estate. And nobody could doubt that here the testator really intended the eldest son of Peter Isaac as the first tenant in tail, and so went on adopting the rule of primogeniture. The decision on the advowson clause (6) was in entire conformity with this construction, and the clause itself shewed in a very clear manner the testator's preference for primogeniture over mere age.

LORD WENSLEYDALE was of the same opinion.—The word "eldest" must here be construed as having reference to primogeniture, and he said this with the full intention of adhering to the rule laid down by Mr. Justice Burton in *Warburton v. Loveland* (7) and adopted in the most recent instance, in *Grey v. Pearson*. "Eldest" did not necessarily mean oldest in point of age, for even applied to an individual having a particular character, it had a different meaning. The eldest magistrate or officer might not mean him who had lived the greatest number of years, nor even him who had filled the office for the longest time, for it might indicate rank only, and the "eldest earl of England"

(6) 3 Myl. & Cr. 584.

(7) 1 Hadson & Brooke (Ir.), 648; s. c. 2 Dow. & Cl. 480.

would not mean him who was most advanced in years, but the eldest in point of family origin—the premier earl. Here, used as it was with other words, it meant, not the eldest in age, but the eldest in heritable blood in the male line. As to the advowson clause, if any semblance of argument of a different sort was to be deduced from that clause, it was explained by this, that the testator was manifestly labouring under the erroneous belief that an infant could not present, and so framed this clause that by the power of presenta-

tion being for the time lodged in a person legally able to make it, the presentation should not go out of the family. There was no uncertainty in the will, nor any intestacy as to any part of it.

LORD BROUGHAM would not take part in the decision as he had not heard the whole of the argument. But the decision entirely accorded with the impression existing in his mind, formed upon the hearing of that portion of the case in the hearing of which he had taken part.

Decree of the Court below affirmed.

The following cases will be reported in the Volume for 1860:—

HOUSE OF LORDS.

IMPERIAL GAS CO. v. BROADBENT.

KENSINGTON v. BOUVERIE.

SMITH v. DAY.

ROLLS COURT.

BROMLEY v. SMITH.

FORD v. DE PONTES.

FULLER v. REDMAN.

ROGERS v. CHALLIS.

VARLO v. FADEN.

VEALE v. VEALE.

VICE CHANCELLOR KINDERSLEY'S COURT.

EDWARDS v. MILBANK.

FALCKE v. GRAY.

SEAWELL v. WEBSTER.

THOMPSON v. WEBSTER.

WADE v. WARD.

VICE CHANCELLOR WOOD'S COURT.

JOHNSON v. HARROWBY.

RE LONDON AND EASTERN BANKING CORPORATION, LONGWOOD'S EXECUTORS' CASE.

RE SOUTH ESSEX GASLIGHT AND COKE CO., EX PARTE STEARE.

REPORTS
OF
Cases in Bankruptcy,

BEFORE THE COURT OF APPEAL.

BY
SAMUEL VALLIS BONE, Esq.
BARRISTER-AT-LAW.

FROM MICHAELMAS TERM 1858 TO MICHAELMAS TERM 1859.

CASES IN BANKRUPTCY.

COMMENCING WITH

MICHAELMAS TERM, 22 VICTORIÆ.

L.C. }
Nov. 9. } *Ex parte VERO, in re VERO.**

Arrangement Clauses — Per-Centage under Section 54. of the 12 & 13 Vict. c. 106.

A proposal for a composition was filed by a petitioning debtor under the arrangement clauses of the Bankrupt Law Consolidation Act, 1849, and in this proposal was inserted, at the suggestion of the Court, a clause providing that the debtor's estate should be vested in the official assignee until payment of the composition. The debtor continued in possession of the estate, and at the time appointed paid the composition:—Held, that the per-centage required by the 54th section to be paid to the chief registrar's fund was, under these circumstances, payable by the debtor.

This was a petition, presented by C. Vero and J. Everett, praying the repayment to them of a sum of 39*l.* 7*s.*, the amount of per-centage payable under the 54th section of the Bankrupt Law Consolidation Act, 1849.

On the 26th of May 1858 Messrs. Vero & Everett presented a petition, under the arrangement clauses of the Consolidation

Act, for an arrangement with their creditors under the controul of the Court. Subsequently they filed a proposal for the payment of 7*s.* 6*d.* in the pound within one month after the confirmation of the proposal, under the 216th section. This was agreed to by the creditors, and at the suggestion of the Registrar, acting for the Commissioner, a clause was inserted to provide for the vesting of the estate and effects in the official assignee until payment of the composition. No order was made for vesting the estate in the official assignee, and the petitioners remained in possession. On the payment of the amount of the composition to the official assignee, he demanded the per-centage payable to the chief registrar's account under the 54th section, such per-centage to be calculated upon the entire amount of the composition and debts payable in full. The petitioners paid this per-centage, amounting to 39*l.* 7*s.*, and now sought to have the same repaid to them.

The petition was partly heard before the Lords Justices, and afterwards brought before the Lord Chancellor.

Mr. De Gex, for the petitioners, contended that the estate had not been so vested in the official assignee as to make this per-centage payable; the 54th section requiring that the vesting should be "in

* Reported by G. S. Allnutt, Esq.

manner hereinafter mentioned," and the 218th section providing that the property should vest, if required by the resolution, as fully as under a bankruptcy. Under the old law two fees of 20*l.* and 10*l.* were payable, and the fees now in question were in substitution for them. Considerable discussion arose as to those fees being payable where assignees had not been chosen, and ultimately Knight Bruce, V.C. decided that they were not—*Ex parte Reynolds, re Reynolds* (1). In fiscal regulations acts of parliament will be construed strictly.—

Warrington v. Furbor, 8 East, 242.

Tomkins v. Ashby, 6 B. & C. 541;

s. c. 5 Law J. Rep. K.B. 246.

Denn v. Diamond, 4 B. & C. 243.

Hobson v. Neale, 17 Beav. 178.

Mr. Clement Swanston appeared for the chief registrar and accountant in bankruptcy, but was not called upon.

The LORD CHANCELLOR said that he was not desirous of charging the bankrupt's estate with more than was necessary, but he must follow the provisions of the act. It appeared to him that the object of charging the bankrupt's estate with this per-centage was not to provide for the remuneration of the Court or of the official assignee on account of the trouble incurred, but, in fact, to make a party who came to the Court for its assistance chargeable to the funds of the Court for the assistance which he derived. In the present case it was intended that there should be an arrangement between the petitioners and their creditors, under the inspection and subject to the controul of the Court. By that arrangement a composition of 7*s.* 6*d.* in the pound was proposed. But in order to effect that composition with their creditors, it was not necessary to have come to the Court at all. On a consideration of the different sections of the act, his Lordship thought that the arrangement with their creditors might have resulted in a certificate to the petitioners without this estate finding its way into the hands of the official assignee. His Lordship read the 221st section, and said that the parties here chose to make an agreement, by which it was arranged that until

payment of the proposed composition the petitioners' estate and effects were to vest in the official assignee, in trust to pay the creditors and the fees to the Court, and that on such payment the estate should revert in the petitioners. *Mr. De Gex* had argued that, under the resolution, the property vested in the official assignee conditionally, and only for the interim between the resolution of the creditors and the payment of the composition, and that it did not vest as fully as in the case of a bankruptcy, which was requisite for the purpose of the 218th section, and therefore of the 54th section. But if the estate were vested at all in the assignee it was absolutely vested, and vested moreover for the purpose of raising money (if necessary) to pay the composition; and, certainly, if the composition were not paid the official assignee would have power to realize from the estate sufficient to satisfy the creditors. Could it then be said that the estate and effects had not vested? If they were vested in the official assignee, *Mr. De Gex* admitted that, under the 54th section, there arose the liability to pay the per-centage. The petition must be dismissed.

Mr. Clement Swanston asked that the petition might be dismissed with costs, but

The LORD CHANCELLOR dismissed the petition without costs.

LORDS JUSTICES. } *Ex parte THORNTON, in re*
Nov. 19, 25. } JOHNSON.

Partnership—Assignment for Benefit of Creditors—Double Proof.

Two traders, partners, assigned the partnership property to trustees for the benefit of their creditors, after full payment to whom, the trustees were to hold the residue, upon trust to divide the same between the partners according to the deed of partnership. The partners had previously given their joint and several promissory note to their bankers for 1,500*l.* The bankers, by their public officer, executed the assignment for 2,755*l.*, which included the 1,500*l.* One of the partners afterwards became bankrupt. A suit was instituted in the Court of Chancery

(1) *De Gex*, 370.

*to carry into effect the trusts of the deed of assignment, and a decree for that purpose was pronounced. The bankers were admitted, under the bankruptcy, to prove against the separate estate of the bankrupt for the 1,500*l.* due on the promissory note; and the same was affirmed, on appeal.*

The technical rule against double proof does not apply where, as here, the partnership estate is not being administered in bankruptcy.

This was the petition of Mr. Thornton and others, the creditors' assignees of the estate of Mr. John Jobson, a bankrupt, praying that the decision of Mr. Commissioner Balguy, of the Birmingham District Court of Bankruptcy, might be reversed or varied. The decision of the Commissioner was a refusal to expunge a proof for 1,500*l.* The facts of the case were as follows:—

Mr. John Jobson and his brother Robert for some years before 1852 carried on the business, first at Sheffield and afterwards at Litchurch, near Derby, of stove, grate and fender manufacturers, under the style of Jobson & Co.; and Robert carried on a separate trade at Wordsley, in Staffordshire. Messrs. Jobson & Co. kept an account with the Rotherham bank at Sheffield, and on the 5th of March 1852 they gave to the bank a joint and several promissory note for 1,500*l.*, payable on demand for money due. On the 14th of January 1857 they executed to Mr. W. Brown, the manager of the bank, an assignment of their partnership property and effects for the benefit of their creditors. The trusts of this indenture were declared to be to call in and collect the property and effects thereby assigned, and as soon as conveniently might be to sell the same, and out of the monies to arise from such sale, in the first place, to pay all costs and charges; and, in the second place, when and so often as by the means aforesaid sufficient money should come to the hands of the said trustee, to pay a dividend at the rate of 4*s.* in the pound upon the debts of the several creditors, parties thereto, of the said Robert Jobson and John Jobson, as such co-partners as aforesaid, to pay and divide the same rateably among the creditors mentioned in the schedule, according

to the amount of their respective debts, until the same, with interest on such of the same as carried interest at the rate of 5*l.* per cent. per annum, from the day of the date of the said indenture, should be fully paid and satisfied; and to divide the surplus, if any, of the said monies and premises pursuant to the terms, provisoes and conditions of the articles of partnership therein mentioned, entered into by them, the said Robert Jobson and John Jobson, as such co-partners as aforesaid. And in the same indenture was contained a proviso that that indenture or any clause, matter or thing therein contained should not extend or be construed to extend to invalidate, prejudice, or in any manner affect any mortgages, charges or other specific securities or liens which any of such creditors, parties thereto, of the said co-partnership might have upon any of the real or personal estate of or belonging to them, or any security for or in respect of all or any of the debts due and owing to such last-mentioned creditors respectively, or any bonds, notes or securities given or payable by any person by way of security for the same debts, or any of them, or any part thereof respectively; but that all such several mortgages, charges, securities, liens, and also all such bonds, bills, notes and other securities as aforesaid, should be and continue as available both at law and in equity in the hands of the several creditors, parties thereto, holding the same, to all intents and purposes as if the same indenture had never been made or executed. And it was thereby expressly agreed and declared, that the said indenture should not in anywise prejudice or affect the rights or remedies of the said several creditors, parties thereto, against the respective separate estates of the said Robert Jobson and John Jobson, for the amount of their several and respective debts, or so much thereof respectively as should not be satisfied by means of the provision thereby made. The bank, by their public officer, executed this deed as creditors for the sum of 2,755*l.* 1*s.* 11*d.* for money due. On the following day, Robert Jobson assigned his separate estate for benefit of his creditors. On the 19th of March 1858, a bill in Chancery was filed by one of the creditors of the partnership to carry into effect

the deed of the 14th of January 1857, and a decree was made in the suit according to the prayer of the bill. On the 31st of March 1857, John Jobson was adjudicated bankrupt on his own petition, and the bank tendered a proof against John Jobson's separate estate for 1,500*l.*, which was admitted. In July last the assignees applied to the Commissioner to expunge the proof, but he refused the application. From this decision the assignees of John Jobson appealed.

Mr. Bacon and Mr. Clement Swanston, for the appellants, submitted that, as the Rotherham Bank were already claimants for the 1,500*l.* under the assignment of the 14th of January 1857, and were at the present time actually in course of payment under the decree of the Court of Chancery in execution of the trusts of that deed, the case was one of double proof, or in the nature of double proof, which the Court would not allow. They cited and remarked upon the following authorities:—

Ex parte Goldsmid, 1 De Gex & Jo. 257; s.c. 25 Law J. Rep. (N.S.) Bankr. 25.

In re Plummer, 1 Phil. 56; s.c. 2 Mont. D. & D. 204.

Ex parte Peacock, 2 Glyn & J. 27.

Mr. Swanston and Mr. De Gex were for the respondents.

LORD JUSTICE KNIGHT BRUCE.—My learned Brother and myself will consider the case, and inform the respondents on a future day whether we consider it necessary that they should address the Court.

Nov. 25.—LORD JUSTICE TURNER (without hearing the respondents' counsel) said, that in this case two brothers, John and Robert Jobson, had been in business as partners, and Robert had also carried on a distinct trade at another place. The firm had kept their partnership banking account with the Rotherham bank at Sheffield, who were the respondents; and the partners, in March 1852, gave to the bank a joint and several promissory note for 1,500*l.* payable on demand. In January 1857 the partners assigned all their partnership estate and effects to the manager

of the bank, upon trust for the benefit of their creditors, and the deed of assignment provided that the trustee should get in the property, and should convert it into money, and should thereout, after payment of all costs, distribute the surplus when and so often as it should amount to a sum sufficient to yield a dividend of 4*s.* in the pound amongst the creditors, parties to that deed. Any further surplus, after full payment of the creditors, was to be divided according to the terms of the deed of partnership between the brothers. The assignment also contained a proviso, that nothing therein contained should invalidate, prejudice or affect any mortgages, charges or other specific securities or liens, which any of the creditors, parties thereto, might have upon any part of the partnership property, in respect of any debts, &c. due to such creditors, or any bonds, notes or securities for the same; but that all such mortgages, &c., and all such bonds, &c., should be as available as if the said indenture had never been made or executed. And it was expressly agreed, that the indenture should not prejudice or affect the rights of the creditors against the respective separate estates of the said Robert Jobson and John Jobson. This deed was executed by the bank as creditors for 2,755*l.*, and shortly afterwards Robert Jobson assigned his separate estate for the benefit of his creditors. In March 1857 John Jobson was adjudicated bankrupt, and the Rotherham Bank were admitted to prove against his separate estate for the sum of 1,500*l.* secured by the promissory note. It was that proof that was objected to by the creditors' assignees of John Jobson's estate, and that their Lordships had to decide upon; but in his (the Lord Justice Turner's) view, the proof must be allowed to stand. The objection against it was, that, by the rule of the Court, proof against the joint estate and against the separate estate of the same bankrupt for the same debt was not allowed. His Lordship, however, said that he had heard no authority cited in which that rule had been held to apply to circumstances like those in the present case. It was hardly going too far to say that the rule in question was little else than a mere technical rule, and its founda-

tion was this—that all the creditors of a bankrupt ought to be placed upon an equal footing in the administration of an estate under the jurisdiction in bankruptcy. Here, however, the joint estate of the partners was not being administered in bankruptcy; and any surplus of that estate was to be divided between the partners, according to the articles of their partnership. The only estate at all under administration in bankruptcy was the separate estate of John Jobson; and his Lordship thought that the technical rule referred to ought not to be extended any further, for it did not appear to him to be based upon any sound or distinct principle. The law would have given a remedy against both partners had they been solvent; and, if they were dead, there was in equity a remedy against the estates of both. The case of *Ex parte Goldsmid* had been relied on by the appellants; but his Lordship did not think that case in point—and even if it were in point, so far as it went, it was of but little authority, considering that the Court was divided in opinion, and that an appeal was now pending to the House of Lords. He should, therefore, prefer to rest his decision in the case rather upon the grounds which he had stated than on the authority of *Ex parte Peacock* and *In re Plummer*, which might possibly be distinguishable from the case now before the Court. The appeal must therefore be dismissed, with costs; but this would be without interference with the discretion of the learned Commissioner as to how they should be ultimately paid.

LORD JUSTICE KNIGHT BRUCE concurred.

LORDS JUSTICES. } *Ex parte* SLATER, in re
Dec. 3. } SLATER.

*Adjudication—Bankrupt's own Petition—Assets exceeding 150*l.*—Realization.*

*Traders petitioned, under the 20th section of the Bankrupt Act of 1854, 17 & 18 Vict. c. 119, for adjudication against themselves, and satisfied the Commissioner that their available assets exceeded in value the sum of 150*l.* They were accordingly adju-*

*dicated bankrupts; but it appearing at the certificate meeting that the assignees had not at that time actually realized that sum in cash out of the estate, the Commissioner postponed the grant of the certificate, adjourning the meeting for six months, with liberty for the bankrupts to apply when 150*l.* should be realized:—Held, upon appeal, that if it should appear, as alleged, that the assets were sufficient to satisfy the requisitions of the statute, but that the realization was only postponed for the benefit of the creditors, the bankrupts were entitled to an immediate certificate of the first class.*

This was an appeal from an order of the Commissioner of the District Court of Bankruptcy at Liverpool. From the statement of the counsel for the petitioners, it appeared that the bankrupts, William Smith Slater and Thomas Herbert, had, prior to their bankruptcy, carried on the business of timber-dealers at Birkenhead, and that on the 19th of August last they had presented a petition for adjudication against themselves, on which occasion they had proved to the Commissioner's satisfaction that their available estate amounted at that time to at least 150*l.*, the sum required by the act of parliament in that behalf; whereupon the Commissioner had adjudicated the petitioners bankrupts. The proceedings in the Bankruptcy Court had been duly prosecuted, and on the 3rd of November a sitting of the Court had been held for the purpose of granting the petitioners a certificate. On that occasion no creditor appeared to oppose the allowance of the certificate, and no objection was taken to the petitioners' conduct, either prior or subsequent to their bankruptcy; but, inasmuch as it appeared that the assignees of the petitioners' estate had not then realized 150*l.* in cash, the Commissioner adjourned the sittings for the allowance of the certificate to each of the bankrupts for six calendar months, for the purpose of enabling them to make payment of that sum, with liberty for them to apply in the mean time if 150*l.* should be paid to the official assignee, either by the realizing of the bankrupts' estate, or payment made by them, or on their behalf.

From this order of the Commissioner the bankrupts appealed.

The 20th section of the Bankruptcy Act, 1854, 17 & 18 Vict. c. 119, which repeals the 93rd section of the Bankrupt Law Consolidation Act, 1849, provides "that any trader may petition for adjudication of bankruptcy against himself; but unless he shall forthwith after filing his petition, and before adjudication of bankruptcy thereunder, make it appear to the satisfaction of the Court that his available estate is sufficient to produce the sum of 150*l.* at the least, his petition shall be dismissed."

Mr. Bardswell, in support of the appeal, contended that there was nothing in the several sections of the Bankrupt Act of 1854 which would justify the Commissioner in withholding the certificate, on the ground on which he had founded his judgment. The 93rd section of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106.), which was repealed by the 20th section of the act of 1854, required the available estate of bankrupts petitioning for adjudication against themselves to be sufficient to pay 5*s.* in the pound. Here the bankrupts had satisfied the Commissioner that they had available assets to the amount of 150*l.*, and the representations made by them as to the value of their estate at the time of their presenting their petition for adjudication were unquestionably correct, and its value at the present time was considerably more than 150*l.*, but the assignees were unwilling to make a forced sale of the estate, as such a step would be most prejudicial to the interests of the bankrupts' creditors. *Mr. Bardswell* urged that, under these circumstances, the petitioners were entitled to an immediate certificate, and that, inasmuch as no opposition had been raised by any creditor, and no imputation whatever had been cast on any part of the petitioners' conduct, the certificate to be awarded them should be of the first class. Even assuming for the sake of argument, and for that alone, that the assets for any reason were not sufficient to produce 150*l.*, there were no clauses of the act of parliament applicable to such a state of circum-

stances; while in instances of applications for adjudication on the petition of a creditor power was given to the Court to annul an adjudication, the act being silent as to annulling when the petition was by the trader himself. All that the act said was, that if it be not proved to the satisfaction of the Commissioner that there are assets available to the extent of 150*l.*, the petition is to be dismissed; but it did not say that in such case the adjudication should be annulled. Here the petition had been entertained and the prayer granted, and the act being silent as to annulling, it was not competent to the Commissioner to adjourn the petition, as he had done in this case. The learned counsel repeated that the certificate ought to be granted, and of the first class.

It appeared by the evidence before the Commissioner, and from the testimony of *Mr. Pemberton*, the bankrupts' solicitor, who was examined *videlicet* by the Lords Justices, that the bankrupts' estate consisted principally of machinery and other trade fixtures, which might, if sold in an advantageous manner, realize more than 2,000*l.*, and which were worth as old material more than 400*l.*; and that the reason why the money had not been yet realized was solely that the assignees were unwilling to force a sale lest the property should be parted with below its value.

LORD JUSTICE KNIGHT BRUCE said, that if their Lordships interfered at all in this case, it would be solely on the ground that at the time of presenting the petition of adjudication, at the time of adjudication, and all along, the bankrupts were really possessed of property worth more than 150*l.*, and that the postponement of realization of that amount was to be attributed to the assignees in the exercise of their judgment as to what would be most beneficial to the creditors.

Mr. De Gex, for the assignees, supported the application, observing that the assignees, both trade and official, considered the petition reasonable.

Their LORDSHIPS requested *Mr. Vizard*, the registrar, to communicate with the

Registrar at Liverpool, and directed that if there was no other objection to the allowance of a certificate to the bankrupts, certificates of the first class should be immediately awarded to them both.

The Commissioner subsequently communicated with their Lordships, and the certificate was granted.

LORDS JUSTICES.
Jan. 14. }

In re TAYLOR.

Trader-Debtor Summons—Admission of Debt—Irregularity—Taking Affidavit and Admission off the File of Proceedings.

A creditor, after assigning his debt, filed an affidavit of such debt (under the act 12 & 13 Vict. c. 106. s. 18.), and caused the alleged debtor to be served with a demand of immediate payment, and summoned him before the Court of Bankruptcy to state whether or not he admitted the demand of the creditor. The registrar (before whom the summons was heard) declining to enter into the question whether the debt had been assigned, and requiring the alleged debtor to state whether he admitted the debt or any part thereof, the debtor filed an admission as to part of the debt and a deposition that he had a good answer to the residue of the creditor's demand:—Held, upon appeal, that the creditor was not justified in making an affidavit of debt after assignment without the concurrence of the assignor, and that the alleged debtor was entitled to have his admission and deposition taken off the file.

Semble—that a proceeding by summons of a trader debtor, if taken by the assignor and assignee of a debt jointly, would not be objectionable.

This was the petition of Mr. James Taylor, of Exeter, contractor, setting forth that Mr. William Wolland, of the same city, timber-dealer, on the 7th of December 1858, signed a demand under the Bankrupt Law Consolidation Act, 1849, whereby he demanded of the petitioner the sum of 445*l.* 3*s.* 10*d.*, and caused the same to be served at the office of the petitioner on the same day; that Wolland also obtained a summons from the Commissioner of the Exeter District, dated the 8th of December, but did not personally

serve it, but sent a copy through his solicitor, Mr. Stogdon, to the petitioner's solicitor, Mr. Daw, on the 13th of December; that the summons required the petitioner to appear personally before the said Court on the 16th of December, in order to ascertain if he admitted the debt or any and what part thereof; that the petitioner and Wolland had had large dealings together, and the petitioner had paid large sums on account, but Wolland had never, until after the 20th of December 1858 delivered a full statement of the amount due to him; that Wolland had, by deed, dated the 23rd of September 1858, assigned to William Tombs, the manager of the West of England and South Wales District Bank at Exeter 100*l.*, part of the debt by the same deed said to be due from the petitioner; and that Wolland had by deed assigned the remainder of the debt alleged to be due from the petitioner to his (Wolland's) solicitor, John Stogdon. The petition then alleged that there were various items in Wolland's bill of charges, which he, the petitioner, disputed. And it went on to state that the petitioner, on the 15th of December, caused a summons to be issued out of the said court, directed to Wolland, requiring him to appear and produce the two assignments and all accounts between him and the petitioner and to be then and there examined, and that the summons was served personally on the same day; that he also issued and served summonses on the two assignees of the debt, of the same date and for the same purposes; that the petitioner attended at the said court on the 16th of December and had witnesses in attendance, and on his name being called by the officer of the court, his solicitor claimed the right of examining Wolland on the subject of his claim against the petitioner, but the registrar, who sat for the Commissioner, decided that the examination could not take place; that the said solicitor then proposed to examine Wolland as to his having assigned the debt, but the registrar would not allow it; and that after other claims and refusals, the registrar called on the petitioner to admit or deny the debt, whereupon the petitioner, "knowing that he owed a debt of 108*l.* 5*s.* 10*d.*, and being thus kept in ignorance of whether

the debt had been assigned or not, was compelled to sign an acknowledgment that he did owe the said debt of 108*l.* 5*s.* 10*d.* to Wolland, in order to prevent being declared a bankrupt under the act of 1849, although your petitioner believes that 100*l.*, part of the same, has been assigned to the said W. Tombs and the residue to the said J. Stogdon." The petitioner stated that he was not in embarrassed circumstances, and that the only object of his summoning Wolland was to shew that various sums he had charged on account were not due, and that there was only due from the petitioner to him 108*l.* 5*s.* 10*d.*, and to ascertain the truth of the assignments having been made, and the only object of summoning Tombs and Stogdon was to ascertain whether they claimed and were entitled to receive any part of the said debt. The petition prayed that the admission of the debt of 108*l.* 5*s.* 10*d.*, signed under the pressure aforesaid, might be declared void and be cancelled, and the affidavit made by the petitioner on the 16th of December 1858 might be taken off the file and delivered up to the petitioner, and that he might be paid his costs of the proceedings at Exeter and here, and attendance of witnesses.

It has been found necessary to state the case at this length in order to make the case intelligible, but the real question in dispute was the payment of the costs in Exeter and in London.

Mr. Shapter and *Mr. Karlake* were for the petitioner.

Mr. Bacon, for the respondents.

LORD JUSTICE KNIGHT BRUCE.—In this case there was an assignment, if not of the whole debt, of at least the greater part of the debt, and of this assignment the debtor had notice. Notwithstanding such assignment and notice, the creditor takes proceedings to make the debtor a bankrupt under the provisions of "the Bankrupt Law Consolidation Act, 1849." If these proceedings had been taken in conjunction and combination with the assignee of the debt, perhaps no substantial objection could be taken to the course adopted. It is not necessary in this case so to decide; but, as at present informed, I see no reason

why, — acting jointly, — an assignor and assignee of a debt may not take proceedings for the purpose of making a trader-debtor bankrupt. But here it does not appear to be the proceeding of both assignor and assignee. The West of England and South Wales Bank, to which the debt to the extent of 100*l.* was assigned, were and are entitled to treat the proceeding taken by the respondent as not affecting them. In fact, the proceeding must be regarded as taken by Mr. Wolland alone, who filed an affidavit that a debt was due to him after he had assigned that debt to Mr. Tombs as representing the bank. The admission as to the sum of 108*l.* filed by the appellant was caused by Mr. Wolland, for the alleged debtor might well have thought after Mr. Wolland's affidavit that the debt was not assigned; and I think the petitioner is entitled to have the admission and deposition taken off the file, if, indeed, that is in any respect important. The proceeding being wrong in its inception, Mr. Wolland, who gave rise to the proceeding, is in my opinion bound to pay all such costs as have been properly incurred.

LORD JUSTICE TURNER.—I entirely agree. The question whether the registrar was right or wrong in refusing to hear evidence whether the debt was assigned we are not required to decide. The proceedings complained of were originated by Mr. Wolland, who, after executing a formal deed of assignment to the West of England and South Wales Bank of 100*l.* of the debt due from Mr. Taylor, goes to the Bankruptcy Court and swears that this was a debt due to him from Taylor. This cannot be justified, but it has been suggested that the assignee of the debt concurred in Wolland's proceedings. If the assignee of a debt concurs in a proceeding of this nature, under which the debtor may be made bankrupt, it ought to be done plainly, in a form which would enable the debtor to say with certainty to whom he should pay the debt demanded of him. There is no pretence for saying that the proceedings in this case gave the debtor the information to which he was entitled. The respondent must therefore pay the costs fairly incurred by the appellant, but

there has been a great deal that is immaterial introduced.

It was finally agreed that the respondent should pay 50*l.* for costs, unless they preferred having the costs taxed. The admission and deposition filed by the respondent to be taken off the file.

LORDS JUSTICES. } *Ex parte* ARNOLD, in re
Jan. 14. } ARNOLD.

Arrangement Clauses of the Bankrupt Act, 1849 — Trader-Debtor Summons — Adjudication—Costs.

A creditor on a bill of exchange accepted by traders issued a writ for recovery of the amount on the 21st of October. On the 28th of October the debtor served him with notice that a petition for private arrangement had been filed on the 26th. The creditor then discontinued his action, but on the 30th he caused notice to be served requiring immediate payment and proceeded on a trader-debtor summons for the same amount. The traders admitted the debt, but as they failed to pay at the expiration of the time limited, they were adjudicated bankrupts. One of the Commissioners confirmed the adjudication; but, upon appeal, Held, that his decision must be reversed.

Costs, under the particular circumstances, were not given against the petitioning creditor.

This was a petition of appeal from an order of Mr. Commissioner Goulburn, affirming an adjudication under the following circumstances:—Messrs. William Arnold, sen., William Arnold, jun., and Henry Arnold were adjudicated bankrupt on the 26th of November 1858, upon the petition of one Mr. Slann, a creditor for 67*l.* 13*s.* 10*d.*, in respect of a bill of exchange, dated the 17th of July 1858, and drawn upon and accepted by the bankrupts, payable three months after date. The act of bankruptcy was non-payment after formal admission of the debt under a trader-debtor summons within the time prescribed by the 81st section of the Bankruptcy Act, 1849. It appeared that Mr. Slann, having made several unsuccessful

applications for payment, caused a writ to be issued against them under the Bills of Exchange Act, 1855, on or about the 21st of October last, and on the 28th he received notice from the bankrupts' solicitors that a petition for private arrangement under the provisions of the Bankruptcy Act, 1849, had been filed on the 26th, and protection granted to the bankrupts until the 26th of November following, the day appointed for the first private sitting under the arrangement. Upon receiving this notice, Mr. Slann discontinued his action, and on the 30th of October he caused particulars of demand and notice requiring immediate payment to be served upon the bankrupts. The money not being paid, an affidavit of debt, as required by the act, was filed on the 2nd of November, and on the same day a trader-debtor summons was sued out, returnable on the 10th; on that day the bankrupts attended at the Court of Bankruptcy, in obedience to the summons, and objected to answer whether or not they admitted the debt, on the ground that they had filed their petition for arrangement and obtained the protection of the Court "from all process" before any proceedings were instituted in bankruptcy in regard to this particular debt. The Commissioner, however, decided that they must answer, whereupon they filed an admission of the debt in the usual course. The debt was not "paid, secured or compounded for to the satisfaction of the creditor" within the seven days prescribed by section 81. of the Bankruptcy Act, 1849, whereby the act of bankruptcy complained of was committed on the eighth day after the filing of such admission. The petition for adjudication was filed on the 19th of November, and adjudication followed on the 26th. Notice to dispute the act of bankruptcy was given on the 30th, and the case came on for argument before the Commissioner on the 4th of December last, when his Honour affirmed the adjudication (1), but at the

(1) The judgment of the Commissioner was as follows:—In this case the Messrs. Arnold disputed an adjudication of bankruptcy under the 104th section of the Bankruptcy Act, 1849, which allows seven days to shew cause against the validity of the adjudication. The 104th clause says, "And such person shall be allowed seven days, or such ex-

same time stayed the same to give the bankrupts an opportunity of appealing to the Lords Justices. Accordingly a petition of appeal was presented and answered for the 11th of December. The petition stated, amongst other things, that "the messenger of the Court of Bankruptcy is now and has been since the 26th of November, in possession of your petitioners' residence and place of business, and of all your petitioners' stock in trade, machinery and effects, and that your petitioners are in

tended time, not exceeding fourteen days in the whole, as the Court shall think fit, from the service of such duplicate, to shew cause to the Court against the validity of such adjudication: and if such person shall within such time shew to the satisfaction of the Court that the petitioning creditor's debt, trading, and act of bankruptcy upon which such adjudication has been grounded, or any or either of such matters, are insufficient to support such adjudication, &c., the Court shall order such adjudication to be annulled." The *ex parte* adjudication was made by Mr. Commissioner Holroyd, with a knowledge of all the facts. Neither the petitioning creditor's debt, the trading, nor the act of bankruptcy, are, in fact, the subject in dispute. The question raised is quite distinct from any of them. It is whether or not a bankruptcy can go on, the bankrupt having already presented a petition for arrangement with his creditors under the superintendence and controul of the Court, and obtained protection for his person and property. It is said, on behalf of the alleged bankrupts, that the two proceedings cannot be allowed to go on together, for that they would necessarily jostle and interfere with each other; but I think that question is not properly raised by these proceedings. It is also said that there is no act of bankruptcy, because process had been staved off by the petition for arrangement and the protection of the Court, and that, therefore, the trader-debtor summons issued by the petitioning creditor in this case, and on which the act of bankruptcy is founded, is a nullity. In this view I cannot for one moment concur, and it seems to me to be at variance with the decisions of the Court of Appeal in the cases of *Ex parte Walker* (1) and *Ex parte Dales* (2). In the first of these cases Lord Justice Turner expressly declared that it was the duty of this Court to proceed to bankruptcy upon a trader-debtor summons, when an act of bankruptcy founded on such summons was complete, and the Lord Justice also clearly intimated his opinion that the protection from process granted under the statute to an arranging debtor did not apply to proceedings under a petition for adjudication of bankruptcy. In that case the only doubt entertained by the Court of Appeal was, whether the petitioning creditor had not delayed the presentation of his petition for adjudication too

this respect and otherwise aggrieved by the order of the 4th of December instant, confirming the said adjudication." On the hearing of that petition, on the 20th of December, the Lords Justices made an order directing that "upon a bond (required by the statute) being executed, with two sureties, to the satisfaction of the Commissioner, the messenger should be withdrawn, and the proceedings under the bankruptcy should be stayed. In default of such bond being given, the mes-

long. No such question arises in the present case, as the petition for adjudication was filed the day after the act of bankruptcy was complete. In the case of *Ex parte Dales* the only question was, whether the creditor who had issued the trader-debtor summons, not having acted upon the admission of the debt obtained under it as an act of bankruptcy by proceeding to an adjudication, another creditor could do so upon the same act of bankruptcy, the debtor having presented a petition for arrangement, and obtained his protection in the mean time; and this question the Court decided, without hearing the respondent's counsel. The two cases cited appear to me to be conclusive of the question I am now called upon to determine. Other cases were cited (3) on behalf of the petitioning creditor; but I confess I am unable to see their applicability to the present case. On the part of the bankrupts my attention was directed to the dates of the various proceedings, but it does not appear to me that the dates are material. The real question is, whether the filing of a petition for arrangement by an insolvent trader is to preclude a creditor who has a just debt of sufficient amount from proceeding in bankruptcy to compel an equal distribution of the debtor's assets. I cannot understand why the creditor should be restrained from following up the remedy which the law gives him, and taking proceedings in bankruptcy against him, because of the debtor's own act; and, therefore, my judgment will be to confirm the adjudication. Mr. Bagley forcibly urged upon me that the two proceedings under the arrangement clauses and the proceeding in bankruptcy were incompatible and could not be permitted to go on together, and so far I agree with him. By the adjudication of bankruptcy all the bankrupt's property is vested in the official assignee. Under the arrangement the property does not necessarily vest in the assignee. But here the property upon which the petitioners relied as the means of carrying the arrangement into effect is gone; and I think the petition for arrangement ought to be dismissed, and for this reason, because there is nothing for it to operate upon. I, therefore, propose to confirm the adjudication and dismiss the petition for arrangement.

(1) *Ubi infra*.

(2) *Ubi infra*.

(3) These cases were *Rideal v. Fort*, 11 Exch. Rep. 847; s. c. 25 Law J. Rep. (N.S.) Exch. 204. *Thomas v. Hudson*, 14 Mee. & W. 352, 372; s. c. 14 Law J. Rep. (N.S.) Exch. 283.

senger to remain in possession and the appeal petition to stand over until the first petition day after the next term, and the proceedings for the then arrangement to go on." During the argument Mr. Lucas, one of the counsel for the petitioning creditor, said that the point had been adjudged by Mr. Commissioner Holroyd in a case of *Ex parte Hills* (2), in which he held, that

(2) Mr. Commissioner Holroyd, in giving judgment, said:—It appears to me that this adjudication of bankruptcy must stand. I think the objections which have been urged do not constitute a valid ground for upsetting it. As regards the delay which is alleged to have taken place previously to presenting the petition for adjudication, I think the legislature itself has defined what should be considered a reasonable time for presenting such petition upon an act of bankruptcy like that upon which the adjudication in this case is grounded. By the 76th section of the Bankrupt Law Consolidation Act, it is provided that a petition for adjudication of bankruptcy against a trader who has presented a petition for arrangement with his creditors under the provisions of that act must be filed within two months after such petition for arrangement shall have been dismissed. I think the provision which I have cited amounts to a legislative declaration of what is to be deemed a reasonable time for presenting a petition for adjudication in bankruptcy in such a case as the present. I am therefore of opinion that the objection as to the delay cannot prevail. Then as to the next, and indeed the main question, it is said that the adjudication should be annulled because the bankrupt had filed a petition for arrangement with his creditors under the 211th section, and had, previously to the filing of the petition for adjudication, obtained the protection of the Court for his person and property from all process. What then is the true construction of the term "from all process"? I think the act must be construed strictly and for the benefit of the creditors, and looking at it in that view, I think the word "process" here must mean process in a suit for a party's own exclusive benefit, and that it does not extend to a proceeding like a petition for an adjudication of bankruptcy for the benefit of creditors in general, and under which, upon the adjudication, the property is affected by operation of law, and not by act of the party. I think the opinion of Lord Justice Turner, in *Ex parte Walker* is very important in its bearing upon this case. His Lordship says: "With respect to the meaning of the word 'process' such a construction must be put upon the act as will make it consistent. With this view the word 'process' should, I think, be construed as not applying to an adjudication of bankruptcy, even if it would be otherwise properly applicable to such a proceeding, which I doubt very much." The subsequent case of *Ex parte Dales*, and the practice in this court, since the case of *Ex parte Walker*, of receiving and acting upon a petition for adjudication notwithstanding the pendency of a petition for arrangement, and the grant of protection by the Court from all pro-

cess, tend to confirm the view which I have taken. The adjudication must therefore be affirmed.

the word "process" in the 211th section of the Bankrupt Act, 1849, meant process in a suit for a party's own benefit, and did not extend to a proceeding like an adjudication in bankruptcy. The case of *Ex parte Hills* was where a trader filed a petition for private arrangement and obtained his protection under the same, and then a petition for adjudication was presented against him, and he was thereunder declared bankrupt: the adjudication, which was disputed, was held good. On the 14th of January 1859 the adjourned petition of appeal came on for argument, the bond having been given.

Mr. Selwyn and Mr. Bagley, for the bankrupts, said that the cases of *Ex parte Walker* (3) and *Ex parte Dales* (4), which had been relied upon by the learned Commissioner in his judgment, were very materially distinguishable from the present, inasmuch as in both those cases proceedings in bankruptcy had been commenced before the petition for private arrangement was filed. It was, therefore, very properly held in each of those cases that the bankrupt could not set aside those proceedings in bankruptcy by instituting proceedings under the private arrangement clauses of the act. The learned counsel complained of the ruinous expense to which the bankrupts had been put by the whole proceedings, and among them, by the messenger being put into possession of their property.

Mr. Bacon and Mr. Lucas, were for the petitioning creditor.

Mr. Caillard, for another creditor, took no part in the discussion, which principally related to the costs.

Mr. Selwyn was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—I do not at present think the orders in *Ex parte Walker* and *Ex parte Dales* were erroneously made. The order of proceeding in the present instance differs in point of

cess, tend to confirm the view which I have taken. The adjudication must therefore be affirmed.

(3) 6 De Gex, M. & G. 752; s. c. 24 Law J. Rep. (N.S.) Bankr. 26.

(4) 2 De Gex & J. 206; s. c. 27 Law J. Rep. (N.S.) Bankr. 13.

time from those two cases. In the case before the Court the petition for arrangement was presented on the 26th of October, and the order founded upon it, being the first under the arrangement clauses, was made on the 28th, upon which day the petitioning creditor was informed by letter that proceedings for an arrangement had been commenced. Knowing this the creditor proceeded, and on the 30th of October, and not before, he commenced proceedings for an adjudication of bankruptcy under a trader-debtor summons. This order of the proceedings in the matter makes the present case materially different from *Ex parte Walker* and *Ex parte Dales*; and adhering as I do to the orders made in both of those cases, I adhere also to the order which has been made in the present case; and as the proposal for an arrangement has been approved and adopted by the learned Commissioner, it is now the duty of this Court to annul the bankruptcy. Upon the question of costs, however, I think that the case stands in peculiar circumstances, and I am not disposed to visit the creditor with costs, nor do I think that he ought to receive any. Therefore, bearing in mind the course taken by the learned Commissioner and the particular circumstances of the case, I am of opinion that no costs ought to be given to either side, and I must repeat the expression of my great regret at what I have heard as to the large amount of costs which has been incurred in the matter.

LORD JUSTICE TURNER.—I entirely concur in the view of my learned Brother. The true position of the matter is this: that while the act leaves the creditor at liberty to proceed, it leaves him to proceed at his own peril. I am not prepared to say that there may not be many cases in which a creditor who takes proceedings after a petition for arrangement has been presented, may not subject himself to the costs of annulling the bankruptcy by proceeding under a trader-debtor summons. However, I am of opinion that in the circumstances of the present case, the petitioning creditor ought not to be ordered to pay the costs. He had the power and the legal right to proceed, although, if he proceeded it must be at his own peril, and

he might render himself liable to the costs; but here the learned Commissioner has upheld his right, and, although he has taken a position which might have subjected him to an order for payment of costs, I think that he should not be ordered to pay them in this instance. The result is, that the adjudication must be annulled; both parties must bear their own costs, and the deposit be returned to the Messrs. Arnold.

LORDS JUSTICES. } *Ex parte SYBRANDT, in re*
Jan. 21. } NEVINS.

Practice—Office Copies of Proceeding in annulled Adjudication.

One of the Commissioners having refused to order office copies of proceedings in an adjudication which had been annulled to be furnished, in aid of a defence to an action in a foreign court, the Lords Justices, without deciding whether the Commissioner was wrong or right in his refusal, ordered the office copies to be furnished on the usual terms.

This was an appeal from the refusal of Mr. Commissioner Perry, of the Liverpool District Court of Bankruptcy, to order the delivery to the petitioner, Mr. Sybrandt's agent, of office copies of the proceedings under a bankruptcy which had been annulled with the consent of the only creditor who had proved. The affidavit in support of the petition stated, that the petitioner and the bankrupt Mr. Nevins had been partners in New Orleans. The bankrupt had afterwards traded alone in Liverpool, and after the bankruptcy the petitioner claimed a balance as due to him on the final adjustment of the partnership accounts. The assignees insisted that the balance was on the other side, and the question was submitted by the petitioner and the assignees to arbitration, the result of which was, that a debt of 1,600*l.* and upwards was awarded to be due from the bankrupt's estate to the petitioner, and a proof was intended to be made for that amount. Before, however, any proof was actually made, the bankruptcy was annulled, with the consent of

the trade assignee, who was the only creditor who had proved. The petitioner, Mr. Sybrandt, and the bankrupt, Mr. Nevins, returned to America, where the latter took proceedings against the former on the subject of the accounts which had been referred to arbitration, and the petitioner, being advised that office copies of the proceedings in the bankruptcy were essential to the successful defence of the American suit, applied for such copies. Mr. Commissioner Perry held that, as the bankruptcy had been annulled, they ought not to be furnished.

Mr. De Gex, in support of the petition, relied upon the universal practice of allowing copies to be taken when it was sworn, as here, that they were required in furtherance of the ends of justice.

[LORD JUSTICE TURNER.—What jurisdiction has the Commissioner to make the order when the bankruptcy is annulled?]

Mr. De Gex.—No one has questioned the jurisdiction. The Commissioner did not rely upon want of jurisdiction, but merely said they ought not to be furnished.

[LORD JUSTICE TURNER.—The order annulling the adjudication may render all that has been done under the bankruptcy of no effect, and that may not be before the American Courts; who can tell what use will not be made of the proceedings in the American courts?]

Mr. De Gex.—The petitioner will hardly be advised not to state all the facts to the American Courts, and if he were, the other side would supply the deficiency. This Court will not presume that the American Courts will deal with the proceedings here in any manner other than in accordance with the law of England.

LORD JUSTICE KNIGHT BRUCE.—The proceedings in the superior courts of America are conducted, I believe, with great regularity and precision. Their Courts observe very scrupulously the comity of nations. They will, no doubt, deal with the office copies in a way consistent with the justice of the case. Whether the Commissioner was right or wrong in his refusal we, by no means, intend to

say, or to intimate any opinion on the point. I think this Court has jurisdiction to make the order, and I am disposed to make it, if the Lord Justice sees no objection.

LORD JUSTICE TURNER.—The copies may be furnished on the usual terms.

LORDS JUSTICES. } *Ex parte* CORLES, *in re*
Jan. 21. } PALMER.

Jurisdiction—Authority to Registrar to make Order after the Death of a Commissioner.

A Commissioner obtained leave of absence, and the Lord Chancellor, under the powers of "the Bankruptcy Act, 1854," (17 & 18 Vict. c. 119.) appointed the registrar attached to his Court to act in his stead for two months. The Commissioner died before the two months expired:—Held, that an order made by the registrar sitting under this appointment, dated the day after the death of the Commissioner, was void.

This was an appeal from an order made by Mr. Waterfield, the Registrar of the Birmingham District Court of Bankruptcy. The facts of the case it is unnecessary to state, as they were not entered into, by reason that a preliminary objection was raised as to the jurisdiction of the registrar. The point was this: Mr. Balguy, the Commissioner of the Birmingham District, petitioned the Lord Chancellor for, and obtained, leave of absence, and his Lordship at the same time, by order, dated the 3rd of December 1857, which, after mentioning "the Bankruptcy Act, 1854," (17 & 18 Vict. c. 119,) and reciting the fact of Mr. Balguy's illness and his application that some person should be appointed in his place, proceeded thus:—"Now, upon reading the application of the said John Balguy and the medical certificate there referred to, and in pursuance of section 6. of the above act, I do hereby grant to the said John Balguy leave of absence, and do appoint Charles Waterfield, Esq., one of the registrars of the Court of Bankruptcy, acting in the county, to act as the

Commissioner of the Court of Bankruptcy for the Birmingham District, in the stead of the said John Balguy, for the period of two months from this day, or until further order."

Mr. Balguy died on the 16th of December, and on the 17th the news was announced by Mr. Waterfield, in the Bankruptcy Court, and afterwards, on the same day, he made the order complained of in the above-mentioned petition of *Ex parte Corles, in re Palmer*, annulling the adjudication, and ordering Mr. Corles to pay the costs. That gentleman therefore appealed.

Mr. Clement Swanston stated the preliminary objection of want of jurisdiction by reason of Mr. Balguy's death (1).

(1) The 6th, 7th and 8th sections of the act are as follows:—

"6. Where a Commissioner or registrar, acting either in London or in a country district, is temporarily hindered from discharging his duty by illness or unavoidable absence, the Lord Chancellor may, if he shall so think fit, appoint a fit person, who in the case of a Commissioner shall be a serjeant or barrister-at-law of at the least seven years standing at the Bar, to act in the stead of such Commissioner or registrar as aforesaid, during his illness or unavoidable absence."

"7. Where a Commissioner or registrar acting in a country district is absent for any reasonable cause, the Lord Chancellor may, if he shall so think fit, from time to time appoint a fit person, who in the case of a Commissioner shall be a serjeant or barrister-at-law of at the least seven years standing at the Bar, to act in the stead of such Commissioner or registrar as aforesaid, during such period or periods as shall not exceed in the whole the period of two calendar months in any one period of twelve consecutive calendar months."

"8. Every serjeant, barrister, or other person who shall under this Act act in the stead of a Commissioner or registrar, or in succession to a registrar, but without a permanent appointment as registrar, may and shall, while his appointment remains in force, have, discharge and execute all the jurisdiction, rights, powers, duties and authorities belonging to the office of the Commissioner or registrar in whose stead or in succession to whom he shall for the time being act, with full validity and effect to all intents and purposes."

Mr. Bacon and Mr. Cracknall contended that as the order of the Lord Chancellor was absolute in appointing Mr. Waterfield to act as Commissioner for the space of two months, or until further order, he was justified in making the order complained of, without any reference whatever to the fact of the Commissioner being in existence or not. This was made plain by the words of the 8th section, by which it was enacted, that every person acting for a Commissioner shall, while his appointment remains in force, "have, discharge and execute all the jurisdiction, rights, powers, duties and authorities belonging to the office of the Commissioner in whose stead he shall for the time being act, with full validity and effect to all intents and purposes."

LORD JUSTICE KNIGHT BRUCE. — Of course, the powers of the registrar ceased immediately on the death of the Commissioner, and he had no power to make the order; and it must, consequently, be discharged.

LORD JUSTICE TURNER entirely concurred.

Mr. Cracknall then drew the attention of the Court to the fact, that Mr. Sanders, the newly-appointed Commissioner of the Bankruptcy Court, had been appointed as successor to Mr. Daniel, and if he was at the date of the order a Commissioner, Mr. Waterfield might, under his appointment, be considered as the deputy of Mr. Sanders, and so the order would be good.

LORD JUSTICE KNIGHT BRUCE.—After much trouble and delay, we have at length been informed, that Mr. Sanders's patent was not sealed until the 18th of December, the day after the date of Mr. Waterfield's order, which will be accordingly discharged.

The deposit was ordered to be returned.

L.C. { *Re* THE LONDON AND BIRMING-
June 2. { HAM FLINT GLASS AND ALKALI
COMPANY.

Joint-Stock Company—Winding-up.

*A. B., the assignee of a debt from a joint-stock company to an amount under 50*l.*, upon which judgment had been obtained and execution issued, petitioned in his own name, and as attorney of the original creditor, for a winding-up order under the Joint-Stock Companies Acts, 1856, 1857. The Commissioner dismissed the petition as the debt was under 50*l.*, and the petition was not presented by the legal creditor; but, upon appeal, this was reversed, the Lord Chancellor considering that there having been execution, the amount of the debt was unimportant, and that the petition was regular, it being presented in the name of the original creditor.*

This was a petition, by Mr. Wright, on his own behalf, and as the attorney of creditors of the above-named company, who had assigned to him a judgment debt against the company; and the petition, which was presented under the Joint-Stock Companies Acts, 1856, 1857, prayed that the affairs of the company might be wound up.

The petition was dismissed, by Mr. Commissioner Sanders, on the ground that the debt was under 50*l.*, and that the petitioner was not the legal creditor, but only the assignee of the original creditors.

By the 67th section of the Joint-Stock Companies Act, 1856 (19 & 20 Vict. c. 47), a company might be wound up by the Court whenever the company was unable to pay its debts. By the 68th section it was enacted, that a company should be deemed to be unable to pay its debts whenever in England or Ireland execution issued on a judgment, decree or order obtained in any court in favour of any creditor in any suit or other legal proceeding instituted by such creditor against the company, was returned unsatisfied in whole or in part by the sheriff of the county in which the registered office of the company was situate. The 69th section provided, that any application for the winding up of a company

should be by petition, and there should be filed or lodged at the time when such petition was presented an affidavit verifying the same: such petition might, in cases where the company was unable to pay its debts, be presented by a creditor or a contributory, but where any other ground was alleged for winding up the company, a contributory alone was entitled to present the petition.

Mr. De Gex, in support of the petition, contended that the provisions of the act contemplated a creditor equitably entitled, and were not confined to a creditor who could sue in his own name in a court of law. The 68th section, by alluding to a "decree," clearly pointed to an equitable creditor. The petition also being presented in the name of the original creditors as well as of the attorney, obviated any objection. A judgment having been obtained, the amount of the debt became unimportant.

The LORD CHANCELLOR said, that the Commissioner had dismissed the petition either on the ground of the amount of the debt or of the nature of the demand. In this case the petitioner was the assignee of joint creditors who had obtained judgment and issued execution, to which a return of *nulla bona* had been returned. With regard to the amount of the debt there could be no question, as the act did not provide that when judgment was obtained it should be for any specific amount. It was only when there was a demand of the debt it should exceed 50*l.*, and, therefore, had the original joint creditors presented this petition they would have been entitled to the order. Then the question arose, whether the assignee of the debt, who petitioned on his own behalf and as attorney of the original creditors, could be considered a creditor under the 69th section. *Mr. De Gex* had argued, and with a great deal of reason, that in the 69th section a creditor might be either a legal or an equitable creditor, and that the words would necessarily include the case of a person entitled to an equitable debt, that is, a debt to which he was entitled under a decree or order of the Court of Chancery. The question was, whether the assignee of the judgment was a creditor.

He was equitably entitled, but was he such a creditor as the section pointed out? Although that section included a person having a decree in his favour, there was considerable doubt whether an assignee of a debt was included, there being a legal creditor. But here the present petitioner had petitioned not only in his own name, but in the name of the original creditors, as their attorney. It was clear that the present petitioner as their attorney was entitled, among other things, to petition in their names; and, therefore, it was unnecessary to decide whether a merely equitable creditor was entitled to petition for a winding-up order. Under these circumstances, the Commissioner ought not to have dismissed the petition, as it was the petition of an assignee of creditors who was representing them, and as the act did not require the debt to amount to 50*l*.

LORDS JUSTICES. } *Ex parte* HARNDEN, *in re*
Feb. 11. } HARNDEN.

Conditional Certificate—Salary of Public Servant—Public Policy.

*A timber measurer in a dockyard carried on the business of an eating-house keeper, which was managed by his wife. The latter business not thriving, he petitioned for an adjudication, which he obtained. He then sold the business, and handed the proceeds to the official assignee. One of the Commissioners granted him a second-class certificate, with the condition that he paid a certain part of his salary while he continued timber measurer until he had paid 7*s*. 6*d*. in the pound on the debts proved. On appeal, the Lords Justices granted an immediate unconditional certificate of the third class.*

It is against public policy that the salary of a public servant should be reduced by the application of any part for the payment of debts.

This was the petition of the bankrupt, praying that the condition annexed to his certificate might be struck out. It appeared from the petition, affidavit and deposition of the petitioner that before the filing of the petition he carried on business

as an eating-house keeper in Ivy Lane, the business being conducted by his wife, and that he held the situation of measurer of timber, at a salary of 150*l*. a year, in Her Majesty's dockyard at Chatham. On the 25th of October last, finding that for the last year the business in Ivy Lane had fallen off, in consequence of credit being allowed to the customers against the wish and the remonstrance of the bankrupt, he sold the same, and petitioned the Court of Bankruptcy for an adjudication, which was pronounced on the same day. On the 10th of December he passed his last examination before Mr. Commissioner Fonblanque, and on the 5th of January 1859 he applied for his certificate to Mr. Commissioner Goulburn (who sat for Mr. Fonblanque), and he was opposed by four creditors, a butcher, a baker, a grocer and another, whose debts amounted respectively to 51*l*., 20*l*., 7*l*. and 11*l*., and the Commissioner granted a certificate, and at the close of his order said as follows:—
“ Having regard to the conformity of the bankrupt to the law relating to bankrupts, and to the conduct of the said bankrupt as a trader before as well as after his bankruptcy, it is ordered that such certificate be and the same is hereby allowed of the second class, upon condition of the said bankrupt paying annually into the hands of the official assignee, for distribution among his creditors who have proved, until they shall have been paid the sum of 7*s*. 6*d*. in the pound upon their debts, the sum of 20*l*. so long as he shall retain his situation as a timber measurer in Her Majesty's dockyard at Chatham.” The only means of the bankrupt to maintain himself, his wife and three children, of the ages of eighteen, eleven and seven, was his salary and 1*l*. a week he received for a boarder and lodger, a deaf and dumb woman. He paid the whole produce of the sale of his business to the official assignee. He had given upwards of 400*l*. for the goodwill of the business, all of which was lost. No accounts were kept, the wife not being an expert writer, keeping her accounts, when there were any, with chalk on the wall, and the business being substantially a ready-money one.

The bankrupt was examined *viâd voce* before the Court, and his evidence was in strict conformity with his petition and deposition; and he swore that his wife, by way of inducing him to continue the eating-house business, assured him that if he would consent, she felt sure she could extricate him from all his difficulties.

He admitted that he had not stopped the business as soon as he thought advisable, because he had not courage to do so at once against the positive wishes of his wife.

Mr. Bacon and *Mr. Charles Hall* supported the appeal, and cited the following cases:—

Ex parte Hammond, 6 De Gex, M. & G. 699; s. c. 24 Law J. Rep. (N.S.) Bankr. 2.

Ex parte Anderton, 1 De Gex & Jo. 298; s. c. 26 Law J. Rep. (N.S.) Bankr. 54.

Mr. Selwyn appeared for the opposing creditors, namely, the before-enumerated tradesmen, and argued on the several distinctions which existed between the facts deduced by this case and those which existed in *Ex parte Hammond*, and expressed his trust that the Commissioner's judgment, lenient judgment as he considered it, might be upheld.

LORD JUSTICE KNIGHT BRUCE. — The bankrupt's conduct has been imprudent, but I do not think inexcusably so; great allowance must be made. I do not think that he could be justly censured for permitting his wife to engage in business with a view of increasing their common income. He has erred probably in want of firmness in not insisting on his own opinion being followed, rather than the opinion of his wife; but so large a portion of mankind have been found liable to err in the same way that it might be thought "righteous overmuch" to blame him severely for such an error. There has not been shewn the slightest ground for impeaching the bankrupt's integrity or good intentions: it is only to be regretted that he had not displayed greater firmness. As to the question of keeping books, I am of opinion that, in a business of this description, and

especially considering that it was carried on by the wife, and under the particular circumstances, and considering also the character of the transactions, a lenient view ought to be taken of the case. But at the same time, as it sufficiently appears that it ought to be attributed to the bankrupt's own want of firmness that matters proceeded as they did, it seems to me, and, I believe, also to my learned Brother, that an immediate and unconditional certificate, but one of the third class only, should be awarded. I desire it, however, to be known that the alteration of the class of the certificate does not involve the slightest imputation upon the integrity of the bankrupt. As to his qualification for continuing to hold his situation in the public service, the matter does not stand in a worse position than when it left the learned Commissioner.

LORD JUSTICE TURNER. — Generally speaking, it has not been found a prudent course to annex a condition of this kind to a bankrupt's certificate. By such a proceeding he is sent back into the trading world with power to contract new debts, but crippled in his means of liquidating them. In the present case, moreover, regard must be had to the interests of the public in having their servant's salary incumbered by a condition such as that which has been annexed to this certificate. The case is altogether one of a peculiar kind. It is not the case of a man carrying on business himself and failing, but of a person whose wife insisted on carrying on the trade, and represented to him that, if allowed to continue in it, she should be able to extricate him from all his difficulties. With reference to the class of certificate to be granted, the Bankrupt Law Consolidation Act provides that where the bankruptcy has not arisen from "unavoidable losses and misfortunes" the certificate is to be of the third class; and it cannot be said that in this case the bankruptcy has arisen wholly from unavoidable losses and misfortunes; for I cannot see that the bankrupt has not had power to stop the trading at an earlier period, notwithstanding the wishes and representations of his wife. There will therefore be an order for an immediate

unconditional certificate of the third class. This, however, involves no reflection upon the bankrupt's character. The bankrupt will take back his deposit of 20*l.*, and the opposing creditors will have their costs out of the estate.

LORD JUSTICE KNIGHT BRUCE added—The bankrupt is to be at full liberty to state to his official superiors in the dockyard that the variation which we have made in the class of his certificate is not intended by us to cast any reflection whatever upon his integrity. The condition will be expunged, for it is contrary to public policy that the salaries of its servants should be reduced below that amount which the authorities consider adequate payment for the duties they have to perform.

LORDS JUSTICES. } *Ex parte* HOLDERNESS, in
July 4. } *re* HOLDERNESS.

Certificate—Offence under Clause 3. of Section 256. of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106.

A trader who had made an equitable mortgage of ships to his brother was pressed by his bankers to give them security for his overdrawn account with them. The bankers produced an agreement, already drawn, to mortgage the ships, which he executed without informing them of the equitable charge. In less than six weeks he was adjudicated bankrupt. One of the Commissioners held, that he had been guilty of "obtaining the forbearance of a debt by fraud or false pretence," within the meaning of the above-mentioned clause, and suspended his certificate for three years without protection, and then to be of the third class. On appeal, the Lords Justices ordered the certificate to be of the second class; but as there had been a departure from truth on the bankrupt's part, the decision was otherwise confirmed.

This was an appeal of the bankrupt from a decision of Mr. Commissioner Ayrton, of the Leeds District Court of Bankruptcy. Mr. John William Holderness was a timber-merchant, ship-builder and commission-

agent at Hull, and became indebted to his brother, Thomas Hunter Holderness, of Liverpool, in a large sum of money, to secure which he, on the 16th of November 1857, agreed to sell to him three vessels, which were then being built upon his (Mr. J. W. Holderness's) premises at Richibuctoo, in the colony of New Brunswick, at a specified rate per ton, but it was provided that if the vessels should realize a larger sum than the money due, the surplus should be paid to him. In the following spring he had overdrawn his account with Messrs. Pease, Liddell & Co., his bankers, several thousand pounds; and on the morning of the 30th of April 1858 they requested him to call on them. This he did, and at the interview they urgently pressed him to give them some security, and they produced, already prepared, a written agreement to mortgage to them the same three vessels, to secure the banking debt due, but not exceeding 14,000*l.* He accordingly signed the agreement, without alluding to the equitable charge in favour of his brother. He stated by his affidavit that it was his intention to go to Liverpool and induce his brother to waive his claim, or at least to allow priority to the bankers, but he failed to do so. After the agreement the account went on as before, until the 10th of June 1858, when Mr. J. W. Holderness was adjudged bankrupt, and assignees were appointed, of whom Mr. Pease, the banker, was one. The bankrupt passed his last examination on the 25th of March 1859; and on the 11th of May the certificate meeting was held, when the bankrupt was opposed by Mr. Pease and the other assignees, on the ground that he had been guilty of an offence against the third clause of the 256th section of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106).

The Commissioner was of opinion that the 256th section of the act, enacting that "if it shall appear that a bankrupt has committed any of the offences thereunder enumerated, the Court shall refuse to grant such certificate, or shall suspend the same for such time as it shall think fit, and shall in like manner refuse to grant the bankrupt any further protection;" one of which offences, the third, being: "if the bank-

rupt shall have contracted any of his debts by any manner of fraud, or by means of false pretences, or shall by any manner of fraud, or by means of false pretences, have obtained the forbearance of any of his debts by any of his creditors,"—he had no authority to do more than grant a certificate of the third class; to be suspended, however, for a period of three years, without protection in the mean time.

From this decision the bankrupt appealed. The state of the evidence in the case is fully referred to in the judgment.

Mr. Bacon and *Mr. Baggallay*, for the bankrupt, admitted that the fact of concealment of the prior charge in favour of his brother appeared to be a strong accusation against him; but it was quite plain from his oath, that he intended to go to Liverpool, and try to induce his brother to forego his priority; that his banking account was not increased after the date of the agreement, nor was any new debt contracted with the bankers; that, under these circumstances, the bankers were not in any worse position than they would have been if he had not executed the agreement to them, since he had been adjudicated bankrupt within six weeks after the date of that instrument. Lastly, they insisted strongly on the great impropriety of the bankers exercising such pressure as they had done, and particularly in having an instrument of security already prepared for his execution.

Mr. Selwyn and *Mr. Eddis* appeared for the assignees, but were not called on.

LORD JUSTICE KNIGHT BRUCE said, it did not appear to him that the creditors, whose particular interests were now represented before the Court, had suffered in any way by what the bankrupt had done. It did not appear that there had been any important delay even, in consequence of what took place; but unfortunately, not only by what took place in April 1858, but also by what had taken place in the latter part of the preceding year, the bankers were led to believe that the bankrupt's interest in the three vessels referred to was not subject to any incumbrance whatever. However little they might have suffered, it

was impossible for the Court to pass over the suppression of truth into which, under some pressure it was true, the bankrupt had allowed himself to be surprised. It would therefore be impossible to adopt a conclusion, which would be one of so bad an example, as to mitigate the sentence pronounced. Of course, the mere apprehension of a bad example would not justify the Court in maintaining a sentence which they thought there was solid ground for varying; but in the present case he feared there was not such an amount of solid ground, however painful under the circumstances it might be to come to that decision. At the same time, he did not see why the certificate, when granted, was to be of the third class only. He thought, if his learned Brother did not dissent from him, that it might be of the second class, which, however, would by no means indicate their approval of the course the bankrupt had taken.

LORD JUSTICE TURNER concurred, but added that, although he could not consent to any variation of the judgment, other than that of altering the class of certificate, he extremely disapproved of the pressure exercised upon the bankrupt by the bankers.

LORDS JUSTICES. } *Ex parte* FRAMPTON, *in re*
 Aug. 2. } FRAMPTON.

Adjudication—Agency for Bankrupt—Bankrupt Law Consolidation Act, 1849, s. 104.

A person, before leaving this country, gave a general authority (but it was not proved whether verbal or written) to his uncle to act for him in the arrangement and settlement of his affairs. Soon after his departure he was adjudicated bankrupt, and the uncle instructed a solicitor to dispute the adjudication. One of the Commissioners refused to hear the solicitor on the ground that, under the 104th section of the above statute (12 & 13 Vict. c. 106), express agency was necessary. On appeal, the Lords Justices reversed the decision, and ordered "that the uncle should be allowed to appear before the Commissioner to dispute

the adjudication by such solicitor as he should think fit." "Such person," mentioned in the section, does not apply only to the bankrupt himself.

This was the petition of Mr. Charles Rothsay Frampton, a bankrupt, stating that he attained the age of twenty-one in the month of February 1859; that in June following he left England to reside in Canada, where he now is; that before leaving he constituted Mr. Edward Frampton, his uncle, and who had been his guardian, his general agent to arrange and settle such of his affairs as then remained unsettled; that for this purpose he left in his uncle's hands more money than enough to settle all claims upon him, and that his departure from this country was not for the purpose of defeating or delaying his creditors; that on the 4th of July Mr. Edward Frampton received notice from the Court of Bankruptcy of the Bristol District, that the petitioner had been, on the 2nd of that month, adjudicated bankrupt; that on the 9th Messrs. Bubb, solicitors, of Cheltenham, the petitioner's solicitors, and who in this matter were expressly instructed by Mr. Edward Frampton, gave notice of intention to dispute the adjudication; that at the sitting held for that purpose, Mr. Abbott, of Bristol, agent for Messrs. Bubb, appeared to shew cause against the adjudication, alleging that Mr. Charles Rothsay Frampton was not nor had ever been a trader; that he had committed no act of bankruptcy; that a part of the debt claimed by the petitioning creditors was not legally due, and that so much of the debt, if due, was not sufficient to support an adjudication. In opposition to Mr. Abbott it was insisted that he had no express authority to appear, which objection Mr. Commissioner Hill allowed, making the following order:—"This Court doth order that the bankrupt having left this country, and gone to America, and there being no agent on his behalf entitled to appear and be heard against the adjudication, the application made on behalf of the said bankrupt to be heard in disputing the said adjudication be refused; but the advertisement to be suspended to a day to be fixed, in order

to afford an opportunity for an appeal" (1). The prayer of the petition was for a reversal of this order.

The only evidence of agency was in the affidavit of Mr. Edward Frampton, who swore, "I have a general authority from my nephew, and I believe in writing, to act for him."

The 104th section of the act enacts, "that before notice of any adjudication of bankruptcy shall be given in the *London Gazette*, &c., a duplicate of such adjudi-

(1) The judgment of the learned Commissioner, so far as it sets forth his reasons, is as follows:—"It was argued that nothing short of express agency would suffice. First, if implied agency were sufficient, it might happen that many persons would have equal authority to make or to oppose such an application; and in such an event how, it was asked, would the Court decide as to whether the name of the bankrupt should be used to support or to defeat the adjudication? On behalf of the petitioning creditor, Mr. Clifton, the solicitor was called, who proved that he was acting for the alleged bankrupt up to the time of his departure, and this gentleman took no part in the present application on the one side or the other. The questions to be considered are, first, whether or not any implied authority will be sufficient to give applicant a *locus standi*. Secondly, whether a sufficient implied authority has been shewn to exist in Mr. Edward Frampton, or if not in him, then in Mr. Bubb. And, thirdly, if in Mr. Bubb, whether it has been executed in due time. The main question no doubt is, whether any authority short of express agency is sufficient, as the law now stands? That a provision which would enable the Court to admit a party in opposition to the adjudication, where the alleged bankrupt is abroad and can have no notice of proceedings in bankruptcy until after they may have deeply affected his interests, it will hardly be denied is desirable for the interests of justice. Wherever the facts, or the law upon which a decision is founded, are fairly disputable, it is a misfortune to the Court pronouncing that decision that it should be deprived of the means necessary to make its judgment conform to the truth of the facts and to sound views of the law to be applied to them. And, assuredly, no means are so important as those which are furnished by hearing both sides. But I am not to inquire what the law should be, or rather what I may think it should be, but what it now is. I must not take upon myself to supply the omissions of the legislature, even assuming that the omission of a provision to the effect which I have pointed out is unintentional. The Consolidation Act and the subsequent acts amending it, control often with great particularity the practice of this Court; and with a view of leaving as little as may be to its discretion, the Consolidation Act provides that rules and orders for its government shall be made by a body of the Commissioners, and then be subject to the Lord Chancellor. It

cation shall be served on the person adjudged bankrupt personally, or by leaving the same at the usual or last known place of abode or place of business of such person, and such person shall be allowed seven days, or such extended time, &c. as the Court shall think fit to shew cause to the Court against the validity of such adjudication," &c.

Mr. Bacon and *Mr. De Gex*, for the appellant, cited the following cases:—

Ex parte Lane, Mont. 12.

Ex parte Rhodes, 2 Mont. D. & D. 41.

Ex parte Tarleton, 19 Ves. 463.

Ex parte Crowther, 4 Deac. & C. 31.

Howard v. Baillie, 2 H. Black. 618, at page 620.

Mr. Roxburgh, for the petitioning creditors, relied on the grounds stated in the Commissioner's judgment, which he read *in extenso*.

Mr. Bacon was heard in reply.

LORD JUSTICE KNIGHT BRUCE.—This petitioner must be taken to have been out of Europe during the whole of the time, which, for the present purposes, it is mate-

would be neither right in itself, nor decorous for Judges so restricted as Commissioners in bankruptcy are, to attempt to go far beyond the letter of the acts, unless under the guidance of the rules and orders, none of which apply to the questions which I have to decide. Now, the words of the 104th section, giving the right to make this application, are limited to 'such person' as has been 'adjudged bankrupt,' and this is in conformity with the general policy of the law relating to bankrupts, which is very jealous of the interference of strangers. And although exception is made in favour of creditors, yet that is clearly because their interests are affected by the adjudication, and it would be therefore contrary to every principle of justice that they should not be heard. So far nothing favours anything resembling laxity of construction in dealing with the power here conferred on the alleged bankrupt. But the hardship of dealing with the interests of a party behind his back is insisted upon, and such an argument cannot but have great weight. Its value, however, will be lessened if it should appear that it could scarcely be but that the legislature must have contemplated the existence of this hardship, without nevertheless providing any mode by which it is to be met. The only period given to the alleged bankrupt as of right for disputing the adjudication before advertisement is seven days, and the indulgence of the Court, if indulgence should be exercised, is limited to fourteen additional days. Thus not only the bankrupt, but the Court, is kept

rial to consider. During his absence he was adjudged bankrupt, and afterwards a solicitor, entitled, as I must assume, to practise in the Court of Bankruptcy, appeared on behalf of the alleged bankrupt, desiring to dispute the adjudication, which would have been a matter of course if the bankrupt himself had been present. The authority of the solicitor was, however, disputed. It was, perhaps, not a very usual thing to do, but I must assume that the petitioning creditors were entitled to raise the question. The solicitor's answer was—"I am here as agent for other solicitors in a neighbouring town, also entitled to practise in this jurisdiction, and they instruct me, under the immediate instructions of a gentleman named Frampton, of the same town, who was the guardian, and is a friend and near relation of the alleged bankrupt; not only so, but he acts under an authority, it may be written, it may be verbal, from his nephew to act for him during his absence." These facts are not disputed. In this state of circumstances, if I had been sitting as Commissioner, I should have admitted the solicitor to appear for the bankrupt and dispute the adjudi-

within very strict bounds; yet it is quite obvious that twenty-one days cannot much avail a bankrupt (if he is to exercise any will upon the subject) who is absent from the country. Is it then intended that if he have no information of the petition against him he shall forfeit his privilege, unless he has left behind him a power of attorney, so framed as to authorize an agent to protect his interests, or what the agent may consider his interests, in the event of proceedings in bankruptcy? Harsh as it may at first sight appear, I think such was the intention of the legislature, although I should be driven to the same practical conclusion, if I were to hold that the legislature has not declared its will upon this point. It appears to me that much light is thrown on the subject by the 233rd section (to which the Commissioner then at length referred). It is also worthy of remark, that the attention of the legislature has been again directed to this matter; for, by the 17 & 18 Vict. c. 119. s. 24, the twenty-one days mentioned in the section which I have just abstracted are enlarged to two calendar months. Again, the Consolidation Act has now been in force for a period of ten years. On the whole, therefore, I cannot resist the impression that it was considered by the legislature that the interests of individual debtors must give way to the interests of creditors, which are often much advanced by those powers of the act which enable the Court to place the estates of bankrupts, without much delay, under the protection of its own officers."

cation, and I think that the order now to be made ought to be to that effect.

LORD JUSTICE TURNER.—The words “such person” in the 104th section of the act cannot be held to apply only to the bankrupt personally; the only question, therefore, is, whether there was authority in the uncle to act for the bankrupt, and I think there was. The order we make will therefore be—“It appearing to the Lords Justices that Mr. Edward Frampton

is sufficiently authorized to act as agent of the petitioner, it is ordered that Mr. Edward Frampton be at liberty, on behalf of the petitioner, by such solicitor as he may think fit, to shew cause against the validity of the adjudication; and it is ordered that the inquiry as to the validity of the adjudication be proceeded with before the Commissioner. Let the petition in all other respects stand over, with liberty to apply.”

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TO THE SUBJECTS OF THE

CASES IN CHANCERY AND BANKRUPTCY,

IN THE

LAW JOURNAL REPORTS,

VOL. XXXVII.—XXVIII. NEW SERIES.

CHANCERY.

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ACCOUNT—An alleged breach of trust having taken place (if at all) at least thirty years back, plaintiffs not, under the circumstances, entitled to an account of the settlor's personal estate. A tenant for life, without impeachment of waste, pulled down the family mansion-house, and built a better mansion in another part of the settled estate, using the old materials. It appeared that for years prior to 1819, the date of the settlement, the settlor had contemplated the abandonment of the mansion and the building of another, and that the settlement contained powers of sale and exchange, and also a power to grant building leases of the settled premises, including the site of the old mansion-house. It was held, the tenant for life was not liable to an account and inquiry as to the application of the materials of the old mansion-house. *Morris v. Morris*, 329

ACCOUNTANT GENERAL—a trustee of funds paid into court. See Trust and Trustee.

ACCUMULATION—Testator gave the income of all his property to his mother for her life, and after her death he gave an annuity of 100*l.* to each of his two sisters, the longer liver to have 200*l.* After the decease of his two sisters, he gave two legacies of 500*l.* each. Testator then left the whole of his property, real and personal, to trustees, to be placed out on such securities as they should think most advisable, for the benefit of his heirs; and after decease of his mother and two sisters, the amount to be invested in landed property in Scotland, which was to be strictly entailed on his nephew and his heirs lawfully

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begotten. It was held, the gift for the benefit of the heirs of testator was a gift of the corpus as it existed at his death, for the benefit of all those who were entitled to any of his property real or personal; that the directions in the will rendered accumulations of income necessary, which could not be done for more than twenty-one years after the death of testator, by reason of the Thellusson Act; and that the direction to invest accumulations on land in Scotland did not prevent the operation of the act. *Macpherson v. Stewart*, 177

— Testator devised real estates in trust for his son G. during the joint lives of himself and T, and after decease of either of them upon trust to invest and accumulate rents, &c. until 3,000*l.* sterling should have been invested, and subject thereto upon trust for G. for life, with remainder to his first and other sons in tail, with successive remainders over; and he directed that the stock to be purchased and the accumulations thereof should be in trust for the children of G, and for default of such issue upon such trusts as G. should by will appoint, and in default of appointment, for his next-of-kin. G. and T. survived testator seventeen years, when G. died without issue, having by will appointed the 3,000*l.* to F. D, a stranger, and the trustees invested and accumulated the rents for a period of ten years from that time, when 3,000*l.* had been invested. It was held, first, that the direction to accumulate was void, except for the period of twenty-one years from the death of testator, the 3,000*l.* not being, in the event which happened, viz., the death of G. without issue, a portion for his children, nor under the power of appointment a portion for G. himself; secondly, that F. D. was entitled to so much of the stock

as was purchased with the accumulations that took place within the twenty-one years from the death of testator, and to the interest thereon; and, thirdly, that, subject thereto, the income directed to be accumulated, with the accumulations thereon, belonged to the persons from time to time entitled to the rents and profits under the limitations in the testator's will. *In re Clulow's Trusts*, 696

— See Will (*Williams v. Lewis*).

ACQUIESCENCE—If works likely to become a nuisance are erected, and subsequently carried on without any objection, the owners of adjoining estates, who acquiesced so long as no perceptible injury was sustained, are not precluded, when injury arises, from objecting to an extension of the works, or from pursuing their legal remedy to recover damages for injury sustained by such works; and when an action has been brought, and damages recovered, this Court will not restrain the execution to obtain payment of the amount, or prevent the plaintiff in the action from taking other proceedings at law. *Bankhart v. Houghton*, 478

— See Company (*Mathews v. the Great Northern Railway*). Infant. Solicitor and Client (*Gresley v. Mousley*).

ADMINISTRATION OF ESTATE—If an executor administers the estate of his testator and pays over the residue so that no part can be recovered to answer a subsequent debt of the testator, he will not as against appropriated legacies be entitled to the costs of an action brought against him by the creditor, or of a proceeding necessary to establish the debt, or of any suit by him to make the appropriated legacies available for the payment of the debt. *Noble v. Brett* and *Noble v. Hodges*, 322

— Testator died indebted on bills of exchange. The creditor, before the executors proved the will, issued a writ under the Bills of Exchange Act, and, the executors not appearing, the creditor signed judgment and levied on the goods of testator in the hands of the executors, and the sheriff sold. Specialty creditors of testator afterwards took out an administration summons, and obtained a degree at the Rolls, and moved to restrain the sheriff from parting with the money arising from the sale, and that the money should be paid into court, and the same was ordered by the Master of the Rolls. Upon appeal (reversing his Honour's order) it was held, that as the money was in the hands of the sheriff at the suit of the creditor on the bills of exchange before the decree in the administration suit, the motion must be refused, with costs. *Marriage v. Skiggs*, 433

— A father, having given a voluntary bond to trustees, conditioned for payment after his death of a sum of money to them for the benefit of his two sons, afterwards upon the marriages of the sons, assented to such bond being settled upon

trust for the benefit of said sons and their respective wives and children. The marriages having taken place upon the faith of the provision thus assented to, the trustees of the marriage settlements of the sons were entitled to claim as specialty creditors for value in a suit instituted after the father's decease for the administration of his estate. *Payne v. Mortimer*, 437

— In a suit for the administration of testator's real and personal estate, it was declared that the debts ought to be paid out of his real in exoneration of his personal estate; and upon a question as to the payment of the costs, it was held, they must be paid out of the personal estate. *Stringer v. Harper*, 643

— Charge by testator of his funeral and testamentary expenses upon a particular portion of his property specified in his will, held not sufficient to justify the Court in throwing upon that specified portion the costs of a suit for the general administration of testator's estate. *Lisley v. Taylor*, 686

— Testator left the whole of his personalty to his son absolutely, and his real estate to his son for life, with remainder to his grandson. His debts were to be paid out of his personalty, and then out of his realty in aid of the personalty. The debts consisted principally of money borrowed in order to make advances to his son, who was a banker. The son kept down the interest upon the debts out of the income of his life estate in the realty for eleven years, and then the bank failed. A dividend was subsequently paid, which was sufficient to satisfy a large portion of the debts. It was held, the tenant for life was not entitled to be recouped out of the real estate for any sums which he had paid in keeping down the interest upon the debts. A receiver having been appointed both of the real and personal estate, it was held, that the expenses of such receiver must be borne by the tenant for life. *Shore v. Shore*, 940

— Testator, by his will, gave (after the death of his wife) any shares in railways, mines or other undertaking that might belong to him at his decease, to his second son, and in case of his death without issue the same to revert to his two other children. Testator was possessed of railway shares upon which, after his death, calls were made. The calls were paid by his widow, as executrix, and the company had power to make further calls. The residue was not sufficient to meet the calls. The Court directed a sale of the shares by the executrix, who was to retain the sums already paid by her for calls, and to invest the residue in consols, the dividends of which were to be paid to her for her life, without prejudice to the question out of what fund the calls already paid were ultimately to be borne. *Day v. Day*, 947

— See Limitations, Statute of. Staying Pro-

ceedings (*Canham v. Neale*). Trust and Trustee (*Fry v. Fry*).

ADVOWSON. See Vendor and Purchaser (*Edwards Wood v. Marjoribanks*).

ALIEN COMPANY—Right to sue. See Injunction.

ANNUITY—A scheme was promoted by the East India Company for granting annuities to their civil servants who subscribed to a fund upon stated terms, which in the result proved in certain cases more favourable to the fund than to the annuitant; but it was held, that in such cases the annuitant was not entitled to a refund. *Boldero v. the East India Co.*, 24

— Testator gave an annuity, or clear yearly rent-charge, of 300*l.* to his niece A. B, for her life; and after her decease he gave the said annuity or rent-charge unto her children equally, if more than one, share and share alike, to be applied for their maintenance until the youngest should attain twenty-one; on the happening of which event he directed the said annuity to be absolutely sold by such children, and the proceeds to be equally divided among them; and he charged the said annuity upon his real estates, which, subject to the said annuity, he devised to H. in fee. This gift held to create a rent-charge on the estates in fee simple. *Mansergh v. Campbell*, 61

— Testator devised certain estates in fee, subject nevertheless, and he thereby charged the same estates with the payment of an annuity of 80*l.* a year. He also devised other estates to trustees upon trust to sell and apply the proceeds arising from such sale, together with his personal estate, which he bequeathed to them, in discharge of his debts and legacies: and if any surplus should remain, testator directed the same to be paid to the then minister of a Catholic chapel, to whom he gave and bequeathed the same. This annuity of 80*l.* was held to be a charge upon the corpus of the estates; the fund for payment of debts and legacies a mixed fund; and the devise of the surplus of the proceeds arising from the sale of the property to the Catholic minister void under the Statute of Mortmain. *Thornber v. Wilson*, 145

— The chief clerk of one of the Vice Chancellors, in taking an account directed by the Court, certified that 1,002*l.* was due to J. P. in respect of the arrears of an annuity charged on real estate. The certificate was dated in November 1855. J. P. claimed interest on the debt from the date of the certificate being signed by the Judge, in November 1855, to the time of the hearing on further consideration, which a subsequent incumbrancer opposed; but it was held, that J. P. was not entitled as against a subsequent incumbrancer to such interest. Whether, if the claim had been against the assets of the grantor, it would have prevailed—*quære*. Interest on arrears of an annuity will not be given, except under special circumstances. A certificate of the chief

clerk finding money due is not “an order for payment,” within the 18th section of the statute 1 & 2 Vict. c. 110. *Manafeld v. Ogle*, 422

— Testator bequeathed all his money and securities for money to his executors upon trust to employ 400*l.* or 500*l.* in purchasing a house, and allow L. to reside therein, and have the use thereof for her separate use, and after her decease the same to go to her children (if any) equally. He further requested his said trustees to invest sufficient money in their names to produce 40*l.* per annum, and to pay the same, quarterly, to the said L, to her separate use. The Court refused, upon the petition of L, to direct the corpus of the fund to be paid to her, but declared her entitled to an annuity for her life only, and to have a sufficient fund appropriated to answer such annuity. *Re Grove's Trusts*, 536

— Duration of. See Legacy (*Bignold v. Giles*).

APPEAL—by a married woman. See Formâ Pauperis.

— for Costs. See Vendor and Purchaser (*Collard v. Roe*).

— within what time. See Enrolment of Decree.

APPORTIONMENT—Where a tenancy from year to year has been originally created by the owner of the fee, it is not determined by the death of a tenant for life claiming under the original lessor, and the 11 Geo. 2. c. 19. s. 15. does not therefore apply to such a case. Nor does the 4 & 5 Will. 4. c. 22. apply to rents reserved by parol. *Cattley v. Arnold*, 352

ARBITRATION—Arbitrators were named in a contract to determine the value of brewery premises and the plant, &c. Before entering upon the valuation they were to appoint an umpire, whose authority was to be limited to the matters in difference between the arbitrators. The arbitrators could not agree in the appointment of an umpire; and upon a summons under the Common Law Procedure Act, 1854, it was held, this was not an arbitration within the meaning of the act, and that the Court had no authority to appoint an umpire. *Collins v. Collins*, 184

— Effect of a provision in a contract for arbitration of disputes. See Contract (*Scott v. the Liverpool Corporation*).

ASSIGNMENT — Pension of retired government officer not assignable. *Lloyd v. Eagle*, 389

ATTORNEY AND SOLICITOR—An agreement between A, a certificated conveyancer, and B, an attorney, that in case A. should introduce to B. any matters of professional business for which B. would have a claim for costs, B. would allow and pay to A. certain sums of money by way of commission, is not such a permitting by the attorney of his name to be made use of upon the account or for the profit of an unqualified person, as was

intended to be provided against by the 82nd section of the Attorneys and Solicitors Act (6 & 7 Vict. c. 73.), nor would such an agreement subject the parties to the penalties for common barratry; and, therefore, where a defendant, an attorney, by his answer declined to answer interrogatories founded on a statement of such an agreement, on the ground that if the facts alleged in the bill were true, he was liable to be struck off the roll, and was liable to other pains and penalties under the statutes and laws in force concerning common barratry and maintenance, it was held, that the answer was insufficient. A witness claiming to be privileged from answering, on the ground that he is not bound to criminate himself, must at all events swear that he is advised or believes that his answer will have that effect; and it is not sufficient to say that his answer would or might criminate him or tend to criminate him. *Scott v. Miller*, 584

— See Privileged Communication. Solicitor and Client.

— Striking off the Roll. See Trust and Trustee (*Thorndike v. Hunt*).

ATTORNEY GENERAL—Service on. See Evidence.

AUCTION. See Vendor and Purchaser (*In re Carey's Estate Act*).

BANKER—A customer kept three accounts with his bankers, the whole of which were overdrawn. Upon their applying for further security he executed a deed-poll, which recited the intention to give security and charge certain estates already mortgaged with the payment of the "three several sums of money which shall, or may be found, on the balance of the several accounts, for principal, interest, commission and other usual and lawful bankers' charges, not exceeding the aggregate sum of 3,000*l*." He subsequently executed a deed of assignment for the benefit of his creditors. The real estate charged by the deed-poll was sold by the mortgagee, and after paying all incumbrances a balance remained, which was claimed by the bankers and by the trustees of the creditors' deed. It was held, upon petition of the bankers, that the security did not include the floating balance. *In re Meadows*, 891

BANKRUPT—A bankrupt, after obtaining his certificate, contracted with the creditors' assignee for the purchase of his reversionary interest in a legacy to which he was entitled under the will of his father-in-law. Shortly after the agreement had been signed the reversion fell into possession. On the day named in the contract for the payment of the purchase-money the bankrupt tendered the amount to the official assignee, who refused either to receive it or to recognize the contract. Upon a petition by the purchaser, and, in the absence of fraud or proof of insufficient value, it was held that the con-

tract was valid and ought to be completed. *In re Ward's Legacy*, 175

— See Voluntary Settlement.

BARON AND FINE—A married woman, whose earnings and property were protected against her husband and his creditors, by an order made under the 20 & 21 Vict. c. 85. s. 21, on account of his desertion of her, will be ordered the payment of a legacy given to her in general terms. *In re Kingale's Trusts*, 80

— A married woman, entitled to a legacy in reversion, was deserted by her husband in the year 1845. The legacy fell into possession and was paid into court under the Trustees' Relief Act. The married woman then obtained a protection order under the Divorce and Matrimonial Causes Act, and upon her petition the Court ordered the money to be paid out to her. *In re Rainsdon's Trust*, 334

— The whole of a fund in court belonging to a married woman was settled (under the circumstances) upon herself and children, in exclusion of the assignee, for value, of her husband; though she was in receipt of a further income for life of 26*l*. a year, and was living with her husband. *In re Welchman and in re the Trustees' Relief Acts*, 647

— Property settled to the separate use of a married woman, without power of anticipation, cannot be applied to make good a breach of trust committed by her; and the circumstance that she herself was the settlor makes no difference. *Oliver v. Carey*, 685

— A legacy of 1,000*l*. bequeathed to the separate use of a married woman was paid to her, she and her husband both joining in a release to the executors. The money was then allowed to get into the hands of the husband, who paid it to his own bankers, and mixed it with his own money, and employed it in his own business and in the family expenditure. This continued nearly twenty years, when the husband died. There was no evidence to shew the circumstances under which the money was paid to the husband's banker, nor any proof of any formal assent on the part of the wife to the mode of dealing with the fund by the husband, or of any gift of the fund by her to him. It was held, notwithstanding, that the wife's assent to the employment and expenditure of the money by the husband must be presumed, and that she could not be allowed to claim it back from the husband's estate, as if still affected by the trust for her separate use. *Gardner v. Gardner*, 903

— See Infant. Divorce Act. Voluntary Settlement (*Atkinson v. Smith and Hogarth v. Phillips*). Fines and Recoveries Act. Specific Performance (*Waldron v. Waldron*).

BARRATRY. See Attorney and Solicitor.

BILL—Right of defendant to dismiss without costs.
Wallis v. Wallis, 441

— When a plaintiff becomes insolvent, and a vesting order is made by the Insolvent Court, this Court will, on the provisional assignee expressing his desire to prosecute the suit, make an order that he do bring himself before the Court within a time limited in the order, or that the bill be dismissed without costs. *Meiklam v. Elmore*, 515

— If a bill filed in this court is not duly prosecuted, it will, though the defendant has taken the benefit of the Insolvent Act, be dismissed, with costs. *Lever v. Heritage*, 704

BILL OF SALE—Effect of registration of. See Ship and Shipping (*Orr v. Dickinson*).

— Receipt not amounting to. See Sale of Goods.

BROKER—Bonds, payable to bearer, and passing by delivery only, were deposited with bankers for safe custody, and the bankers afterwards fraudulently deposited them with their brokers as a security for money advanced, and became bankrupt. It was held, that the bonds were subject to the general lien of the brokers for all money advanced by them to the bankers, and not merely for the advance made upon the security of those particular bonds. *Semble*—The Court will take judicial notice of the custom of brokers as part of the general custom of merchants. *Jones v. Peppercorne*, 158

BUILDING SOCIETY—Members of a building and investment society, which contemplates equal advantage to all, cannot borrow from the fund of investing members without returning the benefits held out to them by the rules. A period fixed for the termination of a building society expired by effluxion of time; the funds, however, were insufficient to pay investing members the sum it was by the rules calculated they ought to receive upon their shares. It was held, the borrowing members were, by their rules, entitled to have the deeds relating to property purchased by them with the borrowed money delivered up at the end of the time fixed for the termination of the society, and also to have a receipt indorsed on the deed mortgaging the property to the society, acknowledging the payment of all monies intended to be secured thereby; but as the object of the society was not complete, that all the members still continued liable to pay monthly subscriptions to the funds until they were sufficient to pay to each investing member the sum he was to receive per share if the calculations had realized the proposed objects of the society. *Sparrow v. Farmer*, 537

— A building society was established and the rules certified under 6 & 7 Will. 4. c. 32; the directors subsequently changed the name, and sought to convert it into a freehold land society.

They made no alteration in the rules, but they applied the funds of the society towards the payment of the purchase-money of a piece of land they contracted to purchase. It was held, that the objects of the society could not be changed, and that the rules of the original society could not be adapted to any altered purpose; that the rules did not authorize the purchase of land, and that the directors must replace the money; that the trustees were not responsible for the funds, as they only acted ministerially when they signed the cheques for payment; they were, however, refused the costs of the suit. *Grimes v. Harrison*, 823

CALLS—Testatrix, who held unpaid-up shares in a banking company, bequeathed them specifically by a codicil to her will. She subsequently received notice of a series of calls on days named. This was accompanied by a notice that the first call must be paid on a specified day, and a form of receipt was inclosed. Testatrix paid the first call, but died before the days named for the other calls. Similar notices were sent to her executors fourteen days before each of the other days named for payment. It was held, that the notification of the series of calls did not create a charge on the estate of the testatrix within the meaning of the company's deed of settlement, or prevent a transfer of her shares; that the liability was created by the subsequent notice to pay, and that the legatees must take the shares *cum onere*, and that they must reimburse the executors such calls as had been paid by the executors after the death of testatrix, with interest at 4l. per cent. The practice of a company must affect the decision of a Court in questions relating to calls and the forfeiture of shares. Executors who transfer shares in a company under a decree of the Court will be indemnified from future liability, when they have brought before the Court all the facts of the case. *Addams v. Ferick*, 594

— See Administration of Estate.

CANAL—By an act obtained by the Regent's Canal Company they were empowered to make and maintain an enlargement of a certain reservoir in the lines and upon the lands delineated in the plans of such enlargement, deposited with the clerk of the peace, shewing the lines, with a section shewing the levels thereof. It was held, that the sections, as well as the plans, were incorporated in the act, and prescribed a vertical as well as a lateral limit within which the works were to be kept. By act of parliament a canal company were empowered to construct a reservoir, raising the water to a certain height. If by exercising their powers to the extreme limit, the effect would have been to cover with water other lands than those the company had taken,—*semble*, that the landowner might compel the company to purchase these lands, if the company's compulsory powers had not expired; but that if the compulsory powers had expired, the company would be restrained by injunction. *Ware v. Regent's Canal Co.*, 153

— The right of traverse by the public on a canal cannot be confined within the state of science as it existed when the undertaking was projected. The public may adapt the inventions and discoveries of practical science to secure a more complete and efficient enjoyment of rights conferred, but such inventions and discoveries must not interfere with or endanger the existence of the property in or over which such rights exist. A carrier claimed a right to navigate a canal with boats propelled by steam, both for carrying loads as well as for drawing barges. Upon a bill to establish the right, it was held, after experiments made by an engineer at the instance of the Court, that the plaintiff had a right to adapt modern improvements to the enjoyment of his rights, provided such improvements did not injure the canal or tend to destroy its existence. *Case v. the Midland Counties Rail. Co.*, 727

— Right to raise embankments. See Injunction (*Ware v. Regent's Canal Co.*).

CARRIER. See Canal.

CHARGE. See Registration of Deeds. Will.

— ON LANDS—The 1 & 2 Vict. c. 110. declares that a judgment at law shall not be enforced for a given period, but a Court of equity will in the mean time restrain trustees from paying to the debtor, a tenant for life, the income arising from the property affected until the charge can be enforced. *Yescombe v. Landor*, 876

CHARITY—If testator points out clearly the purposes of a charity he intends to establish, this Court cannot speculate upon whether it would be better for the community if a different application of the funds had been established, but is bound to carry them into effect, if they are not in opposition to the law of the country. *Philpott v. St. George's Hospital*, and *Attorney General v. Philpott*, 657

CLERGY—An incumbent may borrow money upon mortgage under the provisions of the act 17 Geo. 3. c. 53, for the purpose of enlarging and adding to the parsonage-house, as well as for "building, rebuilding and repairing," if such additions are considered necessary; and there is no objection to the incumbent advancing the money himself upon mortgage for such a purpose. *Boyd v. Barker*, 445

CLERK OF THE PEACE—A clerk of the peace appointed by the corporation of a borough under the Municipal Corporations Act, holding office during good behaviour, and having fees attached to his office, cannot enter into an agreement with the corporation to receive a salary and account for the fees, such an agreement being void on two grounds of public policy; first, because a person accepting an office of trust can make no bargain in respect of that office; and, secondly, because the law presumes that all the fees are required

for the purpose of enabling him to uphold the dignity and perform properly the duties of his office. *The Corporation of Liverpool v. Wright*, 868

CLERK'S CERTIFICATE—A summons to vary the chief clerk's certificate is a sufficient application within the 51st Order of the 16th of October 1852; and therefore, where such summons was obtained within eight days from the filing of the certificate, although not returnable within the eight days, it was held to be in time. *Wycheley v. Barnard*, 562

COLONIAL LAW. See Mortmain.

COMPANY—An act of parliament enacted, that it should be lawful for any shareholder who should have paid up one-half the amount of any share or shares of the G. N. R. Company, to require each share to be converted into two half-shares, whereof the one-half which should be so fully paid up should be denominated deferred half-share, and the other half of such share should be denominated guaranteed half-share; and thenceforth in respect of each whole share so divided, the whole of the interest and dividends which would in each year have accrued should be applied in or towards payment, in the first place, of interest or dividend after the rate of 6l. per cent. per annum on the amount paid upon the half-share so denominated "guaranteed," and the remainder, if any, should alone be payable to the half-shares so denominated "deferred," provided that the company should not pay any other or greater amount of interest or dividend upon the two half-shares than was for the time being paid on each undivided share. Upon the construction of this section it was held, the holders of guaranteed half-shares were entitled to be paid their 6l. per cent. in each year, not only out of the dividends accruing in that year, but out of all subsequent dividends; and, therefore, if in any year the dividends were more than sufficient to pay 6l. per cent. on the guaranteed half-shares, the surplus must be applied in payment, in the first place, of all arrears due on those half-shares in respect of past deficiencies, before any dividend could be declared on the deferred half-shares. The holders of the guaranteed half-shares having in a former year acquiesced in the declaration of a dividend on the deferred half-shares, whilst there was an arrear of dividend due on the guaranteed half-shares, although they had precluded themselves from making any claim in respect of those particular arrears, had not thereby renounced their rights in respect of subsequent arrears. *Matthews v. the Great Northern Rail. Co.*, 375

— The directors of a company are trustees for the shareholders; and, therefore, where directors contracted for an amalgamation of their company with another, and, without the knowledge of the shareholders, contracted for payment to themselves of sums of money as a compensation for their prospective interest in their fees, they were, upon a bill filed by a shareholder for

an account, compelled to pay such monies into court. *Gaskell v. Chambers*, 385

— A company formed in 1837, and issuing scrip certificates transferable from party to party by delivery, is not an illegal company. *In re the Mexican and South American Co., ex parte Aston*, 631

— The directors of a company, in contravention of their deed of settlement, drew bills of exchange to secure a debt incurred in building a music-hall, and at the same time mortgaged the building to secure the payment of the bills of exchange. In a suit by the mortgagee for foreclosure, it was held the mortgage was valid, that the legal estate was vested in the plaintiff, and that the company could not, in this suit, dispute the power of the directors to give such security for a past debt. *Scott v. Colburn*, 635

— Powers of directors as to cancellation and purchase of shares. *Hodgkinson v. the National Live Stock Insurance Co.*, 676

— E. B. and J. B. in 1854, by deed, assigned leasehold premises, and the copyright of a book on life assurance, to trustees, in consideration of a sum of 1,000*l.* and annuities to each, with a view to form a company. E. B. subscribed for 25,000 shares, and J. B. for 30,000; each paid such a sum for deposits as would leave 1,000*l.* due from each. In 1855 the directors accepted and confirmed the deed of 1854, and obtained the sanction of a general meeting to a loan to the company from another company. In 1856 H. M. B., a lawyer, became a shareholder and director. In December in the same year the directors passed a resolution, that E. B. and J. B. should be relieved from all liability in respect of 20,000 each of their shares, and that the same should be assigned to trustees for the company. These shares were originally taken to facilitate complete registration. H. M. B. early in 1858, filed a bill, on behalf of himself and all other shareholders, except the defendants, against the directors and two shareholders, to set aside this transaction. Afterwards, in April 1858, a general meeting of the shareholders was held, at which the directors were authorized to purchase these shares of E. B. and J. B. on their giving up the benefit of the deed of 1854. It was held, first, that the plaintiff must be taken to have been all along cognizant of and to have acquiesced in the proceedings complained of; secondly, that as the whole of the transactions of the company were entered in their books, he must be held to have had notice of them; and, thirdly, that whatever rights any of the shareholders, who were not precluded by knowledge and acquiescence from suing, might have, the plaintiff's bill could not be sustained, on account of his own incapacity by reason of his knowledge and his subsequent conduct; his suit being similar to one instituted by a plaintiff who had released the defendants. *Burt v. the British Nation Life Assurance Association*, 731

— Compulsory Powers of taking Land. See Lands Clauses Act. Railway.

— Costs of action by creditor against shareholder. See Winding-up Acts (*Ex parte Tobin*).

— Promoters. See Partners (*Hamilton v. Smith*).

— Transfer of shares tainted with unfairness. See Winding-up Acts (*Ex parte Lund*).

— Transfer of shares in scrip company by delivery. Illegality by statute since repealed. See Winding-up Acts (*Ex parte Griswood*).

— See Debentures. Production of Documents. Security for Costs. Service of Bill. Winding-up Acts.

COMPENSATION. See Specific Performance.

CONTRACT—A representation made by a party, not knowing that it is false, is binding upon him; and if the other party enters into a contract on the faith of its truth, the Court will set aside the same altogether, and not merely rectify it. Though the other party does not examine the books for four years during which the partnership continued, it not being his duty to do so, it will not bar him of relief on the score of negligence or acquiescence. The bringing of an action against the partners, and recovering a verdict against the survivor of them, does not prevent the deceived party from seeking relief in equity. *Rawlins v. Wickham*, 188

— If parties to an agreement provide for the settlement of disputes arising out of the contract by the arbitration of persons mentioned in the agreement, or to be determined when the disputes arise, this does not oust the ordinary tribunals of jurisdiction in such disputes. But if a contract provides for the determination of the contractor's claims and liabilities by the judgment of a particular person, everything depends on his decision, and until he has spoken no right arises which can be enforced either at law or in equity. *Scott v. the Liverpool Corporation*, 230

— For the purposes of an agreement not to carry on business within a fixed distance from a particular place, that distance must be measured as the crow flies, and not by the nearest practicable route. *Duignan v. Walker*, 867

— See Clerk of the Peace. Specific Performance. Vendor and Purchaser.

CONTRIBUTORY. See Winding-up Acts.

COPYHOLD—A copyhold estate was devised to trustees for a tenant for life, with gifts over to other persons in remainder. Upon the admission of new trustees to the copyhold estate, it was held, the fines and fees must be borne by the tenant for life and those in remainder in proportion to

the value of their respective interests. *Carter v. Sebrigt*, 411

CORPORATION—Tolls. See Receiver.

COSTS—Where a summons, taken out at chambers, was adjourned into court, and then abandoned by the plaintiff, the defendant was held entitled to the taxed costs of such summons. *Lister v. Bell*, 162

— The costs of an interlocutory application and order were reserved, but by inadvertence on the final decree ordering the defendant to pay all the costs of the suit, no provision was made for these costs. The defendant enrolled the decree; but, upon the plaintiff's petition, the defendant was ordered to pay these reserved costs. *Viney v. Chaplin*, 164

— Decree without costs in consequence of unsupported charges of fraud in the bill. *Rawlins v. Wickham*, 188

— In an information filed before the 18 & 19 Vict. c. 90, 'An Act for the payment of costs in proceedings instituted on behalf of the Crown in matters relating to the revenue, and for the amendment of the procedure and practice in Crown suits in the Court of Exchequer,' the Court has no jurisdiction to order the Attorney General to pay the costs of a successful defendant: *aliter*, with respect to defendants made parties after the act. *Attorney General v. Hammer*, 511

— A solicitor has no lien for his costs upon the fund in court, which is the subject of the suit, as against other parties than his client; but he has a right to prevent his client from receiving any sum recovered by his exertions until his costs are paid. Such right, however, cannot preclude a fair compromise between the parties. *Verity v. Wild*, 561

— of an issue *devisavit vel non* are in the discretion of the Court, and, where an heir-at-law obtained an issue to try the validity of the will (which, as to personalty, had been established in the ecclesiastical court), the Court, after the verdict had been returned against the heir-at-law, directed each party to pay his own costs. *Stacey v. Spratley*, 563

— An order was made against the plaintiff for payment of the costs of an application for an injunction, and execution was issued upon failure of payment by the plaintiff, but no return had been made to the writ. The defendants were subsequently ordered to pay the costs of an application to dismiss the plaintiff's bill. An appeal by the plaintiff against the first decision of the Court was still pending. Defendants moved to set off their costs against those ordered to be paid by plaintiff. The motion was granted, upon defendants undertaking not to levy for more than the balance; and as defendants had not applied for a set-off when the order was

made against them, no costs as to this application were given on either side. *Bryon v. the Metropolitan Saloon Omnibus Co.*, 798

— See Administration of Estate. Bill. Company. Devise. Injunction. Lunacy. Staying Proceedings. Trust and Trustee. Taxation. Winding-up Acts.

COUNTY PALATINE OF LANCASTER. Jurisdiction to appoint a new trustee. See Trust and Trustee (*In re Ormrod*).

COVENANT—to repair. See Landlord and Tenant.

CUSTOM—Judicial Notice of. See Broker.

DEBENTURES—A person buying debentures of a joint-stock company is bound to ascertain whether they are tainted with fraud or irregularity; and, in such a case, the facts of the assignment having been registered and of interest having been paid, make no difference unless the shareholders can be shewn to have acquiesced. *Athenaeum Life Insurance Co. v. Pooley*, 119

DEBTOR AND CREDITOR. See Insurance. Poor. Voluntary Settlement.

DECREE. See Enrolment of Decree.

DEED—A. B, under the mistaken notion that he was, as heir-at-law of his father, entitled to shares in a joint-stock company as realty, executed a deed, by which he joined in indemnifying the directors in respect of certain advances made by them. It turned out upon inquiry that the shares were personal estate, and A. B. filed his bill to be relieved from the deed, and the Court made a decree in his favour, which decree was, upon appeal, affirmed. *Broughton v. Hutt*, 167

— executed in blank. See Vendor and Purchaser (*Taylor v. Great Indian Peninsular Rail. Co.*)

— See Fixtures. Voluntary Deeds and Settlements.

DEMURRER—for want of equity. See Solicitor and Client.

DEVISE—Testator directed that freehold premises should be given to the inhabitants of B. to found an asylum, and that his executors should call a meeting of the inhabitants to appoint a committee and trustees to carry out the same, but in the event of the said inhabitants not appointing a committee or not being willing to carry out the scheme, he willed that all his said property so given to the said asylum should belong to W. H. W. The gift to the charity being void, the devise to W. H. W. took effect. *Warren v. Rudall and Hall v. Warren*, 70

— Testator by his will settled estates and declared that the same should be forfeited and go over in the event of the party entitled for the

time being to possession not repairing a column which he was building, but which he left incomplete at his death. Upon a bill for the administration of testator's estate, it was held, that the party entitled to possession of the estates was not liable to complete the column, and that no contract could be implied to make the testator's residuary estate liable to the expenses of completing it. Though all the questions except those relating to the column and the payment of costs had been settled by agreement between the parties, the suit remained an administration suit, and the costs were ordered to be paid out of the residuary estate of the testator. *Joliffe v. Twyford*, 93

— Testator, in 1834, devised a sum of money to be secured so as to raise an annuity of 2,000*l.* for his wife, "and on her decease the sum set apart for such payment to become the property of my son, G. C, so far as he shall receive the interest on the said sum during his life, and on his demise the principal to become the property of any child or children he may leave born in lawful wedlock, and in such sums as my said son shall will and direct; but in case of my son dying before his mother, then and in that case the principal sum to be divided between the children of my daughters." This son married, and had a son during the life of testator, and died before testator. It was held, by the House of Lords (*Lord Cranworth* and *Lord Wensleydale dissentientibus*), that this son was entitled to the fund, for that the whole context of the will required that "dying before his mother" must be read "dying without issue before his mother." Two appeals were presented, each set of appellants having the same interest. No costs were given. *Abbott v. Middleton* and *Ricketts v. Carpenter*, 110

— Testatrix devised all her real estate to trustees upon trust for three persons for life, with remainder to their issue in tail, "and for default of such issue, then upon trust for the right heirs of my grandfather, Sir T. S, Bart., deceased, by Mary, his second wife, also deceased, for ever." It was held, by the House of Lords, affirming the decision of Vice Chancellor Kindersley, that the ultimate limitations created an estate tail special and not a fee simple. *Vernon v. Wright*, 198

— Testator desired that his two sons might have the use and occupation of certain lands, they paying a stated rent, and that, in default of payment, or if they converted the arable land into tillage, they should no longer have possession thereof. It was held, that personal use and occupation was not necessary, and that they might underlet the property. Testator gave his residuary real and personal estate to trustees, upon trust, as to one-fifth, for each of testator's five children for life, and after his or her decease for his or her children which he or she should leave at his or her decease; but provided that if any child should die without leaving any child at his or her death, such share was to go to testator's other children for their lives and the issue of any then dead, as before directed; and after the death of his five children in trust for their children equally, *per capita*. One of testator's children died, leaving a son, who died before the last of the testator's children. It was held, the parties claiming through the son had no interest in the rents and income during the lives of the surviving children of testator; that that one-fifth was undisposed of, and that cross-remainders were not in the event which had happened to be implied. *Rabbeth v. Squire*, 565

— -- Testator devised his real estates to his only daughter for life; remainder to her husband for life; remainder to their second son for life, and afterwards to his first and other sons in tail; remainder to his daughter's eldest son for life; remainder to trustees to preserve contingent remainders; remainder to his second and other younger sons in tail; remainder to his eldest grand-daughter for life; remainder to trustees to preserve; remainder to her sons and daughters in tail. The will contained a shifting clause, that in case any tenant for life or in tail should become entitled to the Turton estates, then in possession of the husband of testator's daughter, the limitations in favour of such person should cease, as if he or she were dead, and the estates so limited were to go to the person next entitled in remainder, it being the testator's intention that both estates should not vest in the same person. In the events that happened, the eldest son of testator's daughter became entitled to the Turton estates, and he was the person next entitled to the devised estates, in case the shifting clause did not take effect. He had only one son. It was held, that the effect of the shifting clause was to divest him of the devised estates; that the Court would effectuate the testator's intention, that the property should go to the unborn sons of the tenant for life whose estate had so ceased; that the trustees to preserve took the estate, as the persons next in remainder, to support contingent remainders; and that the intermediate rents accruing between the time when the estate of the tenant for life ceased, and the birth of a son entitled under the limitations, belonged to the residuary devisee or heir-at-law. *Lambarde v. Peach*, 569

— A right to sue is a devisable interest. *Gresley v. Mousley*, 620

— Testator devised specific shares in an estate to several persons *nominatim*, to hold the same as tenants in common, and not as joint-tenants; and in the event of any of them dying before having heirs of their body, "or" making a particular disposition of his or her property, then his or her share was to go to the survivors. It was held, the devisees did not take estates tail, but estates in fee; that the gift over could only take effect on the happening of two events; that the word "or" must be read "and," although in effect it introduced a condition repugnant to the estate previously given, and made the gift over void; also, that the shares of those devisees

the value of the
Sebright, 411

CORPORATION-

Costs—Who
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Will.
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was instituted by one of them against the
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Court would decide the question between the two
other claimants as if they were the only lit-
igating parties. *Jolly v. Arbutnot*, 547

DISCOVERY—in aid of proceedings in Court of Pro-
bate. See *WELLS v. Ingram*).

DISMISSAL OF BILL. See Bill.

DIVORCE ACT—A married woman obtained a pro-
tection order from a magistrate, under the provi-
sions of the Divorce Act, on the ground of deser-
tion. A suit was then instituted against her as
a feme sole. The protection order was afterwards
discharged, on application by the husband, who
proved there had been no desertion on his part.
The plaintiff in the suit then obtained a supplemen-
tal order as of course, to bring the husband
before the Court. The protection order held
good *ab initio*, and there having been no "change
of transmission of interest or liability" the
supplemental order was discharged (*Rudge v.*
Woodon, 788). But on appeal this decision was
reversed, and the supplemental order was held
good. *Rudge v. Woodon*, 889

DOMICIL—A Scotchman by birth, having property
in Scotland, went to India, and remained there
many years. On his return he resided five years
on his property in Scotland, expending money
upon such property, and considerably improving
it. He then left Scotland, in consequence of
unpleasant domestic events, and went to Paris,
where he resided five years, purchasing expensive
furniture and keeping up an establishment there.
During this time he retained domestics at his
house in Scotland, and constantly gave directions
by letter as to his property, and particularly
as to the management of his horses and other
animals there. His furniture was left in Scotland,
but ready packed up for immediate removal. He
died in France. It was held, his domicile was
Scottish, and not French; the Court acting upon
the principle that slighter evidence is required to

support the conclusion that a man intends to
abandon an acquired domicile and to resume his
domicil of origin, than that he means to abandon
his domicile of origin and to acquire a foreign
domicil. *Lord v. Colvin*, 361

G. was born in Scotland, and went, when
quite a young man, to India, where he entered
into the service of the East India Company.
After being there more than twenty years, he
returned to Scotland. He took a house and mar-
ried in Edinburgh. He afterwards became
offended with the people there, and using very
strong expressions as to his intentions never to
return there, he came to London. He brought
his books and his property to London, and lived
in London for some years, and engaged in various
occupations. He then left London and went
to Paris, but left his books, some ornamental
furniture and other things in London, telling the
persons with whom he left them to keep them
until his return. He lived in Paris for some
years, made his will there, made it in the English
form, but described himself in it as of "Edin-
burgh"; and he died in Paris. It was held, he
had lost his domicile of origin, which was Scotch,
and had acquired, and never lost, an English
domicil. *Whicker v. Hume*, 396

DONATIO MORTIS CAUSA—A lady had a dressing-
case and a box, both containing jewellery; the
dressing-case was in her possession at the place
where she died, the box was at her residence.
On her death-bed she delivered the keys to her
servant, with directions to deliver both to the
plaintiffs in the event of her dying. This not a
donatio mortis causa. *Powell v. Hellicar*, 355

ELECTION. See *Legacy (Boston v. Barton)*.
Power of Appointment (*Woodbridge v. Wood-
dridge*).

ENROLMENT OF DECREE—Although the Court is
disposed to take a lenient view of circumstances
which may have prevented an appeal from being
prosecuted within five years, yet after that time
it is desirable that the orders as to enrolment,
&c., should be strictly adhered to. *Wellesley v.*
Wellesley, 1

On the 20th of July, 1852, a decree was
made giving an infant defendant costs out of
the estate, upon an undertaking not to appeal.
On the 9th of May, 1857, the infant attained
twenty-one, and in May, 1859, applied for leave
to enrol the decree, with a view to appeal to
the House of Lords. The application was held
too late, defendant having allowed two years
to elapse from his attaining twenty-one before
applying. *Monypenny v. Dering*, 503

Defendant entered a caveat against enrolment
of a decree on 22nd of December. On 2nd of
March he obtained an order to set down the
appeal, and served the order on 23rd of April.
On 29th of March notice was given that the
docket for enrolment would be presented for the
Lord Chancellor's signature, unless the appeal

were lodged, and an order for setting down the same served within twenty-eight days. The appeal was set down on 29th of April, after the expiration of the twenty-eight days, and the enrolment was signed on the following day. Although to prosecute the *causal* with effect, according to the 4th Order of August, 1852, the appeal ought to have been set down and notice of it served within the twenty-eight days, yet, as the defendant appeared to have been misled, the enrolment was vacated on the ground of indulgence. *Pearce v. Lindsay*, 513

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EVIDENCE—One of the partners in a firm died intestate, and in a suit for winding up the partnership affairs, a sum of money was paid into court. The intestate was also possessed of two other sums of stock, which were transferred to the Commissioners for the Reduction of the National Debt, since no next-of-kin of the intestate could be found. A claimant came forward as next-of-kin, and presented a petition in the partnership suit, claiming the money standing to the separate account of the intestate. In that suit nine affidavits were filed. The same claimant presented a petition praying for a transfer of the sums paid to the Commissioners, when nineteen affidavits were filed. On this petition the Attorney General appeared, as representing the Crown and the Commissioners. Letters of administration were then granted to the Solicitor for the Treasury, as nominee of the Crown, and a suit was instituted against him by the representatives of the first claimant, to prove his relationship to the intestate. Another claimant also came forward in this suit, by whom one affidavit was filed. The persons who made the affidavits were all dead. Upon the principle that evidence produced on a former occasion could only be made use of, in subsequent proceedings, between the same parties and upon the same issue, the nine affidavits in the partnership suit and the one affidavit in the present suit by a different claimant, were rejected, but the nineteen affidavits on the petition were admitted. The Attorney General having been served, under the 56 Geo. 3. c. 60, it was held, he must be presumed to have represented the Crown and the National Debt Commissioners and the beneficial interests of the Crown. *Lawrence v. Maule*, 681

— Upon a notice of motion for a decree a plaintiff may cross-examine a defendant on his answer, but other defendants may object to such cross-examination being read as evidence against them. After notice of motion for a decree witnesses in chief cannot be examined. *Rheden v. Wesley*, 797

— Presumption of marriage. See Legitimacy. And see Frauds, Statute of.

EXECUTOR—Testator, who died in 1855, by his will gave all his property and the residue of his estate to three persons, upon trust, to pay various legacies; he also gave legacies of unequal amounts to each of his trustees, whom he also appointed executors. The trustees were also empowered to appoint new trustees in the place of those unable to act. Testator afterwards gave an additional legacy to one of his executors. He was illegitimate, and died without having ever been married. It was held, the undisposed-of residue did not belong to the executors, but lapsed to the Crown, and that it was unaffected by 11 Geo. 4. & 1 Will. 4. c. 40. *Read v. Stedman*, 481

— Liability of executors for testator's breach of covenant to insure. *Fry v. Fry*, 593

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— A suit having been instituted by the first mortgagee to redeem or foreclose several subsequent incumbrances, the Court made a special decree, fixing a day for any subsequent incumbrancers, to redeem or be foreclosed. *Edwards v. Martin*, 49

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who died in testator's lifetime were undisposed of, and passed to the heir-at-law. *Greated v. Greated*, 756

— Testator, who had several natural children by his housekeeper, devised real estate to each of them, by name. He then devised a real estate "to such other child, if any, that might be born of his housekeeper in his, testator's, lifetime, or in due time after his death," and to such child's heirs and assigns. A child born after the date of the will took no interest under the devise. *Medworth v. Pope*, 905

— See Legacy. Will.

DISCLAIMER—Three parties claimed a fund, and a suit was instituted by one of them against the other two: one of the co-defendants disclaimed, but contended, that the Court upon deciding against the plaintiff could not go on to declare the rights of his co-defendant. It was held, the disclaiming defendant ought to have brought his case before the Court, and that as he had disclaimed, the Court would decide the question between the two other claimants as if they were the only litigating parties. *Jolly v. Arbuthnot*, 547

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— A suit having been instituted by the first mortgagee to redeem or foreclose several subsequent incumbrances, the Court made a special decree, fixing a day for any subsequent incumbrancers, to redeem or be foreclosed. *Edwards v. Martin*, 49

— A first mortgagee filed a bill of foreclosure, and asked for a decree. Subsequent incumbrancers asked, under 15 & 16 Vict. c. 86. s. 48, for a sale of the mortgaged estates. Plaintiff not consenting, the Court directed the subse-

quent incumbrancers to deposit a sum of 200*l.* to cover the expense of any ineffectual attempt to sell, and also directed a reserved bidding to be fixed sufficient to cover the amount due to the plaintiff, and made an order for sale of the estates within a given time, and foreclosure in default. *Whitbread v. Roberts*, 431

FORFEITURE—of Shares. See Winding-up Acts (*Ex parte Barton*).

FORMA PAUPERIS—A bill was filed, by a married woman by her next friend, to enforce payment of an annuity settled to her separate use, and at the hearing the same was dismissed. The plaintiff wished to appeal, but the next friend refused to allow his name to be used. The plaintiff applied to the Lords Justices, and filed an affidavit stating that she was unable to find any other person whose name could be substituted for the present next friend, and that she was subsisting entirely by charity; and their Lordships made an order, that she should be at liberty to present the appeal and take any other proceedings in the cause *in forma pauperis* without a next friend. *Crouch v. Waller*, 514

FRAUD. See Contract. Principal and Surety. Winding-up Acts. Sale of Goods.

FRAUDS, STATUTE OF—J. L. agreed by parol with J. W. for a conveyance of a life interest in real estate, part of which, a cottage, was in his own occupation; the terms were, that J. W. should be repaid the purchase-money and interest out of the rents, and should allow J. L. to continue to occupy the cottage. G, a witness, swore that this was the effect of the parol arrangement, but two witnesses swore that they had heard J. W. deny it. A short time after this agreement J. W. asked J. L. to execute an absolute conveyance of the same life interest to J. W.'s daughter, then an infant, which J. L. accordingly did; and J. W. entered into possession of the property, leaving the cottage in J. L.'s possession, rent free. J. W. wrote letters afterwards to G. and to J, saying that he had bought the property out and out, and offered J. L. an annuity for life if he would give up possession of the cottage. J. W., by will, devised his real estate to his daughter, and appointed B. his executor and her guardian. B. made J. L. an offer of the annuity on the same terms as J. W. had done, but the offer was refused. Thereupon B., as the next friend of J. W.'s daughter, brought an action of ejectment against J. L., who filed a bill to restrain it, alleging the parol agreement, and praying an injunction to stay the action, and a re-conveyance of the property on payment of what was due. Evidence of the parol agreement was held to be admissible notwithstanding the 29 Car. 2. c. 3, and a decree was made declaring the daughter of J. W. to be a trustee for J. L., who was entitled to redeem on payment of what was due. *Lincoln v. Wright*, 705

GUARDIAN—Under the Leases and Settled Estates

Act, 19 & 20 Vict. c. 120, the appointment of a guardian to infant petitioners should be made after the petition has been presented. *In re Hargreave's Settled Estates*, 197

INFANT—On marriage between a minor of seventeen and a widow of thirty-two possessed of 1,000*l.* in business, he covenanted by settlement to pay 1,000*l.* to a trustee, upon trust for the separate use of the lady for life, and if she should die in his lifetime, for the children of the lady by a former marriage. After the marriage the husband possessed himself of the stock of the wife's business, and carried it on till her death, seven years afterwards. The trustee demanded payment of 1,000*l.*, and on the husband refusing to pay, he filed a bill on behalf of the children of the former marriage. The husband set up as his defence that he was an infant, and that the wife knew the fact, at the time of the marriage. The evidence proved the infancy, and an assertion by the husband to the wife's solicitor that he was of age, but it also proved that the wife knew of the infancy. It was held, that the case upon the evidence must be taken as if the fact of infancy had been stated in the settlement; that the rights of the husband must, as to the ground of acquiescence, be taken to be the same as on the day after his marriage; that to deprive an infant of the privilege of infancy, more is necessary than shewing he made a false representation, for it must be proved that the party to whom it is made was deceived; and that contracts made with an infant, known to be so, are binding on those who enter into them, for infancy is a legal privilege, and not to be broken in upon on slight grounds. *Nelson v. Stocker*, 760

— **CUSTODY OF**—The Court of Chancery cannot decide upon the custody of infants simply with reference to what is most for their benefit, and cannot interfere with the rights of a father, unless he so conducts himself as to render it essential to the safety and welfare of the children in some serious and important respect, either physically, intellectually or morally, that they should be removed from his custody. *In re Curtis*, 458

INFORMATION. See Costs (*Attorney General v. Hanmer*).

INJUNCTION—Bill filed, by an American trading company, incorporated by the law of the State of Connecticut, in the United States of America, for an injunction to restrain defendant, a manufacturer of Birmingham, from continuing the fraudulent use, as alleged, of the trade marks of plaintiffs, and for an account of profits. Defendant, by his answer, admitted the user of the trade marks complained of, but by way of rebuttal of the charge of fraud, stated that in so using the said trade marks he had only followed a custom prevalent at Birmingham for manufacturers of goods of the kind sold by the plaintiffs to affix on the goods ordered by merchants a particular trade mark, relying on the respectability of the merchant, when known to them, for the fact that those merchants had authority

to act as agents of, or by way of licence from, the person entitled to the exclusive use of the trade marks; and, further, that he had been informed that plaintiffs themselves had ordered goods to be manufactured at Birmingham, with their own trade mark upon them, for the purpose of sale in foreign countries. These statements of defendant were left uncontradicted by plaintiffs. The Court, upon motion for decree, ordered that an interim injunction, which the defendant had previously submitted to, should be continued for a year, with liberty to the plaintiffs to bring an action within that time to try their right at law; and in case of their not proceeding at law and to trial within that time, then that their bill should thereupon stand dismissed, with costs. *The Collins Co. v. Reeres*, 56

— Where a company having power by act of parliament to raise an embankment to a certain height exceeds that height, a neighbouring landowner is not, on account of the possibility of injury to his lands, entitled to an injunction against the company; but the right to such injunction is in the Attorney General, on behalf of the public. *Ware v. Regent's Canal Co.*, 153

— One of the Vice Chancellors refused to decree the specific performance of a charter-party or to grant an injunction at the suit of the charterer to restrain a mortgagee of the ship, who had notice of the charter-party, from making a sale in pursuance of his power of sale contained in the mortgage-deed; but the Lords Justices, considering that where property is contracted to be used in a particular manner, and a purchaser buys that property, with notice of that contract, he is bound not to use it otherwise than in accordance with the contract, held, that plaintiff was entitled to an injunction to restrain the mortgagee from exercising his power of sale, and from interfering with the ship on her voyage, the injunction to continue till the hearing of the cause, and plaintiff undertaking to be answerable in damages. *De Mattos v. Gibson*, 165

— Plaintiff sold two leasehold houses, one to defendant and another to L. The conveyance to defendant contained by mistake a part of the property intended to be sold to L, but which defendant believed he was purchasing. Upon a bill filed against defendant by L. he was directed to reconvey to L. that portion which by mistake was included in the assignment to him. Defendant then brought an action at law against plaintiff, the vendor, for damages under his covenant against incumbrances. An equitable plea was put in by plaintiff, who now filed a bill for an injunction to restrain the action; but the injunction was refused. *Wild v. Hillas*, 170

— If one trader, by using the trade marks or labels of another trader, provokes a suit for the interference of the Court, the defendant, though he withdraws the marks or labels, and consents to a perpetual injunction, will still be liable to the costs of the suit, and if he does not pay

them, or refuses to pay them, the plaintiff will be justified in setting down the cause and bringing it on for hearing. *Buryess v. Hill*, 356

— Upon bill filed to restrain an action at law for damages by reason of the non-performance of a covenant in a deed to pay premiums upon a policy, the Court held that, under the Common Law Procedure Act of 1854, it was optional and not compulsory upon a defendant at law to put in an equitable plea; and that if the defendant did not choose to avail himself of his right, he could not be compelled to plead an equitable defence, although the question might be more proper for the decision of a Court of law. An injunction was granted upon motion to restrain the action until the hearing. *Kingsford v. Swinford*, 413

— The 83rd section of the Common Law Procedure Act, giving a right to plead an equitable defence, is only permissive, and not compulsory; and a defendant at law who has not exercised his option of putting in an equitable plea may come for an injunction to restrain the action, as he might have done before that act. *Gompertz v. Pooley*, 484

— A plaintiff, who files a bill against parties abroad, and on an affidavit of merits obtains an injunction to stay proceedings at law, cannot, upon a sufficient answer being put in, retain the injunction upon inferences to be drawn from a previous evasive answer and the proceedings taken upon the exceptions. And though it is suggested that the bill has been amended and filed, the injunction will be dissolved. *Mollett v. Encquist*, 507

INSOLVENT—The surplus of an insolvent's estate left in the Insolvent Debtors Court, after payment of all the debts under the insolvency, was claimed adversely by various persons, as assignees by deed from the insolvent, and also by the provisional assignee of the Insolvent Debtors Court, representing the creditors under a second insolvency of the same insolvent. It was held, this Court, and not the Insolvent Debtors Court, was the proper tribunal for adjudicating upon such conflicting claims. Whether there is a concurrent jurisdiction in the Insolvent Debtors Court, *quære*. *Cook v. Sturgis*, 345

— A writ of *ne exeat regno* was obtained against a defendant upon an undertaking by plaintiff to be answerable for damages. Defendant became insolvent, and obtained his protection, under the act, and it was held the writ must be discharged upon payment of costs by defendant, and plaintiff be released from his undertaking. *James v. North*, 374

— Insolvency no ground for staying a suit. See Winding-up Acts (*Caldwell v. Ernest*).

— See Assignment. Bill.

INSURANCE—A policy of assurance on the life

of E. W. was subject to a condition avoiding it on suicide, but provided that in case the policy should have been assigned to other parties for a valuable consideration six calendar months before the death of the assured, it should remain in force to the extent of the beneficial interest therein of the party to whom it should have been assigned. E. W. deposited the policy with the plaintiff. The policy was accompanied by a letter, stating that it was to be held "as security, in case of death or otherwise, for any notes of hand or bills of exchange you may have cashed for me." From that time a current account existed between the parties; the plaintiff cashed or discounted for E. W. divers bills of exchange, and frequently took renewals of them as they came due. E. W. afterwards shot himself. At that time a sum of money was due to the plaintiff by E. W. on several outstanding bills of exchange, &c. exceeding the amount payable on the policy; but none of them bore date much more than two months before the death of E. W. Upon a bill to obtain payment of the sums insured, it was held, the policy was duly assigned; that the security continued from the date of the deposit, notwithstanding the consideration for it was fluctuating; that the payment or withdrawal of the earlier bills did not necessitate a fresh deposit; and that it was, and was intended to be, a security for what was due on the current account at the death of E. W. or otherwise. *Jones v. the Consolidated Investment and Assurance Co.*, 66

— Effect of an alleged mistake in the indorsement on a life policy as regards the liability of the company. *Fowler v. the Scottish Equitable Life Insur. Society*, 225

— Mortgagee, by way of collateral security for his mortgage debt, insured in his own name the life of his debtor, the latter paying the premiums upon the policy. The debtor afterwards took the benefit of the Insolvent Debtors Act, obtained the ordinary vesting order, and, having put in his schedule, in which the mortgage debt was specified, and the policy, as one of the securities for the payment of such debt, obtained his discharge. The debtor, after surviving the mortgagee, died, and the insurance company paid the amount due upon the policy to the personal representatives of the mortgagee, who, after retaining thereout the amount of their debt and costs, paid the balance into court. The balance being claimed by the assignee in insolvency of the debtor, on the one hand, and by his personal representatives on the other, held, that the title of the assignee in insolvency was to be preferred. *In re Storie's Trust*, 888

— Marine Insurance. See Ship and Shipping.

INTEREST OF MONEY. See Annuity (*Mansfield v. Ogle*).

INTERPLEADER—The mortgagees of lands in settle-

ment, by the direction and with the concurrence of the donee of a power under the settlement, granted a lease at an annual rent to the plaintiff, who, with the assent of the mortgagees, covenanted to pay the rent to the donee of the power, unless it should be demanded by the mortgagees. The deed of settlement, as well as the power contained therein, was referred to, but its terms were not set out in the indenture of lease. The rent payable under the lease having fallen into arrear was claimed of the plaintiff both by the surviving trustee of the settlement and by the donee of the power therein. It was held, that a bill of interpleader filed against the counter claimants could not be sustained. *Cook v. the Earl of Rosslyn*, 833

INVESTMENT—Testator directed his trustees to invest in the funds, or on government securities "or upon the security by way of mortgage of any freehold, copyhold or leasehold hereditaments in England or Wales." This did not authorize the investment upon security of railway mortgages made in conformity with 8 & 9 Vict. c. 16. s. 38, or in Great Northern Railway Debenture Stock. *Mortimore v. Mortimore*, 558

ISSUES—The Chancery Amendment Act, 1858, having expressly left it to the Court to say, whether the trial of a question of fact shall take place before a jury at common law, before a jury in Chancery, or before the Court without a jury, this Court will not at present, unless both parties concur in the application, or there is some special reason for delay, expense or otherwise, direct the trial to be before itself, the confidence of either suitor in the method established by long habit being a circumstance which ought to turn the scale, especially on the first experiment of a different system being required to be made. *Scoble*—the legislature did not contemplate the trial of issues before the Court of Chancery as a general rule. *Peters v. Rule*, 246

— In cases requiring a jury under 21 & 22 Vict. c. 27, the practice of the Court in granting issues will be followed; and, therefore, before the hearing the Court will not summon a jury without the consent of the defendant. *George v. Whitmore*, 720

— A cause being ready for hearing upon bill and answer and affidavits, a preliminary motion was made under the 21 & 22 Vict. c. 27, that a jury might be summoned to try certain disputed questions of fact. It was held, the act was only intended to apply to cases in which, under the old practice, an issue would have been directed at the hearing. *Bradley v. Berington*, 799

— After the trial of an issue *devisavit vel non*, if the verdict given satisfies the conscience of the Court that the capacity of the testator was competent to enable him to execute a will, a new trial will not be granted, at the request of the heir-at-law, though there were discrepancies in the evidence which were not satisfactorily explained. *Swinfen v. Swinfen*, 849

JUDGMENT—If a mortgagor sells the mortgaged estate, and pays off the mortgagee, the estate in the hands of the purchaser ceases to be affected by a judgment which had been registered against the mortgagee. *Greaves v. Wilson*, 103

JURISDICTION—over suit in local court of limited jurisdiction. See *Staying Proceedings (Wynne v. Hughes)*.

— of ordinary tribunals, when excluded. See *Contract (Scott v. the Liverpool Corporation)*.

— See *Arbitration. Charity. Receiver. Trust and Trustee. Winding-up Acts.*

LANDLORD AND TENANT—A tenant, under a lease which contained a covenant to repair, and leave in good repair, all buildings and erections then standing or to be erected during the term, built a farm-house, partly on the land demised and partly on the waste adjoining belonging to the lessor. On the decease of the tenant, upon a claim by the landlord for dilapidations, it was held that his acquiescence in the act of the tenant prevented his dispossessing him of the premises built on the waste, and that it must be assumed by implication that the covenant to repair extended to the whole building, and that the landlord was entitled in a suit for the administration of the tenant's estate to establish a claim for dilapidations. *In re Newbery and White v. Wakley*, 77

LANDS CLAUSES CONSOLIDATION ACT—A railway company, under the compulsory powers of the Lands Clauses Consolidation Act, took lands belonging to a corporation, which were then let on lease. The value of the reversion was alone assessed, it being understood that rents were to be paid to the corporation during the existence of the leases. Upon petition by the corporation, asking for investment of the purchase-money, it was held, the purchase was made as of property in possession, and the dividends were payable to the corporation, and ought not to be accumulated up to the falling in of the reversion. *In re Hampstead Junction Rail. Co., ex parte Dean and Chapter of Westminster*, 144

— Upon a petition by a tenant for life for the re-investment of purchase-money for lands taken by a railway company, the costs of the appearance of the reversioner, and of the trustees of a deed of separation between the tenant for life and her husband, must be paid out of the fund, and not by the railway company. *Wilson v. Foster, in re the Lancashire and Yorkshire Rail. Co.*, 410

— Three houses were built upon a plot of land, a portion of which was laid out in gardens for each house; a summer-house and other detached out-houses were also built. A railway company, under the Lands Clauses Consolidation Act, required a portion of the gardens for the purpose of their undertaking, but they refused to purchase the whole premises. Upon bill by the freeholder, it was held, that the gardens were

part of the houses to which they were attached, and that the company was bound to purchase the two houses and premises from which parts of the gardens were taken, and to make compensation for any injury sustained in respect of the third house. *Cole v. West London and Crystal Palace Rail. Co.*, 767

LEASE—An agreement to let a farm less a stated number of acres will be supported in equity, though the lands to be excepted were not specified. The right of selection must be exercised so as not to prevent the useful and beneficial occupation of the rest of the farm; and with these declarations a decree was made for a specific performance of the agreement. *Jenkins v. Green*, 817

— If a farmer contracts with a rector for a lease of glebe lands, the Court will not assume that both parties had an enabling statute present in their minds, and modify the express terms of the agreement, to make it conform with the provisions of the statute. Where an agreement had been made by a rector to grant a lease of glebe lands, at a rent to be paid half-yearly, the Court will not vary the agreement in accordance with the provisions of the 5 Vict. sess. 2. c. 27, and direct the rent to be paid quarterly. A decree was made for the specific performance of a lease of glebe lands. The decree was duly enrolled; it was, however, subsequently found, that the agreement and the statute enabling incumbents to grant leases of their glebe did not conform. It was held, notwithstanding the previous proceedings, that the bill must be dismissed, but without costs. *Jenkins v. Green*, 820

— Glebe lands which have been usually let on lease by incumbents are not within the 5 Vict. sess. 2. c. 27. *Jenkins v. Green*, 822

LEASES AND SETTLED ESTATES ACT. See *Guardian. Settled Estates Act.*

LEGACY—Testatrix, by her will, gave all her real and personal estate to be converted into money, on trust, to pay debts, &c. and “the following legacies”; then followed a legacy of 10*l.* and a legacy of 5*l.*, and the will proceeded thus, “Also I give to my nephew G. T. the sum of 2,000*l.*, in which sum or thereabouts, he now stands indebted to me, subject nevertheless to, and I hereby charge the same with the payment of the following annuities and sums of money, that is to say, to—&c.” The will, after declaring when these legacies were to be paid, went on thus: “Provided always, and I hereby declare that I do not intend by the legacy of 2,000*l.* hereinbefore bequeathed to my said nephew G. T. to exonerate or release him from the debt which may be due from him to me at the time of my decease. But I direct that whatever sum or sums of money shall be due or owing from him to me at the time of my decease, shall be taken or considered in part or in satisfaction (as the case may be) of the said legacy or sum of 2,000*l.*, and shall be reckoned and accounted for by him accord-

ingly." G. T. became insolvent, and was never able to satisfy the debt due to the testatrix's estate. It was held, by the *Lord Chancellor* and *Lord Cranworth* (*Lord Wensleydale dissentiente*), that the deficiency to meet the annuities and legacies charged on the 2,000*l.* must be made up out of the general assets. *Vickers v. Pound*, (H. L.) 16

— A sum of stock was bequeathed to trustees, after the decease of the survivor of two tenants for life, "to pay and apply the stock equally amongst the testator's nephews and nieces then living, or their legal personal representatives, share and share alike." There were seven nephews and nieces; four were still living; one nephew and niece had died in the lifetime of the testator: the nephew alone had left issue; another nephew survived the testator, and died in the lifetime of the surviving tenant for life, leaving issue. Upon a suit for the administration of the fund, it was held to be divisible into seven shares, and that the nephews and nieces living were each entitled to one share, and that the legal personal representatives of each nephew and niece deceased were entitled to one share each. *King v. Cleaveland*, 74

— A substitutionary gift to the personal representatives of a niece, one of a class, who had died in the life of testator, without issue, devolves upon her next-of-kin, and does not pass to her administrator. *King v. Cleaveland*, 76

— Testator, by his will, stated that he had lent his money to various persons on their respective notes of hand, and to sundry other persons, whose names and notes would be found among his papers; he then said, "Now my will is, that the monies as aforesaid be disposed of as follows"; testator then gave legacies to the amount of 9,900*l.* At his death none of the enumerated investments existed. The legacies were held to be not specific, but general. *White v. Wakley*, 79

— Testator gave 1,000*l.* to his sister Sarah for life, with remainder to her children; he then said, To each of my sisters, M. A. C, and B. I bequeath 500*l.*, and in case of death to either, their portions to go to the surviving sisters "above mentioned." C. died in the lifetime of the testator. It was held, that her 500*l.* survived to M. A. and B.; and that Sarah was not included in the words "the surviving sisters above mentioned." *White v. Wakley*, 79

— Testator, by his will, made an equal division of his real and personal estate among his children; in the course of fifteen years afterwards he made advances of large sums to some of his daughters on their marriage, and to some of his sons on establishing them in business: to others of his sons and daughters he gave trifling sums only. It was held, the small sums were intended as free gifts, but that the larger sums being for permanent advancements, were in part satisfaction of the benefits given to them by the will. If

a presumption arises that payments by a testator to his children were made in satisfaction of legacies they would become entitled to under his will, it is not rebutted by their believing such payments to have been gifts, when the belief is unsupported by any testimony of the intention of the testator. *Schofield v. Heap*, 104

— A bequest in a will of specific chattels to H. is not revoked by a gift of the same chattels by codicil to other legatees, the last-mentioned gift appearing to be founded on the supposition that the chattels had been by the will bequeathed to C, and that the bequest had lapsed by his death. *Barclay v. Maskelyne*, 115

— Where a sum directed by testatrix to be set apart for an annuity was bequeathed, on death of the annuitant, to such of testatrix's nephews and nieces as should be "then" living, and the child and children of such of them as should be "then" dead, it was held, that the children of a nephew who was dead at the date of the will were entitled to participate, and that their interest vested at the death of testatrix. *In re Faulding's Trusts*, 217

— A residuary estate was bequeathed to trustees upon trust to permit testator's wife to receive the income for life, and also to apply such parts of the capital to her own use as she should think proper, and after her decease to apply the residue to such persons as she by will should direct. The widow used no part of the capital, but by her will she directed that the property should be distributed as directed by the will of her husband. It was held, that the widow took a life interest only in the fund, with power to apply the capital for her own benefit, and if not so disposed of, with a power to appoint it by will. *Scott v. Josselyn*, 297

— Testator gave a sum of 4,300*l.* consols to his executors, upon trust as to the annual dividends thereof, amounting to 129*l.*, to pay his brother and two sisters an annuity of 20*l.* each during their lives; the remainder of the said dividends he directed to be paid to his nephew during his life; and as and when the brother and two sisters should die, then the three annuities of 20*l.* were to be paid to A. B. and C, the eldest taking the first of the said annuities that should fall in, and the others in like manner by seniority. And after the decease of the survivor of A. B. and C, then the principal sum of 4,300*l.* was given to Anne Beale. It was held, the bequests to A. B. and C. were gifts of certain portions of the dividends of the capital sum of money, and not annuities; and that the personal representative of one of the three who had died was entitled to receive his annual sum of 20*l.* until the death of the survivor of the three. *Bignold v. Giles*, 358

— A legacy to a class not definitively fixed will be carried into effect so far as the objects can be ascertained; but blanks in a will cannot be filled up, though the testator apparently contemplated

an extension of the class. *Mason v. Bateson*, 891

— Testator gave a portion of his personal property to trustees, to invest the same in the securities therein mentioned, and pay out of the proceeds an annuity of 5*l.* to T. P., and apply the residue of the interest, &c. towards the maintenance and education of W. C. until twenty-one, and on his attaining that age to transfer the principal of the trust-moneys charged with the said annuity of 5*l.* unto W. C. absolutely. But if W. C. should die before twenty-one, and during the life of T. P., then the trustees were to pay T. P. for life an annuity of 10*l.* in lieu of the 5*l.*, and to pay the remainder of the interest during the life of T. P., as well as the principal after her death, to a third person absolutely. T. P., the annuitant, died before W. C., but W. C. died a minor. It was held, the gift to W. C. was an absolute vested interest in him, and notwithstanding he died under twenty-one the estate was not divested, since the precise contingency of W. C. dying under twenty-one and during the life of T. P. never happened; that consequently the representatives of W. C. were entitled to the property. *Potts v. Atherton*, 486

— A, who was possessed of property, both in consols and in Bank stock, made a will, by which she gave to her brother (who received the income from all her property, and acted as her banker,) "everything I may be possessed of at my decease for his own life, and should he marry and have children of his own, to those children after: but should he die a bachelor, I leave the whole of my fortune now standing in the funds to Emma Slingsby, my god-daughter." The brother died a bachelor. Under this will the Bank stock did not pass to Emma Slingsby. *Slingsby v. Granger*, 616

— Testator gave his real and personal estate to trustees upon trust out of the income to pay an annuity of 500*l.* a year to his widow for life, or for so long as she should continue his widow, for the maintenance of herself and his children, and to invest the surplus; and after her death or marriage again, upon trust to apply such annual income for the maintenance and advancement of such of his children as should be under twenty-one; and when the youngest of his children should attain the said age, then upon trust to distribute all his property equally between his children, except so much as would secure to his wife, if she should be then alive and married again, an annuity of 100*l.* a year for life. And in case of the death of any of his children, leaving lawful issue, testator directed that the share of such child or children should go to his or her children. It was held, the share of each child became vested on attaining twenty-one, that no division was to be made until the youngest child attained twenty-one, or during the life or widowhood of testator's wife, and that the share of any child dying and leaving issue was given over to the children of such deceased child, on the death of a child before the period of distribution. After
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the date of the above-mentioned will, testator, on the marriage of one of his daughters, settled 2,000*l.* for the benefit of herself, her husband and children. It was held, the daughter must elect whether to take under the will or the settlement. *Beckton v. Barton*, 673

— Under a bequest to such of testator's grandchildren as should be living at the death of a tenant for life, and the executors or administrators of such of them as should be then dead leaving any child or children living at the death of the tenant for life, it was held that the share of a grandchild, who died in the lifetime of the tenant for life, leaving a child, belonged to his estate, and was not given either to his executors beneficially, or to his next-of-kin. *In re Seymour's Trusts*, 765

— A legacy of stock in trust for A. B. for life, and afterwards to divide the same amongst testator's nephews and nieces, children of A. B., then living, or their legal personal representatives, share and share alike. One of testator's nieces died in his lifetime, without issue. It was held, the fund was divisible among the nephews and nieces whether surviving the tenant for life or not, and that the share of the deceased niece devolved upon her next-of-kin, and not upon her administrator. *King v. Cleveland*, 835

— Vested or contingent. See Will.

— Lapse to the Crown. See Executor.

LEGACY DUTY—Testator directed his estates to be sold, and gave the dividends of one portion of the proceeds to his wife for life, and after her death he gave the capital to A. B. The second portion he gave to A. B., subject to various annuities. By an arrangement between the widow and A. B., the first portion was paid over by the executors to A. B. during the widow's life, and no sum was retained to answer the legacy duty, which would become payable on the widow's death. A. B. sold the second portion to plaintiff, and the surviving executors of the surviving executor of testator joined in the assignment for the purpose of admitting A. B.'s title to the property, and stating that they knew of no incumbrance upon it. Upon death of annuitants, the purchaser filed a bill against the executors for a transfer of the fund; and the Court held, that defendants were not entitled to retain the legacy duty payable upon the first portion of the property. *Bignold v. Giles*, 238

LEGITIMACY—A, a Jew, and B, a Christian woman, cohabited as man and wife for twenty-eight years, and until B.'s death. They had several children, who were brought up as Christians. They cohabited partly in England and partly in foreign parts. There was no evidence of any marriage having been solemnized, but there was general reputation that the parties were married, and proof of the registry of the baptism in England of several of the children as

of A. and B. his wife, and that on a judicial proceeding the parties gave evidence on oath as "A. and B. his wife." The relatives of A. never recognized the fact of a marriage, and some of them swore that they did not know even of the reputation of marriage. A, in his will, referred to such of the children as were living as "my legatees." One of the Vice Chancellors decided that the children were entitled as legitimate children of A. and B. to a fund belonging to A.'s next-of-kin; and that the onus of proof lay upon those who sought to disturb the general reputation and presumption of marriage under the foregoing circumstances: and, on appeal, the decision was affirmed. *Goodman v. Goodman*, 745

LIEN—for costs. See Costs (*Verity v. Wild*).

— See Broker. Judgment.

LIMITATIONS, STATUTE OF—Testator, by will, gave all his real and personal property to his wife, out of which he desired that she would discharge all his legal debts and enjoy the surplus for her life; and at her decease the property was to be divided as in the will mentioned. A farm servant of testator left his wages from time to time in his master's hands, and it was agreed between them that the debt thus due should carry interest. Testator died in 1837. In a suit instituted after death of testator's widow, in 1854, for administration of his estate, the Statute of Limitations was held not to bar arrears of interest upon the sum left by the servant in testator's hands. *Blower v. Blower*, 181

— To a suit by a barrister to recover out of the assets of his deceased clerk fees embezzled and retained by such clerk, the Statute of Limitations cannot be set up as a defence. *Teed v. Beere*, 782

— A bond was executed in 1821, and the obligee having claimed against the estate of the surety in the bond more than twenty years after the debt, it was held, that an acknowledgment of the debt, in the answer of the executrix of the surety, was sufficient to take the case out of the Statute of Limitations. *Moodie v. Bannister*, 881

— By a will, dated in 1761, a trust was created in favour of a certain class of testator's relations, nearly all of whom were paid their proportions. The surviving executor and trustee of testator had the remainder of the funds standing in his name at his death, and by his will he recognized the existence of the trust and directed that it should devolve upon his nephew. Administration *de bonis non* was granted in 1822 to the surviving executor's estate, and subsequently to another person in 1825, when the remaining trust fund was mixed up with such administrator's personal estate and applied in the purchase of real estate. A bill was filed by a person claiming part of the legacy under the original testator's will, charging a

breach of trust by the surviving executor, and that his real and personal estate were liable to make good the amount. It was held, upon demurrer to the bill, that the real estate could not be charged with the legacy; that there was an implied trust created by the will, but the right of the claimants having accrued more than twenty years since, their claim was barred by the Statute of Limitations. *Henderson v. Atkins*, 913

— See Will.

LUNATIC—A committee of a lunatic has no special lien upon the estate, after the death of the lunatic, for money expended by him on his behalf, and a purchaser having notice of the claim of the committee is no more bound to see to the application of the purchase-money than if he bought with notice of simple contract debts. *Jones v. Noyes*, 47

— A power for the appointment of new trustees contained in a settlement became vested in a person who had been found lunatic by inquisition. The committee of the person and estate petitioned, under the 16 & 17 Vict. c. 70, for leave to exercise the power for him, and the same was ordered. Form of order. *In re Bowmer*, 618

— A person having been duly found lunatic by inquisition, but before a committee of person or estate had been appointed, and before any report as to his estate had been made, having recovered his reason, and a supersedeas of the commission being ordered, the Court had no jurisdiction to order the party who sued out the inquisition to be paid his costs out of the estate. *In re —, a Lunatic*, 644

MARRIAGE. See Legitimacy.

METROPOLIS LOCAL MANAGEMENT ACT. — The powers conferred upon the Metropolitan Board of Works by section 135. of 18 & 19 Vict. c. 120, of carrying their sewers and works into, through or under any lands, making compensation for any damage done thereby, may be exercised without purchasing such lands, or any easement in them; and the 150th, 151st and 152nd sections of the act, enabling them to purchase any land, or any right or easement in or over any land which they may deem necessary or expedient for the formation or protection of their works, are not to be read as restricting such exercise of those powers. In the construction of powers conferred by act of parliament upon public bodies, acting for the public benefit alone, the intention of the legislature is not to be measured by the more guarded powers given to public companies established for trading purposes. *The North London Rail. Co. v. the Metropolitan Board of Works*, 909

MORTGAGE—A. B. mortgaged one estate to C. D. and mortgaged another estate to E. F. He then mortgaged his equity of redemption in both estates to G. H., and notice of this was given to the two original mortgagees. The two original mort-

gages ultimately became vested in I. K, who filed a bill to foreclose G. H. in default of payment of all that was due. G. H. insisted that he was entitled to redeem one estate without redeeming the other; but it was held, affirming the decision of one of the Vice Chancellors, that he had no such right, and that the fact of C. D. and E. F. having had notice of the mortgage of the equity of redemption made no difference. *Vint v. Padgett*, 21

— A receiver of an estate was appointed, in compliance with an agreement made between a mortgagor and mortgagee. They both joined in the appointment, and gave him power of distress and entry, and the mortgagor attorned as tenant from year to year to the receiver, at a rent of 3,500*l.* The deed recited all the facts relating to the mortgage, and provided that nothing in the deed should abridge the rights of the mortgagee. The mortgagor afterwards became bankrupt, and the receiver distrained for 3,500*l.* Upon this being claimed by the mortgagee, by a party under a bill of sale, and by the assignees of the mortgagor, it was held, the powers of distress and entry were determined by the bankruptcy of the mortgagor, and that the distress was invalid inasmuch as it was executed against the goods of the mortgagor after they had vested in the assignees. If a co-defendant has an interest in the property claimed by the plaintiff upon which he intends to rely, he must upon the pleadings bring his case before the Court. If he merely disclaims, the Court will decide the case between the litigating parties, and leave the co-defendant to such other remedy as he may have. *Jolly v. Arbuthnot*, 274

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— A mortgagee of an equity of redemption without notice of prior equitable charges, is entitled, even after a foreclosure bill, filed by the intervening incumbrancer, to get in the legal estate and tack his mortgage. T. E. B, by ante-nuptial settlement, covenanted to convey certain free-

hold hereditaments of which he was seised in fee, to trustees, upon trusts, for benefit of himself and his wife and children of the marriage. No conveyance was ever made, and T. E. B. afterwards, in fraud of the settlement, executed a mortgage of the premises, and subsequently mortgaged the equity of redemption, none of the mortgagees having notice of the trusts of the settlement. The first mortgagee having afterwards received notice of the trusts of the settlement, it was held, that, notwithstanding such notice, he was at liberty to transfer the legal estate to any person who would pay off his incumbrance, being in a different position from a dry trustee or a satisfied mortgagee. *Bates v. Johnson*, 509

— Right to Tack. See Municipal Corporation. And see Company (*Scott v. Colburn*). Foreclosure. Priority. Production of Documents (*Howard v. Robinson*).

MORTGAGOR AND MORTGAGEE—Testator directed his estates to be sold, and after decease of his wife gave 14,000*l.* out of the proceeds to different legatees, including 8,000*l.* to be divided between his four nephews, or such of them as should be living at the decease of his wife, but if the fund should not amount to 14,000*l.*, then all the legacies were to be reduced *pari passu*. The four nephews mortgaged their interest in the 8,000*l.*, with a power to the mortgagees to sell upon non-payment of the money, subject to such special conditions as they should think proper. The money not being paid, the mortgagees sold the property by auction, as a sum payable out of the residue, but without stating that it was liable to abatement, and one condition of sale was, that if the vendors should be unwilling or unable to satisfy any requisitions made by the purchaser, they should be at liberty to rescind the sale. It was held, this condition was not depreciatory; that the mortgagees were justified in selling under such a restriction; and that the omission to state in the particulars that the 8,000*l.* was subject to abatement was not a misstatement calculated to mislead the purchaser. *Faulkner v. the Equitable Reversionary Interest Society*, 132

MORTMAIN—Testator in his will gave property to trustees, to appropriate the same as they in their “uncontrolled discretion should think proper, for the benefit, advancement and propagation of education and learning in every part of the world.” The will was held valid, and that there was a valid bequest of a charitable nature which was not void for uncertainty. Testator had lands in New South Wales, which were to form part of the property given to trustees for the purposes of the charity. It was held, these lands would pass, and that the Mortmain Act was not applicable to New South Wales. *Whicker v. Hume*, 396

— A bequest for charitable purposes of shares in a railway company, which, at testator's death, had granted a lease of its railway property and undertaking for 999 years to another railway

company at a fixed rent, and with an option of purchasing on notice, is not void under the Statute of Mortmain. *Linley v. Taylor*, 686

MUNICIPAL CORPORATION — Defendants were holders of two mortgages made by the corporation of Brecon, upon their land. One was made before the Municipal Corporation Act, and the other subsequently. This latter mortgage comprised in addition lands acquired under the Market House Act. Defendants brought an action to obtain payment of the money due on both mortgages. The corporation then paid into court the sum due on the mortgage made before the Municipal Corporation Act. Defendants, plaintiffs in the action, took this money out of court and proceeded with the action upon the second mortgage, and obtained a judgment. Defendants refused to reconvey the lands or deliver up the title-deeds in the first mortgage; and upon a bill by the corporation, it was held, the first mortgage was satisfied before any judgment was obtained, and that no right to tack had arisen, and that defendants must reconvey the lands and deliver up the title-deeds to the corporation. *The Mayor, &c. of Brecon v. Seymour*, 606

NOTICE. See Mortgage.

NUISANCE. See Acquiescence.

ORDER FOR PAYMENT—What amounts to. See Annuity (*Mansfield v. Oyle*).

PARTNERS—Plaintiff filed a bill for dissolution of a partnership entered into with the defendant, and moved for a receiver. A question was raised upon the evidence as to the conduct of the parties, and as to whether there was any term fixed for the expiration of the partnership. It was held, that these questions must be decided at the hearing, and that the Court, not being able to say that a dissolution must be decreed at the hearing, would not appoint a receiver, which would operate as an injunction. *Baxter v. West*, 169

— Certain persons joined together for the purpose of forming a joint-stock company, and with that view purchased property, and incurred debts and expenses. The project became abortive, and upon a bill filed for an account, on the footing of a partnership, it was held, that this was not a partnership, and the bill was dismissed. *Hamilton v. Smith*, 404

— A partner in a periodical who withdraws from the publication, and determines the partnership, so that the right to use the name must be sold and the affairs wound up, will not be restrained from advertising a work of a similar description under a new name, or the discontinuance of the former work, so far as his connexion with it was concerned. *Bradbury v. Dickens*, 667

— A surgeon sold a share of his business, and

took the purchaser into partnership. The articles specified that the partnership was for such term as they should mutually agree, and that in case of death, absence or incapacity of either of the partners the survivor should have the right of purchasing his share at two years' value, or, in case of dispute, at a price to be named by valuers; but in case he should decline to purchase such share, then that it might be sold to any person willing to purchase. The purchaser died fifteen months after the date of the articles; and on his death the surviving partner refused either to purchase his deceased partner's share, or to admit any other person to be a partner with him. It was held, the surviving partner could not repudiate the articles; and that his refusal to purchase the deceased partner's share, or to admit a new partner in his place, left the surviving partner liable to reimburse the value of deceased partner's share, and also, in the meantime, to account for accrued profits. *Featherstonhaugh v. Turner*, 812

— Where land is purchased by partners out of the partnership assets, and used for the purposes of the business, it is to be considered as personalty, both as between the partners themselves and as between the heir and personal representatives of a deceased partner. *Holroyd v. Holroyd*, 902

— See Contract.

PATENT—In computing time under 16 Vict. c. 5, avoiding letters patent, on failure in payment of stamp duties, the day of the date is excluded, and the three years do not expire until twelve o'clock at night of the anniversary of the day on which the letters patent were granted. *Williams v. Nash*, 886

PAYMENT OUT OF COURT. See Baron and Feme.

PENSION. See Assignment.

PERIODICAL—Advertising discontinuance of. See Partners.

PLEADING—To bill against executor for payment of a legacy defendant pleaded that testator was at the time of making his will and of his death domiciled in France, and all the bequests of personal estate affected to be made by the said will were by the laws of that empire null and void. Plea not double, as it did not state two bars to the suit, but two averments leading up to one bar. Although probate of a will is conclusive so far as relates to the appointment of executors, it is not conclusive as to the validity of the particular dispositions therein contained; and the above plea therefore was held not to be bad on that ground. *Campbell v. Beaufoy*, 645

— The Court has no jurisdiction to declare an equitable right on behalf of the legal owner of property, without something on which the Court can act. *Bristow v. Whitmore*, 801

POOR—*Semble*—The real and personal property vested in the guardians of a union for the general benefit of the parishes in the union are liable to the debts of judgment creditors. But money raised by rates for the relief of the poor is impressed with a definite trust, and as it would be a breach of trust to apply such money in the discharge of outstanding debts, a creditor who has obtained judgment in respect of a debt incurred prior to the year for which the rate was raised will be restrained from levying execution against the money so raised. Whether a judgment creditor of the existing year can levy execution against such money—*quære*. *Attorney General v. Wilkinson*, 392

POWER OF APPOINTMENT—A father, on his son's marriage, conveyed a certain farm to use of himself and his wife successively for life, with remainder to the children of the son. A power was reserved to the father by deed or will to charge all or part of the hereditaments thereby settled, with any sum or sums not exceeding 500*l.*, for portions of his younger children, and to create a term for securing the same. The father, by his will, devised the said farm to his son in fee, charged with payment of legacies of 200*l.*, 200*l.* and 100*l.* to testator's three daughters respectively. The will contained no reference to the settlement, and no limitation of any term, nor did the father otherwise exercise the power. It was held, the will operated as an execution of the power of appointment of which the father was donee under the settlement. *Davies v. Davies*, 102

— Where a person having a power of appointment over a fund in favour of her children, made an appointment under such circumstances as led the Court to believe that the appointor intended to derive some benefit to herself, but it was not proved that she actually derived any benefit, excepting that the fund appointed was applied partly in payment of debts of the appointee for which the appointor was a surety, the Court of Appeal (reversing a decision of the Master of the Rolls) set aside the appointment. Where there is proof that an appointor at one time intended a benefit to herself, the onus of proof that at the time of the appointment she had abandoned that intention lies upon those who support the appointment. *Humphrey v. Over*, 406

— Testatrix having, under her marriage settlement, a power of appointment over a trust fund in favour of her children, by her will appointed the trust fund, and also bequeathed her residuary personal estate, upon trust, after the marriage of her daughter C, to assign and transfer the same equally between her two sons and C; and by a codicil, after reciting the marriage of C, she directed that the income of any sums, &c. to which C. might become entitled under her will should be enjoyed by her, for her separate use, during her life, and at her death the principal should become the property of her children. C. was held to be entitled to

her share of the trust fund, for her separate use during the life of her husband, with remainder to herself absolutely, and that no case of election arose; and a declaration having been made to this effect, the Court declined to alter it on the ground that the absolute interest, being in remainder, was inalienable during coverture. *Wooldridge v. Wooldridge*, 689

— Testator had three sons. After referring to a power in his marriage settlement, he said of the settled fund "the sum of 2,000*l.* was settled at her marriage upon my daughter Mary"; and then he added, "the remainder I wish to be equally divided among my sons." One of the sons died in testator's lifetime. This was held a good appointment; and that it was made to them as a class. *Fitzroy v. the Duke of Richmond*, 750

— Tenants for life of a fund settled on their marriage had a power to appoint the same among the children of the marriage. Upon the marriage of a daughter, one of the children of the marriage, under age, a deed was executed by the tenants for life, by which the reversion in 2,000*l.*, part of the fund, was assigned by the tenants for life to trustees to pay the income to the intended husband for life, with remainder to the wife for life, with remainder to the children of the marriage. This was held to be a valid appointment to the daughter, and that the settlement was a good declaration of trust by the intended husband of the fortune of his wife, though an infant. *Fitzroy v. the Duke of Richmond*, 752

— By marriage settlement personal property was settled in trust for the husband for life, remainder to the wife for life, remainder upon trust after decease of the wife for such children of the marriage and their issue who should be then living, as the husband should appoint; in default of such appointment to such children and their issue living at the death of the husband as the wife should appoint. There were five children of the marriage all living at the husband's death, and the wife survived her husband. The husband appointed four-fifths to four of these children, omitting any appointment of the remaining fifth. The fifth child died before the wife, leaving three children, one only of whom was born at the husband's death. The wife then appointed the remaining fifth to the only child of the deceased son, who was living at the husband's death, omitting the two children subsequently born, who were plaintiffs in this suit. It was held, overruling *Simpson v. Paul*, that the partial execution of the primary power by the husband did not preclude the wife from exercising the secondary power in appointing the unappointed fifth; that both the appointments were valid, and that plaintiffs could take no share in the fund. *Mapleton v. Mapleton*, 785

— A married woman, having a power of appointment in favour of any one or more of her children, appointed the whole fund to one child

absolutely; and there was evidence to shew that an arrangement had been entered into, that such child should hand over one half of the fund to her father absolutely, and should give him a life interest in the other half. No notice of such arrangement was, however, given to the appointee during the life of the mother. The execution of the appointment was held void, as being in fraud of the power. *In re Marsden's Trust*, 906

PRACTICE—Plaintiff obtained an order for a subpoena to hear judgment, and set down the cause for hearing after the time for closing the evidence in chief had expired, but before the time allowed for cross-examining affidavit witnesses. Defendant moved to set aside the order for a subpoena, and to strike the cause out of the Registrar's list, on the ground of irregularity. Plaintiff's proceedings regular, and the cause was allowed to be set down for hearing before the period for closing the cross-examination of witnesses. *Dowson v. Solomon*, 884

— Extension of time for enrolling decree; and rectifying after enrolment. See Enrolment of Decree.

— Rectifying deed. See Deed.

— Right of defendant to dismiss bill without costs. See Bill.

— Trial of issues of fact. See Issues.

— Right to costs on abandoned summons. See Costs.

— See Service. Will.

PRE-EMPTION. See Will (*In re Cant's Estate*).

PRESUMPTION. See Legacy (*Schofield v. Heap*).

PRINCIPAL AND AGENT—A solicitor acting for an embryo banking company agreed with R. for purchase of a large building and adjoining premises suitable for the company; R, through the solicitor, induced the company to purchase the building at a large increased price, which was divided between R. and the solicitor. The company took possession and adapted the building to the purposes of a bank, and obtained a trade reputation. They subsequently discovered the circumstances under which the sale of the building had been made to them, and upon a bill by the company stating that they could not relinquish the building and that the adjoining premises would greatly facilitate their business, it was held, that the purchase by the solicitor was made as agent and for the benefit of the company; that the company was entitled to the profits made by the solicitor and that the solicitor was a trustee for the company of the premises adjoining the building. *The Bank of London v. Tyrrell*, 921

— See Vendor and Purchaser.

PRINCIPAL AND SURETY—Right of surety to have the shares of the receiver, a party to the cause, applied in discharge of payments made by him. *Brandon v. Brandon*, 147

— An innocent party to a fraud committed by another will not be allowed to derive any benefit from that fraud, unless there has been a consideration moving from himself. Therefore, where a surety innocently joined with his principal in persuading the creditor to accept a transfer of a pretended mortgage, which turned out to have no existence, and to release the surety from his liability, such a release was held to be inoperative. The friends of a surety advanced money to satisfy his private debts, stipulating, however, as a condition of such advance, that he should be released from his liability as surety. The surety having been released under the above circumstances, the creditor was held not entitled to set aside the release without repaying to the friends the money advanced by them. *Schofield v. Templar*, 452.

PRIORITY—A. mortgaged to B. to secure present and future advances, and afterwards executed a similar mortgage of the same property to C. B. & C. had mutually notice of each other's deeds. B. having made advances after the date of C.'s mortgage, it was held, affirming the decision of the Master of the Rolls, that C. was, in respect of his advances, entitled to priority over B, on account of such subsequent advances made by him. *Gordon v. Graham* overruled. *Roll v. Hopkinson*, 41

— A solicitor borrowed money from plaintiff, and deposited with him title-deeds of a leasehold house by way of security, at the same time agreeing by writing to execute an assignment of the premises when called on to do so. The solicitor, who had acted for himself in the first transaction, subsequently assigned the same property to another person, his articulated clerk, but the assignee neglected to obtain the title-deeds, although he made several applications for them to the mortgagor. Plaintiff claimed priority in respect of his equitable security. It was held, the assignee could not be considered to have had constructive notice, through the mortgagor, as his solicitor, of plaintiff's security, and that the omission on the part of the assignee to obtain the deeds did not prevent him from having the benefit of his assignment. *Espin v. Pemberton*, 308

— Where an assignee of a lease upon occasion of the assignment, made *bond fide* inquiries for the deeds, and a reasonable excuse was given for their not being produced, he was held (on appeal, affirming the decision below—see the preceding case) to be entitled to the benefit of the assignment, free from a previous equitable charge which had been made by the assignor by deposit of the deeds. Where a mortgagor is a solicitor and prepares the mortgage-deed, no other solicitor being employed in the transaction,

the mortgagor will not be considered as the solicitor for the mortgagee, so as to affect the mortgagee with notice of facts within the mortgagor's knowledge, unless there be some consent on the part of the mortgagee to constitute the relation. *Hewitt v. Loosemore* observed upon. *Espin v. Pemberton*, 311

— See Statute.

PRIVILEGED COMMUNICATION—The rule as to privileged communications between an English solicitor and his client, applies equally to a Scotch solicitor resident in England, not being admitted in England, and his client in Scotland. *Lawrence v. Campbell*, 780

— A solicitor who obtained possession of a lease from a client, which was claimed by a third party, cannot refuse to answer a bill filed against him upon an allegation that the information respecting the matters inquired into was obtained either in the character of solicitor or as a creditor of his client, neither will his claim to be a purchaser for value without notice in respect of a lien claimed upon the lease for a debt incurred by his client prevent his being required to answer the bill. *Thomas v. Rawlings*, 829

— See Solicitor and Client.

PROBATE—Discovery. See Will.

PROBATE DUTY—Where testator died domiciled in Scotland, and entitled to property in Scotland, and also to a fund standing in this court, and his executor, after the 21 & 22 Vict. c. 56, obtained a grant of confirmation of testator's will in Scotland, which he afterwards got sealed under the statute in England, this Court held it had no jurisdiction to question the sale at which the probate duty upon the fund in court had been assessed by the Scotch Commissary Court. *In re the Trustees Relief Act, and the Trusts of the Will of Booth*, 800

PRODUCTION OF DOCUMENTS—Testatrix devised an estate to trustees for fifteen years, and directed them to deliver up possession to such person as within that time should, to the satisfaction of her trustees, make out a right to the estate as heir-at-law to her uncle, who died owner of the estate; but in default of any such right being made out, testatrix devised the estate to L. W. There were two claimants to the estate; but the surviving trustee, after laying various cases before counsel and taking their opinions, was satisfied with neither. After the expiration of the fifteen years, L. W. filed his bill against the trustee and the two claimants to obtain possession of the estate; and upon motion by one defendant, a claimant, it was held the trustee was not bound to produce the cases laid before counsel, or their opinions, or any of the documents affecting the title to the estate. *Wynne v. Humberston*, 281

— If a solicitor, party to a suit, admits by his answer the custody of papers relating to a com-

pany, he will, if the directors and the company are before the Court, be compelled to produce them, notwithstanding, by their answers, the directors say that the papers are in the hands of a third party, and the solicitor says that he has the documents, but that in his hands they are privileged. *Gaskell v. Chambers*, 388

— A. and B. had dealings together. B. afterwards became bankrupt, and A. filed a bill against B's assignees to establish the dealings. The defendants admitted the possession of copies of the examination of A. before the Commissioners, but refused to produce them, on the ground of privilege, as being evidence given in support of the defence. The Court (overruling a decision of the Master of the Rolls) discharged an order for their production, considering that they ought not to be produced until the hearing of the cause. *Gandee v. Stansfeld*, 436

— Legatee under a will filed a bill against the trustee who had raised money to pay off legacies, and against the mortgagee, who had lent the money, charging that the trustee had effected a certain mortgage; that he had borrowed the money for his own purposes, and not to pay the legacies; and that the mortgagee knew of the alleged breach of trust. The mortgagee admitted the mortgage-deed, "and for greater certainty as to the contents thereof craved leave to refer to it when produced to the Court," but denied the other allegations. The plaintiff obtained an order in chambers for production of the mortgage-deed. It was held, upon an adjourned summons, that plaintiff, who did not allege that the deed contained anything which would support his case, was not entitled to the production, except upon redeeming the mortgage. *Howard v. Robinson*, 670

— Defendant by his answer stating that he was a purchaser for value without notice, is not bound to produce the title-deeds of an estate to a mortgagee whose security preceded the purchase, though the bill charged that the deeds were fraudulently retained by the mortgagor. If defendant, in his answer, sets out partially the conveyance made to his vendor, he must produce the deed to verify the statement. *Hunt v. Elmes*, 680

— A corporation were sole defendants to a suit, no officer of the company being party for the purpose of discovery. On motion by plaintiff that defendants might file an affidavit, as directed by section 18. of 15 & 16 Vict. c. 86, as to documents in their possession, it was ordered that the company should, before a day named, file an affidavit, made by one or more of its officers, as to such documents, unless they should in the mean time satisfy the Court that they could not procure such officer or officers to make the affidavit. *Ranger v. the Great Western Rail. Co.*, 741

PUBLIC HEALTH. See Sewers.

PUBLIC BODIES—Construction of statutable powers. See Metropolis Local Management Act.

PUBLIC RIGHTS. See Canal.

RAILWAY—Compulsory power of purchasing land is not applicable where the fee simple of the land is not necessary for the making and maintaining the railway within the meaning of the parliamentary powers of the company, but the soil alone is wanted. *Everfield v. the Mid-Sussex Rail. Co.*, 107

— Illegality of certain agreements for lease of a railway and user of joint station. *London, Brighton and South-Coast Rail. Co. v. London and South-Western Rail. Co.*, 521

— See Lands Clauses Consolidation Act.

RECEIVER—In the case of a receiver who was managing a business under the direction of the Court, a special order was made that, instead of the further fee payable under the Order of the 30th of January 1857, in respect of his gross receipts, the fee should be payable in respect of the net profits; and a sum previously paid in respect of gross receipts was directed to be allowed in the payment of subsequent fees. *Buckmaster v. Buckmaster*, 564

— A corporation, by act of parliament, was authorized to raise money by debentures upon the tolls, rents and stallages of the borough markets. The interest upon these debentures having been allowed to fall into arrear, the Court granted a receiver of the tolls, but held it had no jurisdiction to interfere with the corporation in the letting or management of the stalls, &c. in the market-place. *De Winton v. the Mayor, &c. of Brecon*, 598

— See Administration of Estate. Mortgage (*Jolly v. Arbuthnot*). Partners (*Baxter v. West*).

REGISTRATION OF DEEDS—A memorandum charging a leasehold estate in the county of Middlesex with the payment of a sum of money, retains its priority over a subsequent mortgage duly registered under the 7 Ann. c. 20; and in a suit by the equitable mortgagee, he was held entitled to a foreclosure. *Wright v. Stanfield*, 183

REMOTENESS—In a gift by will to the present and future children of J. L, who should be living at the decease of the testator's wife, a direction that the shares of daughters should be settled upon themselves for life, with remainders to their children, is not void for remoteness as regards the share of a daughter born in the testator's lifetime, the gift not being to a class, but a separate gift in favour of each child. *Wilson v. Wilson*, 95

— See Will (*Williams v. Lewis*).

RENT. See Apportionment.

RENT-CHARGE—The owner in fee of a small freehold estate granted twenty-two separate rent-

charges to several persons and their heirs, each of which was made subject to the others; the whole fell into arrear, and the power of distress and entry could not be enforced. Upon bill by one of the grantees, on behalf of himself and the other grantees, a decree was made to raise the arrears by a sale of the estate. *White v. James*, 179

REVENUE. See Succession Duty.

REVIVOR AND SUPPLEMENT—The sole plaintiff in a suit to restrain waste, having died after decree, and having devised all his real estate to his son, the Court, upon the *ex parte* application of the devisee, made the usual supplemental order under the 52nd section of statute 15 & 16 Vict. c. 86. *Jackson v. Ward*, 515

SALE—A tradesman expecting the execution of a writ of *fieri facias* issued by the Court of Chancery for payment of costs in a suit, effected a sale of the whole of his furniture and stock-in-trade. The only document passing upon the occasion was a receipt for the money paid upon the purchase. A few days after the purchaser had taken possession the writ was issued, and the sheriff subsequently filed a bill of interpleader, upon which the question arose whether the sale was fraudulent and void. It was held, that it is not a ground for vitiating a sale, that it was made with a view to defeat an expectant execution; and under the particular circumstances of the case, there being no ground for saying that the purchase was not *bond fide*, the sale could not be set aside; but, there being facts of a highly suspicious character attending the transfer of the property, the purchaser was ordered to pay his own costs. The receipt given for the purchase-money not a "bill of sale" under the 17 & 18 Vict. c. 36, and therefore did not require registration. *Hale v. the Metropolitan Saloon Omnibus Co.*, 777

— of estate. See Settled Estates Act.

— of share. See Vendor and Purchaser (*Taylor v. Great Indian Peninsular Co.*)

— Particulars and Conditions. See Vendor and Purchaser.

— See Mortgagor and Mortgagee.

SECURITY FOR COSTS—A plaintiff described himself of a particular place, and stated that his wife and family resided at this address; that he was a commission agent, and travelled about the country, but had been at his residence within the last few months. Upon an affidavit that he could not be found at his address, and that his place of abode could not be discovered, he was ordered to give security for costs. *Oldale v. Whitehead*, 333

— The Court will not require from a limited company security to be given for costs at the instance of a defendant who alleges that plain-

tiffs are insolvent, since the solvency or insolvency of plaintiffs can only be ascertained on the accounts being taken. *Caillaud's Patent Tanning Co. v. Caillaud*, 357

SERVICE OF BILL—Where a company amalgamate with another, and cease to have either officers or any place of business, the Court, upon a bill being filed, ordered the service to be made upon the late deputy-chairman and secretary, and directed that it should be good service upon the company. *Gaskell v. Chambers*, 385

— An order to serve a defendant out of the jurisdiction with a copy of the bill is wholly in the discretion of the Court, but it will look into the bill to see that the case made by the plaintiff is not such as *prima facie* will not obtain relief at the hearing of the cause, notwithstanding that the 33rd Order of May 1845 does not require evidence of the merits or truth of the case. *Maclean v. Dawson*, 742

SETTLED ESTATES ACT—Real estate was given by will to trustees, upon trust, to pay an annuity; and after the death of the annuitant, upon trust for all her children who should attain twenty-one. Some of the children attained twenty-one, and the others were infants. Part of the property was contracted to be purchased, and a petition was presented by the infant children for an order authorizing the sale, under the Act to facilitate Leases and Sales of Settled Estates (19 & 20 Vict. c. 120); but one of the Vice Chancellors refused to make the order, and his decision was affirmed. *In re Burdin's Will*, 840

SETTLEMENT—Construction of, as to whether the deed contained a covenant on which an action could be maintained. *Monypenny v. Monypenny*, 303

— On marriage of J. A. and S. A. a sum of stock was settled by deed, upon trust after the death of J. A. and S. A. and failure of issue of the marriage, to transfer the same unto, amongst and between J. F, R. F, W. F. and E. F. equally; provided that if either of them, the said J. F, R. F, W. F. and E. F, should depart this life without having acquired a vested interest, leaving issue, the share of such person so dying should go to such issue; but in case either of them should die without having lawful issue, then the share of him, her or them so dying should belong to the survivors or survivor of them. There was no issue of the marriage. J. F. and R. F. died in the lifetime of J. A. and S. A, leaving issue. W. F. survived J. F, and died in the lifetime of R. F. without issue. E. F. having survived both J. A. and S. A, she was held entitled by survivorship to W. F.'s share in the fund. *In re Acott's Settlement*, 383

— Real estate subject to a mortgage was devised in strict settlement, and a power of sale given to the trustees; a suit was instituted, and the Court ordered the estate to be sold, and E, S. and V. were appointed to execute the conveyance, and it was declared that the mortga-

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gees should be bound by the order. The legal estate having been afterwards reconveyed to the trustees of the settlement, it was held, that E, S. and V. had power to convey it, and that the trustees of the settlement were not necessary parties to the deed. *Eyre v. Sanders, ex parte Yeo*, 439

— of wife's property. See Baron and Feme. And see Power of Appointment. Voluntary Settlement. Ward of Court.

SEWERS—The powers of local boards, under the Public Health Act, 11 & 12 Vict. c. 63, for the construction of sewers, are confined to their own district; and the Local Government Act, 21 & 22 Vict. c. 98, extends the exercise of those powers beyond the district only where it may be necessary for the purpose of outfall or distribution of sewage, and not for the purpose of making new sewers. *Hayward v. Lowndes*, 400

SHIP AND SHIPPING—A. being equitably entitled to a ship entered into a charter-party with C, and afterwards mortgaged the ship to B, B, the mortgagee, having notice of the charter-party. The ship proceeded on its voyage, but shortly afterwards was obliged to put into port for repairs, which were paid for by B, and B. took possession of the ship. C. filed a bill against A. and B, praying specific performance of the charter-party, and for an injunction to restrain the use of the vessel for any other purpose than in performance of the contract entered into with C. One of the Vice Chancellors dismissed the bill; and, on appeal, this decision was affirmed, the Lord Chancellor considering that specific performance of the charter-party could not be decreed, the highest right against B. being to prevent him from actively interfering to stop the performance of the contract, while the contract remained in force, but that, under the circumstances of the case, the contract was virtually at an end, upon B.'s taking possession of the ship. *De Mattos v. Gibson*, 498

— The registration of a bill of sale of a ship does not confer an absolute title at law, unless the bill of sale itself not only appears to be, but is actually valid. Where a valid title has been acquired at law, *quære*, whether a Court of equity has jurisdiction to deal with the equitable interests. *Orr v. Dickinson*, 516

— N, a timber-dealer in Sweden, had transactions with D, a factor in London, who sold timber on his account on a *del credere* commission. D. had sold for him three cargoes of timber. N, on the 29th of September 1853, wrote to D. a letter, in which he expressed a hope to be able in a few days to send the shipping documents of all the cargoes. Two only of those cargoes arrived. On the 6th of October 1853, N. wrote to D. inclosing invoices of timber shipped on board three vessels, and made out an account in which N. appeared to be a creditor for 1,312*l.*, and he drew a bill to that amount on D. On the same day N. wrote to H.

D

& Co., stating the value of the cargoes, and asking for three acceptances to the amount of 1,300*l*. He inclosed his letter to D, and the bill and the shipping documents, with directions to H. & Co. to deliver these last to D, on condition that D. accepted the bill for 1,312*l*., acknowledged the correctness of the account current, and admitted that the cargoes agreed for had been forwarded. These conditions were communicated by H. & Co. to D, who called the whole affair a regular swindle. D, after some hesitation, accepted the bill, but he obtained possession of the shipping documents by a statement that he wanted them to compare with the invoices, and would return them if from any cause he did not accept the bill. On this H. & Co. accepted N.'s three bills for 1,300*l*. D. did accept the bill for 1,312*l*., but refused to return the shipping documents, and utterly disregarded the other conditions on which they were to be delivered to him. It was held, that though he might have a prior equitable claim to these shipping documents, he had not properly insisted on it, and that he had thereby misled H. & Co., who had a legal right to recover them from him. *Hoare v. Dresser*, 611

— As between the owners of a vessel and the assignees of the freight, the wages of the captain and seamen and the expenses are proper deductions to be made from the gross freight. Where part-owners of a vessel authorize co-owners to insure the whole vessel, and afterwards assign their interest in the freight, and the assignees do not give express notice of the assignment, the co-owners are entitled to insure the vessel and deduct the costs of insurance from the freight. *Lindsay v. Gibbs*, 692

— Right of master to be reimbursed expenses connected with freight. *Bristow v. Whitmore*, 801

— Sale of mortgaged ship. See Injunction.

SOLICITOR. See Attorney and Solicitor. Trust and Trustee.

SOLICITOR AND CLIENT—After decree in an administration suit some of the plaintiffs filed a supplemental bill against their co-plaintiffs and defendants, alleging generally that it was inconvenient that they and their co-plaintiffs should continue to be represented by the same solicitor, and praying that the suit might be carried on between the parties to the supplemental bill in the same manner as it was carried on between the parties to the original suit. Demurrer to the bill, for want of equity, allowed. *Peareth v. Peareth*, 118

— A sale of real estate by a client to his solicitor at an undervalue, the client being in embarrassed circumstances, and not having independent professional advice in the transaction, cannot be allowed to stand, although upwards of twenty years have elapsed. A solicitor, who purchases from his client, must take care that the transaction is perfectly fair, and also that evidence of

that fairness is preserved, the onus of proof being upon him; and he cannot be heard to complain that the means of proving his fairness is lost by lapse of time. A right to sue is a devisable interest. *Gresley v. Mousley*, 620

SPECIFIC PERFORMANCE—By an agreement for a separation under seal B. W, in consideration of the agreements therein contained on the part of his wife J. W, covenanted with a trustee to pay for her separate use an annuity, in addition to the income to which she was entitled under her marriage settlement, and also to permit his daughter H. W. to reside with her; and J. W, who was entitled under her marriage settlement to an annuity of 400*l*. to her separate use, without power of anticipation, covenanted with the same trustee, that so long as B. W. should perform his part of the agreement, she would maintain, &c. H. W, and would not allow B. W. to be sued for her debts. Upon demurrer to a bill filed by J. W. for specific performance of the agreement, and for the appointment of a new trustee, it was held, that such a bill could not be sustained, first, because there was no consideration for the agreement on the part of B. W; secondly, because the stipulation as to the custody of the daughter was illegal; and, thirdly, because there was no trust property of which a new trustee could be appointed; and that to appoint a new trustee would be in effect to order fresh covenants to be entered into with a new covenantor. A covenant by a married woman having property settled to her separate use, without power of anticipation, is not a sufficient consideration to support an agreement otherwise voluntary. *Walrond v. Walrond*, 97

— A purchaser of leasehold property is bound to inform himself of the contents of the lease, and cannot avoid specific performance on the ground that it contains an unusual covenant, which was not mentioned in the particulars or at the sale. *Grosvenor v. Green*, 173

— An offer by letter to sell or buy a business cannot be carried into effect unless from the whole letter taken together an inference can be drawn from which the material terms of the contract can be ascertained. In the absence of that, it amounts but to an offer to treat, as nothing can be supplied by conjecture. What may be considered as fair inferences in such cases. *Cooper v. Hood*, 212

— When a defendant resists specific performance of a contract on the ground that he would thereby incur a forfeiture, the Court will look at the circumstances which gave rise to the danger of forfeiture, and if it arise out of the defendant's own acts subsequent to the contract, it will decree specific performance, and leave the defendant open to the consequences of his acts. *Helling v. Lumley*, 249

— A purchaser raised certain valid objections to his vendor's title, which the vendor refused to satisfy. The vendor gave notice, that if the

purchaser refused to complete within five days he should re-sell and charge the purchaser with the expenses. The purchaser thereupon gave the vendor notice that he should bring an action for the deposit, if the requisitions were not complied with within a week. The action was commenced, and the vendor some time subsequently agreed to satisfy the requisitions at the purchaser's expense. Upon the purchaser's refusal, a bill was filed by the vendor for specific performance. The Court held, that the notice by the vendor of an intention to re-sell was equivalent to a declaration that he would not seek specific performance of the contract, and that the purchaser's action to rescind was effectual, and the bill was dismissed, with costs. Power of the Court to order the return of the deposit where the vendor's bill is dismissed, he having given an undertaking. *Royou v. Paul*, 555

— A company contracted to purchase the interest of leaseholders in a piece of land for a given sum, and for the conveyance in fee of a piece of the land which they were to take under the compulsory powers of their act of parliament. The agreement contained a clause that the company were to be consulted on any buildings to be erected in the line of street, and that differences should be settled by two parties named, or their umpire. The company held the contract suspended, and after their compulsory powers expired they refused to complete the contract. Upon a bill for specific performance, it was held the agreement respecting the buildings was vague, and that the Court could not decree a specific performance of the contract. Also, that as the agreement was uncertain, no compensation could be awarded; but as there was a concluded agreement, the Court dismissed the bill, without costs. *Tillett v. the Charing Cross Bridge Co.*, 863

— See Lease. Ship and Shipping.

STATUTE—The Brecon Market Act empowered the corporation to purchase lands for enlarging the borough market, &c., and it directed them, within seven years after the act, to sell so much of the lands as were not required, the proceeds to be applied for the purposes of the act. They were also empowered to borrow money on debentures, and one holder was to have no priority over another. Power was also given to borrow money on mortgage, or by sale of the corporate property. The corporation was directed to apply all money received under the act, and the rents of the estates, and the tolls, &c. of the market, after paying various charges, in payment of the money borrowed. The act also contained a clause restraining the corporation, without the consent of the Lords of the Treasury, from taking, appropriating, using, selling, demising, mortgaging or alienating for the purposes of the act any messuages which they could not have taken, &c. before the act passed. Upon a bill by a debenture holder, it was held that a mortgage of lands made to a debenture holder, as a further

security for money advanced on debentures, could not be supported; that such mortgage gave no priority or preference to the mortgagee; and that the lands comprised in the mortgage (being part of those purchased under the act) must be sold, and the money applied in discharge of the debts as directed by the act. *De Winton v. the Mayor, &c. of Brecon*, 600

— When retrospective. See Fines and Recoveries Act.

STAYING PROCEEDINGS—If two creditors' suits are instituted for the administration of the estate of a deceased debtor, and one is stayed by order of Court, provision will not be imperatively made for payment of the costs of the suit stayed in the suit to be prosecuted, but they will be left to depend upon the result of the assets after debts are satisfied. If two suits are instituted for one purpose, and one is stayed, no order will be made which will give the plaintiff in the suit stayed a priority for his costs, especially if the application is made in the one suit only. *Canham v. Neale*, 69

— The Master of the Rolls having decided that parties to a suit in a local court of limited jurisdiction could not apply to stay proceedings in a court of general jurisdiction, when part of the property in question was situate out of the limits of the local court (see *Wynne v. Hughes*, 283), on appeal, the Lords Justices ordered all the proceedings in this suit to be stayed, the plaintiffs here to have the conduct of the suit in the court of limited jurisdiction, they appearing in that court for that purpose. *Wynne v. Hughes*, 485

STOCK—Retransfer of stock which had been transferred to the Commissioners for the Reduction of the National Debt, under the provisions of 56 Geo. 3. c. 60, ordered upon a clear title to the legal interest, but a *prima facie* title only to the beneficial interest, being shewn to be in the petitioner. *Ex parte Bouts*, 648

STOCK EXCHANGE—Practice of. See Vendor and Purchaser.

SUCCESSION DUTY—One of the Vice Chancellors held that the 2nd section of the Succession Duty Act, 1853, did not apply to the case of donees of powers; and that the 4th section of the same act did not operate by way of exception out of that section, but laid down the general rule to commence from a given time, for donee and predecessor in every case. Therefore, where a settlor, having by a settlement executed prior to the time fixed for the coming of the act into operation, reserved to herself a general power of appointment, executed that power by will, and died after the act came into operation, his Honour held, that the case was governed by the 4th and 12th sections of the act, and the property was not liable to succession duty. But, upon appeal, it was held, reversing that decision, that the property was subject to the payment of the

duty, and that the case was within the 2nd section of the act; that the 4th section had no application, nor did the 12th section have any bearing on the question. *In re Lovelace's Settlement*, 489

SUPPLEMENTAL BILL—for change of solicitor. See Solicitor and Client.

SUPPLEMENTAL ORDER. See Divorce Act.

SURVIVORSHIP. See Settlement.

TAXATION—The allowance of the higher scale of fees does not depend upon the amount to be recovered, but upon the questions raised in the suit, and whether the suit is one which affects the entire property involved. *Grimes v. Harrison*, 828

— The costs incurred by trustees in paying money into court under the Trustees' Relief Act, and also the costs of their appearing on paying it out, are subjected to taxation. *In re Hue's Estate*, 893

TENANT FOR LIFE. See Copyhold.

THELLUSSON ACT. See Accumulation. Will.

TIME—Computation of. See Patent.

TRADE RESTRICTION. See Contract.

TRIAL BY JURY. See Issues.

TRUST AND TRUSTEE—The Court of the County Palatine of Lancaster has not jurisdiction to appoint a new trustee in place of a trustee of unsound mind not so found by inquisition. Such jurisdiction is given by the legislature (by the Trustee Acts) to the Lord Chancellor, or other persons intrusted with the care of lunatics, and not to the Court of Chancery. *In re Ormerod*, 55

— If the Bank of England is required to act upon an order made in pursuance of the Trustee Acts, the circumstances bringing the case within the acts must appear upon the order of Court. *In re Mainwaring*, 97

— Upon a separation between husband and wife, a deed was executed, in which a trustee covenanted that, in the event of the husband allowing the wife to live separate and have the custody of their children, the trustee would indemnify the husband against the debts, &c. of the wife. Upon the decease of the trustee it was held, as the deed contained no power to appoint new trustees, the Court, under the Trustees' Relief Acts, had jurisdiction to appoint new trustees of the property. *In re Matthews*, 295

— If trustees, defendants to a bill filed against them for the execution of the trusts of a will, appear separately and sever in their defence,

one set of costs alone will be allowed, and in the absence of evidence shewing misconduct, the Court will not order the costs to be paid to one trustee only. *Course v. Humphrey*, 327

— Mrs. E. Linzee, by her will, gave stock to her three daughters for life, with remainder to their children respectively. W. A. H. was one of the trustees. He ultimately became possessed of the whole fund, and sold out part and applied the same to his own purposes. G. E. V., by his will, gave 8,000*l.* consols to Mrs. Thorndike for her life, with remainder to her children. W. A. H. was one of the trustees. He ultimately became possessed of this fund, and sold it out and applied the proceeds to his own use. Mrs. Thorndike filed a bill against him (*Thorndike v. Hunt*), and an order was made that he should transfer into the court the amount sold out, and he accordingly transferred into court 3,253*l.* consols (which in fact was part of the trust estate of Mrs. Linzee). The dividends were paid for many years to Mrs. Thorndike. W. A. H. became insolvent, and the parties beneficially interested under the will of Mrs. Linzee filed a bill (*Browne v. Butter*) and soon afterwards presented a petition in both suits, praying that the 3,253*l.* which originally belonged to the trust estate of Mrs. Linzee, but which had been transferred to the name of the Accountant General in the suit of *Thorndike v. Hunt*, might be transferred to the suit of *Browne v. Butter*, and that the dividends which had been paid to Mrs. Thorndike might be repaid; and the Master of the Rolls ordered accordingly, on the ground that the 3,253*l.* was part of Mrs. Linzee's trust estate. The plaintiff in the first suit, Mrs. Thorndike, appealed to the Lords Justices, who held, reversing that decision, that the legal estate in the fund had by transfer become vested in the Accountant General for the purposes of the suit of *Thorndike v. Hunt*; that Mrs. Thorndike was a purchaser for valuable consideration without notice of the fraud, and was entitled to hold the fund against the parties interested under Mrs. Linzee's will. Strictly, a bill ought to have been filed, though the merits were so plain that their Lordships felt themselves enabled to decide upon petition. W. A. H., who was a solicitor of the Court, was ordered to shew cause why he should not be struck off the roll, and was struck off. *Thorndike v. Hunt*, and *Browne v. Butter*, 417

— Testator devised a public-house to A. and B., as trustees, upon trust, as soon as convenient after his death, to sell the same, invest the proceeds, and pay the income to C. for life, and divide the capital, after the death of C., as therein mentioned. Testator died in 1834. In 1836 the property was advertised for sale, and soon after, an offer was made of 900*l.* for it. The trustees having been advised that the property was worth 1,000*l.* did not accept of this offer. Shortly afterwards the property became depreciated in value from the scheme of a railway. A. died in 1842. C., the tenant for life, died in 1842. B. died in 1856. The property

was unsold. In a suit instituted in 1856 for administration of testator's estate, it was held, that the property must be sold, and the estates of A. and B. held liable for the difference between the purchase-money and the rents from 1842, and 900*l.* and interest at 4*l.* per cent. from 1842. *Fry v. Fry*, 591

— A trustee having paid money into court under the Trustees' Relief Acts without making inquiries for the parties entitled to the fund, it was held, he must pay the costs which the *cestuis que trust*, who were officers in the Austrian service, had been put to in obtaining the money out of court. *In re Knight's Trusts*, 625

— In order to raise a trust by precatory words in a will there must be a certain subject-matter and a certain object; but it is not necessary that the object should be so defined that it can be distinctly ascertained: if there is a definite object intended, that is a sufficient creation of a trust to exclude the legatee from taking beneficially. Thus, where testatrix bequeathed to her husband absolutely a specific sum of 13,000*l.*, and requested that, after reserving to his own absolute use and benefit 2,000*l.*, he would make such disposition of the remainder as he might deem most desirable, to carry out her wishes, often expressed to him by word, and it appeared that she had never expressed any wishes on the subject, it was held, that there was a definite object intended; and though that object could not be ascertained, there was a sufficient creation of a trust to exclude the husband from taking the beneficial interest in the remainder of the fund, although the trust itself failed. *Bernard v. Minshull*, 649

— Powers, rights and duties of trustees of a chapel. *Perry v. Shipway*, 660

— Where trustees of a legacy, given for the benefit of a lady for life, with limitations over, one of such trustees being also the residuary legatee under the will, refused to comply with request of tenant for life, that they would pay the legacy into court under the provisions of the Trustees' Relief Act, 1847, although she offered to pay the costs of the proceedings for that purpose, and she consequently instituted a suit and obtained an order for payment of the fund into court, the costs of the suit were directed to be paid out of the residue. *Handley v. Davis*, 873

— Appointment of new trustees. See Lunacy.

— See Baron and Feme. Company. Investment. Limitations, Statute of. Mortgage. Principal and Agent. Production of Documents.

UNCLAIMED DIVIDENDS. See Stock.

VENDOR AND PURCHASER—Effect of an agreement by purchasers not to bid against each other at a sale of land by auction. *In re Carew's Estate Act*, 218

— Upon sale by auction, the property sold was described as leasehold ground-rent of 50*l.* per annum, amply secured on houses producing rental of 250*l.* let on a lease for the whole term at 82*l.*, held under two leases direct from the original lessor for an unexpired term of twenty-six years, at ground-rents amounting to 32*l.* The purchaser objected to complete, because the ground-rent was not amply secured, and the nature of it was not sufficiently set out. But it was held, that as the facts stated in the particulars were sufficiently explicit to lead to inquiry, and as, by the conditions, inspection of the documents was offered previous to the sale, the purchaser could not plead ignorance of what he might have made himself acquainted with, and the purchase must be enforced. *Smith v. Watts*, 220

— A contract for sale, by defendant to the plaintiff, of an advowson was entered into, subject to conditions of sale, one of which provided that if any objections and requisitions should be made which the vendors were unable or unwilling to comply with, the vendors might, notwithstanding any treaty or discussion in reference thereto, or any attempt to remove or comply with the same, annul the contract, without payment of costs. After the purchaser had accepted the title, disclosed in an abstract delivered to him by the vendors, and his solicitor had sent to their solicitor a draft conveyance for the vendor's approval and execution, the purchaser's solicitor, upon a search at the office of Queen Anne's Bounty, discovered that the rectory was subject to a mortgage or charge payable to Queen Anne's Bounty, of which upwards of 600*l.* then remained undischarged. The vendors having refused to comply with the requisition that compensation should be made in respect of the deterioration of the value of the advowson by reason of the charge on the benefice, and insisting upon their right to rescind the contract according to the terms of the condition of sale, the purchaser filed his bill for specific performance of the contract with compensation. One of the Vice Chancellors made a decree for specific performance, but without compensation, and ordered plaintiff to pay the costs of the suit; and, on appeal, the Lords Justices affirmed the decision in all respects, and the appeal was dismissed, with costs. *Edwards-Wood v. Marjoribanks*, 298

— A vendor put up for sale "the absolute reversion to the sum of 2,000*l.* consols," with conditions that any objections to title should be made within ten days after delivery of the abstract, and that the vendor, in case he should be either unable or unwilling to meet any objection that should be raised, might rescind the contract upon return of the deposit without interest or costs. The vendor filed a bill for specific performance, and the case came on upon motion for a decree. It was held, that notwithstanding the expiration of the time allowed for making objections to title, the purchaser was entitled to raise objections in respect to matters not disclosed upon the face of the abstract, which

he had subsequently discovered, and which would render the title bad or doubtful. Also, that the vendor could not rescind the contract under the condition without first dismissing his bill, with costs. The Court refused the motion for a decree, with costs. *Warde v. Dixon*, 315

— A young man of the age of twenty-two, being the owner of a reversionary interest in a freehold estate, contingent on his surviving his father and mother, whose respective ages were fifty-four and forty-seven, sold the same by private contract. There was a doubt whether the reversion was in fee or in tail, but no steps were taken to ascertain its market value. Upon the death of the surviving tenant for life, after a lapse of thirty-eight years, the vendor claimed payment of a charge upon the estate, unknown at the time of the purchase, and he instituted a suit to rescind the contract, on the ground of fraud and inadequacy of price, or otherwise to foreclose the equity of redemption. It was held, a purchaser must, under such circumstances, satisfy the Court, by evidence taken at the time of purchase, that the purchase was *bond fide* and for full value; but that in the absence of such evidence the purchase must be set aside. *Salter v. Bradshaw* and *Bradshaw v. Salter*, 426

— A suit was instituted by a vendor for specific performance of a contract to purchase an estate which, by deed, dated in 1841, was limited to use of the vendor for life without impeachment of waste; and after determination of that estate by any means in his lifetime, to use of a trustee and his heirs during the life of the vendor, in trust nevertheless for the vendor and his assigns; and after determination of the estate so limited to the trustee and his heirs, to the only use and behoof of the vendor, his heirs and assigns for ever. One of the Vice Chancellors held, upon objection taken by defendant, that he was entitled to a conveyance of any interest which might have become vested by forfeiture or otherwise in the dower trustee, but no costs of suit were given to either party up to the hearing. The defendant appealed, on account of the decree not giving him costs, and of his having to pay interest from a certain date on his purchase-money. The appeal was dismissed, with costs. *Semble*—that the rule as to there being no appeal on the subject of costs alone is practically not now in force. *Collard v. Roe*, 560

— T. being the holder of certain shares in a company, upon which 20*l.* each had been paid up, and being also entitled to other shares in the same company, upon which 2*l.* each had been paid, instructed his broker to sell the 2*l.* shares. The broker sold the 20*l.* shares, and brought to T. for execution by him deeds of transfer in which blanks were left for the name of the transferee, for the number of shares sold, and for the distinctive numbers of the shares. The deeds bore stamps high enough to carry the 20*l.* shares, and were executed in blank by T. The deeds were delivered in this condition, together with the share certificates for the 20*l.* shares, which

had been fraudulently obtained by the broker, to *bond fide* purchasers, who filled up the blanks. T. filed his bill to set aside the deeds, and it was held (see *Taylor v. the Great Indian Peninsular Rail. Co.*, 285) that they were void, and that T. was entitled to the shares expressed to be thereby transferred, and to have his name restored to the register. This decision was affirmed on appeal. The practice of the Stock Exchange for a broker to deliver deeds of transfer in blank cannot prevail against the rule of law. *Taylor v. the Great Indian Peninsular Rail. Co.*, 709

— The goodwill of a business comprises all the advantages that may be derived from the purchasers holding themselves out to the public as the persons interested in that business which has been identified with the name of a particular firm. Therefore, though it is well settled that the sale of a goodwill does not imply a contract on the part of the vendor not to set up again in a similar business, he is not at liberty to hold out to the public that he is continuing the same business by using the name of the old firm, even though his own name may be the only one that appeared in that firm. *Churton v. Douglas*, 841

— If a party executes a deed as principal he at once takes the property and makes himself liable for the purchase-money, and he will not be heard to say that no contract existed with the vendor, or that his execution was obtained upon the representation of a third party that the purchase-money was paid, and that he took the property in the character of trustee only. *Wilson v. Keating*, 895

— Power of Court to order return of deposit. See Specific Performance.

— Application of purchase-money. See Lunatic.

— See Solicitor and Client.

VOLUNTARY BOND—A father having given a voluntary bond to trustees, conditioned for the payment after his death of a sum of money to them for the benefit of his two sons, afterwards, upon the marriages of his sons, assented to such bond being settled upon trust for the benefit of these sons and their respective wives and children. The marriages having taken place upon the faith of the provision thus assented to, in a suit for the administration of the father's estate it was held, that the trustees of the marriage settlements were entitled to rank as specialty creditors for value. The cases of *George v. Milbanke* and *The East India Company v. Clavell* observed upon. *Payne v. Mortimer*, 716

VOLUNTARY SETTLEMENT—A. and his wife, joint tenants in fee, in 1818 mortgaged their estate to B, the proviso for redemption being, that on payment of the mortgage-money B. should re-convey to A. and his wife, their heirs or assigns, or unto such other person

or persons, and for such intents and purposes, and in such manner and form as A. and his wife, or the survivor of them, or the heirs or assigns of such survivor, should appoint. In pursuance of a covenant in the mortgage-deed, a fine was levied by A. and his wife. In 1823 the mortgage-money was repaid, and in 1827 by a deed reciting these circumstances B, by the direction of A. and wife, conveyed, and A. and wife appointed to a trustee the property to be held to the use of the wife for life, then of A. for life, and afterwards of S. (a daughter) and her children, &c. After the death of the wife, A. in 1854 conveyed the estate to his son for a valuable consideration. The son after A.'s death instituted a suit to set aside the settlement of 1827 as voluntary and void against himself, a purchaser for value. One of the Vice Chancellors made a decree in plaintiff's favour; but, upon appeal, it was held, that a power was created by the proviso in the deed of 1818, which enabled A. and his wife effectually to convey their interest, as they did by the settlement of 1827, without levying a fine; and that the wife's parting with her interest for the purpose of the settlement was sufficient to prevent the settlement being voluntary on A.'s part, and accordingly the plaintiff's bill was dismissed, with costs. *Atkinson v. Smith*, 2

— An attorney in insolvent circumstances, having assigned the goodwill of his business in consideration of a sum of money paid down and an annuity secured by bond to be paid to his wife for life, with remainder to himself for life, the settlement of the annuity was held void as against creditors. *Neule v. Day*, 45

— By post-nuptial settlement wife's reversionary property was conveyed to trustees, to pay the interest to the husband during their joint lives, and after death of either of them the principal to be in trust for the survivor absolutely. Upon joint application of husband and wife, the Court, upon the property coming into possession, treated it as unaffected by the settlement. *Hogarth v. Phillips*, 195

— To render a deed void as against creditors, it is not sufficient that it is merely voluntary, but it must be proved that the party making it intended to delay, hinder or defraud his creditors. On the question of a voluntary deed being void under the Statute of Elizabeth, all the surrounding circumstances must be looked at, and each particular case must depend upon those circumstances. *Thompson v. Webster*, 700

— P. B, in 1840, became bankrupt, and did not obtain his certificate, and in 1849 had a grant of leasehold property made to him by the Crown. The same year he settled that property on his sons and his daughters (then unmarried), and their children, but declared no trusts in favour of their husbands. The daughters afterwards married, and one of them had children. C. C. was a simple contract creditor

of P. B, on a debt subsequent both to the bankruptcy and the settlement, and he filed a bill on behalf of himself and all other unsatisfied creditors of P. B, against the assignees, the trustees of the voluntary settlement, the sons of P. B, and the two daughters and their husbands, and the infant children of one of them, to set aside the settlement. One of the Vice Chancellors made a decree in plaintiff's favour, but considered that the husbands had no present interest, and that the wives and children were mere volunteers. On appeal, held, that plaintiff had no right to sue, he having no judgment, and not being in process of obtaining any; and their Lordships dismissed the bill, with costs, both of the appeal and of the original hearing. *Collins v. Burton*, 943

WARD OF COURT—A ward of Court married a fortnight after attaining twenty-one. Upon a joint petition of her husband and herself, asking for payment of a fund in court, part of her fortune, to her husband, the Court refused to accede to the prayer of the petition, though the wife attended and offered to consent; but a reference was directed to the chief clerk to approve of a settlement. *Biddles v. Jackson*, 40

— A female ward of Court married a fortnight after attaining twenty-one. Upon a joint petition of herself and her husband, asking for payment of a fund in court, part of her fortune, to her husband, the Court refused to examine the lady, who offered to attend for that purpose, and it also refused to accede to the prayer of the petition, but made an order directing the dividends of the fund to be paid to the husband during the joint lives of himself and his wife, without prejudice to any question. The order of the Court was made precisely on the same footing as if the lady had been examined in court, and had expressed in the strongest manner her desire that not any part of the fund should be settled. *Biddles v. Jackson*, 290

WILL—Construction of, as to vesting of legacy payable out of the proceeds of land. *In re Hart's Trust*, 7

— T. W, by his will, made in 1805, gave the residue of his real estate and all his personal estate to a trustee in trust for conversion and for accumulation, for the benefit of "such child or children" as his nephews and niece, Walter, Thomas and Dorothy, should leave at the time of their respective deceases, in equal third parts; and in case either of his said nephews and niece should die without leaving any children or a child, then such third share should be paid to the children or child of the other or others leaving children or a child, in equal proportions. And in case all his said nephews and niece should die without "leaving any issue," then he directed that the whole should go to the children of P. G, in equal shares. Walter, Thomas and Dorothy all died without leaving any child, but Dorothy left grandchildren. The Master of the Rolls decided that the word "children" should

be interpreted so as to include grandchildren and remoter issue, and that the property was divisible among the eight grandchildren of Dorothy *per capita*, so that the gift over did not take effect, nor was there an intestacy. It was held, reversing that decision, that the words "child or children" must be read in their strictly proper sense, and did not include grandchildren or remoter issue; that "any issue" could not be read "any such issue," so that the gift over to the children of P. G. did not take effect, but that there was an intestacy. *Pride v. Fooks*, 81

— Testator gave leasehold premises to M. R. for life, and at his death to A. R. and her children; but if they should die without issue, in that case the property was to be divided between four persons, *nominatim*. A. R. had no children either at the death of testator or of the tenant for life. A. R. took only an estate for life, with remainder to her children. The rule in *Wild's case* has no application to personalty. *Audsley v. Horn*, 293

— The old rule that the Court would not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court is not applicable to the case of a bill for discovery in aid of proceedings in the Probate Court, that Court not having the same power of compelling discovery as the Ecclesiastical Court had. An heir-at-law having been cited to see proceedings commenced in the Probate Court for the purpose of proving the testator's will in solemn form, filed several pleas denying the validity of the will, and filed a bill of discovery in aid of his pleas, and moved for an injunction to stay proceedings until answer. Interrogatories not having been filed, the motion was refused, with costs, but leave was given to move on a future day, after the interrogatories should have been filed. *Fuller v. Ingram*, 432

— Testator directed that, when the youngest of his two daughters had attained twenty-one, his real and personal estate and effects should be divided into three equal parts: one part to be for his wife, and one of the remaining two for each daughter; at his wife's decease her share to be equally divided between his two daughters; and, provided either of his two daughters should die before a division of the property should have been made, and having no surviving issue, then the part of the deceased to be given to her surviving sister. By a codicil, testator provided that "should both his children die in their minority, and leave no issue, then in such case, and in such case only," the property should go to his widow for life, and then over. One daughter attained twenty-one, and died without having been married, and afterwards the other daughter died under age and without having been married. It was held, the gift by the codicil to the widow for life, and then over, had failed. *Maddison v. Chapman*, 450

— Testator possessed of leasehold estates created a term for thirty years, which he vested in trustees to pay debts and to accumulate rents until

the legacies were paid, and then to permit his son Benjamin to take the rents "until the son of my son Benjamin (if he shall have a son) shall attain twenty-one," when this son of Benjamin was to take the rents for life, "and after his decease, to the heirs male of such son, and the heirs male of their bodies." There were exactly similar provisions (in default of Benjamin having children) as to the next son, Lewis, and on failure of Lewis and his sons, then to the son of testator's daughter Abigail. Benjamin and Lewis entered successively into possession of the rents, and died without issue. Abigail had a son who attained twenty-one. It was held, the devise over was not void for remoteness, but that the rule as to freeholds applied in this case to leaseholds, and as in freeholds Abigail's son would have taken an estate tail, so here he took an absolute interest. Also, as the only legacy in the will was to be paid to a person in being at the time of testator's death on her attaining twenty-one, the direction to accumulate was not void. *Williams v. Lewis*, 505

— Testator, by his will, directed his trustees to accumulate the income of his residuary personal estate, "until the principal and accumulations should amount to the sum of 3,000*l.*, or thereabouts," and then to pay the income of the fund to A, B, C, D, E, F. and G. during their lives and the life of the survivor; and after the death of the survivor to pay the principal sum unto and equally among the issue of the said A, B, C, D, E, F. and G, who should be then living. At the end of twenty-one years from the death of testator (the period allowed by the *Thellusson Act*) the residue and the amount of the accumulations of the income thereof, fell far short of the sum of 3,000*l.* It was held, per *Stuart, V.C.*, that the whole fund thus produced belonged to those who were next-of-kin of testator at the time of his death: but, upon appeal, it was held that the gift was not void for remoteness; but that the income of the fund, between the termination of twenty-one years from the testator's death and the time when the fund became divisible, belonged to the next-of-kin; *Lord Justice Knight Bruce*, however, dissenting from each construction of the will. *Oddie v. Brown*, 542

— Testator, by his will, gave all his real and personal estate to be enjoyed by his widow for life, and after her death to be sold, and the proceeds to be divided among his ten children equally. Testator directed that one of his sons should have a right of pre-emption for 450*l.* of a particular parcel of garden land, part of the real estate. After testator's death, and before the widow died, the parcel of garden land was purchased by a railway company under their compulsory powers; the compensation-money paid therefor, when freed from incumbrance, being represented at the widow's death by the sum of 882*l.* 18*s.* 2*d.* standing in court. It was held, that testator's son to whom the right of pre-emption was given was entitled to the compensation-money, subject to the deduc-

tion of the price fixed by testator. *In re James Cant's Estate. In re the Lands Clauses Consolidation Act*; and *In re the Eastern Union and Harwich Rail. Co.*, 641

— Under the 22nd section of the Wills Act, a general bequest by a married woman will include property over which she has a power of appointment. A bequest of "all and singular my other property and estate" will include not only everything not before mentioned in the will, but everything the previous disposition of which fails, unless it appears from the will that the property comprised in the previous disposition was intended to be excepted for all purposes from the residuary bequest, and not merely for the purpose of giving it to the particular legatee. *Bernard v. Minshull*, 649

— Testator bequeathed his residuary estate upon trust as to one moiety for his daughter M. for life, and in default of issue of M. upon trust as to one half part thereof as M. should appoint, and in default of appointment over, and as to the half part of such moiety, upon the same trusts as were thereafter declared concerning the other moiety of his residuary estate; and he proceeded to declare precisely similar trusts of the other moiety, substituting the name of his daughter E. for that of M. Both M. and E. exercised their powers of appointment, and died without issue. It was held, that each appointment effectually disposed of one moiety of testator's residuary estate. *Atkinson v. Jones*, 753

— Parol evidence will not be admitted to shew that a bequest in a former will had been inadvertently allowed to remain in a second will. Testator, in the lifetime of his niece E, made a will containing bequests in her favour. She afterwards died, leaving a grand-daughter, E. J, who was a great-great-niece of testator. With a knowledge of these facts, testator made a second will, which contained bequests to E, identical with those contained in his former will. It was held, that testator's great-great-niece was within the description, and that she was entitled to the legacies. *Stringer v. Gardiner*, 758

— Testator gave a legacy to each of his brothers and sisters (naming them), or to their "legal representatives," to be paid to them two years after his death, and legacies to his nephews, the whole amounting together to 6,100*l.* He then gave the residue of his property to his widow absolutely, except 4,100*l.*, which she was only to take for life, and after her death it was to be divided among his relations before mentioned, "in proportion to the legacies left above, which will just make their legacy double the first bequest." One of testator's sisters and two of his nephews died after the date of the will, but in his lifetime; and after his death the widow died. It was held, on appeal, there was not sufficient evidence before the Court to justify it in departing from the words of the will respecting the

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apparent miscalculation of the amount excepted out of the residue; and with regard to the postponed legacies, that notwithstanding the words "or to their legal representatives," the shares of the pre-deceased legatees in the amounts postponed to the widow's life interest lapsed, and that as the 4,100*l.* was not given as part of the residue, but as an exception out of the residue, those shares which lapsed fell in to the residue, and did not go to testator's next-of-kin. *Thompson v. Whitelock*, 793

— Testator, who died in 1822, by his will, gave to his brother J. B. a legacy of 100*l.*, to be paid "as soon as conveniently may be after my decease." He then gave an annuity of 50*l.* to H. H, to be payable out of his real estate, until one of testator's grandchildren should attain twenty-one, and on the happening of that event he directed his real estate to be exonerated from the annuity of 50*l.* and his real and personal estate to be sold, and the annuity paid out of the income of the produce. He declared that after the grandchild attained twenty-one the annuity should be a charge only on his personal estate. In 1839 the grandchild came of age and the real estate was sold, and the whole income paid to H. H. in part of her annuity until 1856, when she died. In 1858 J. B, the legatee, filed a bill for payment out of the trust fund, alleging that the personalty was not sufficient, but no personal representative of testator was made a party. The Master of the Rolls dismissed the bill on the grounds that the legacy was not charged on real estate, and that it was barred by the Statute of Limitations (3 & 4 Will. 4. c. 27). But on appeal it was held, that the personal estate was the primary fund; which there was no evidence was insufficient; that there was no personal representative of testator before the Court, and that by lapse of time the bill came too late. The appeal was dismissed, and leave to amend refused. *Bright v. Larcher*, 837

— If an estate is given to A. simply during the life of B, and A. dies before B, any person getting possession of the land after the death of A. will be entitled to hold it as the general occupant; but if an estate is limited to A. and his heirs during the life of B. a general occupant is not permitted, but the heir will take as special occupant, and not by descent. *Semble*—If an estate is given to A. and his executors and administrators during the life of B, and A. dies first, the executor would be capable of taking the estate as special occupant. In the case of an incorporeal hereditament limited *simpliciter* to A. *pur autre vie*, an executor or administrator may be a special occupant, but there can be no general occupant. If A, having an estate to himself, his heirs and assigns, during the life of B, conveys the legal interest to trustees, their executors, administrators and assigns, and the trustees die in the lifetime of the *cestui que vie*, the executors of the trustees will be special occupants, and A. will have no interest in the legal estate. If a tenant *pur autre vie* parts

with the beneficial interest contingently, and the contingency does not happen, then there will be a resulting trust in favour of A. of the interest which he has not effectually parted with. *Northen v. Carnegie*, 930

— Testator (who at the time of making his will had three sons living), after devising estates to trustees, and directing accumulations, &c., appointed a time at which the estates were to be divided into three portions, and one was to be conveyed to the “eldest male lineal descendant” then living of testator’s eldest son. At the appointed time two persons were living who filled the character of “male lineal descendant.” One was a youth who was eldest in point of primogeniture: the other, his uncle, who was eldest in point of age. Under the words of the will, the former was held entitled to have the estate conveyed to him. *Thellusson v. Rendlesham*, 948

— See Annuity. Devise. Legacy. Remote-ness.

WINDING-UP ACTS—A person may be a contributory in respect of his application for shares, although he signs no written agreement to take shares, and does not, therefore, fall within the description of a “subscriber” mentioned in the 3rd section of the 7 & 8 Vict. c. 110. *Ex parte Cookney, in re the Electric Telegraph Company of Ireland*, 12

— If the directors of a banking company which is in difficulties, make a flourishing report to the shareholders and public of the financial condition of the company, and it induces a person to purchase shares in open market, or of third parties, and it turns out after he is registered in the books of the company that the report was altogether untrue and without foundation, and the company stops payment, still the purchaser is a shareholder and liable as a contributory. *In re Liverpool Borough Bank, ex parte Duranty*, 37

— Creditor of joint-stock company (limited) commenced an action against one of the shareholders. Petition for winding up was then presented, and notice given to the creditor, who, however, continued proceedings in the action until the advertisement appeared for a creditor’s representative. Creditor entitled to his costs of action up to the period of advertisement. *In re the Welsh Potosi Mining Co., ex parte Tobin*, 44

— A. B. was tenant for life of certain shares in a banking company, under a will of which his uncle was executor. At request of A. B., his uncle, a director of the company, transferred these shares into his name for a nominal consideration, in order to qualify him to be a director. A. B. became a director, and the company failed, and was ordered to be wound up. A. B. objected to his name being placed on the list of contributories, on the ground that, prior to his taking the shares, the directors had published fraudulent reports of the affairs of the company,

and his uncle, being a director, must have known that they were fraudulent; and also that, being only tenant for life of the shares, it was a breach of trust on the part of his uncle to transfer the shares into his name, and that the directors must have been aware of the fact; and, therefore, that the transaction was a nullity. A. B. properly placed on list of contributories. *In re Northumberland and Durham District Banking Co., ex parte Bigge*, 50

— Where a company has been registered under the Joint-Stock Companies Acts of 1848 and 1849 as an unlimited company, and subsequently registered under the 19 & 20 Vict. c. 47. as a limited company, the Court of Chancery has power to make an order for the winding up of the whole transactions of the company. *Ex parte the Plumstead, Woolwich and Charlton Water Co.*, 163

— A chartered banking company were empowered to extend their capital by the issue of new shares. A fraudulent report of the state of the affairs of the bank was made by the directors to a general meeting of the company, and by them adopted. The accounts had been audited by auditors appointed by the shareholders. In pursuance of the desire to have new shares taken, the directors issued a circular, which also contained false and fraudulent representations. N., upon the faith of the report and the circular, and also upon the representation of one of the directors, took shares, and received a dividend upon them. He afterwards employed his broker to dispose of the shares. According to the constitution of the company, the assent of the directors to a transfer of shares was necessary, the evidence of which assent was to be an indorsement on the deed of transfer. The broker employed by the bank purchased these shares, giving the name of E. as the purchaser. The transfer to E. was executed in the form which had been furnished at the bank, with E.’s name inserted as purchaser. E. was not aware of this transfer, but he had given authority to the principal manager to use his name in transfers, and he had accepted some transfers in which his name had been so used. The purchase-money for N.’s shares was paid by the bank. The next dividend was treated as part of the assets of the bank, and the shares were subsequently found in the principal manager’s possession, and given up by him to the solicitor of the bank as part of their property. The bank having stopped payment, N.’s name was sought to be placed on the list of contributories, and it was held that N. was not exempted from liability by reason of the false representation in the report and the circular, as the directors were not agents of the company for the purpose of making fraudulent representations, or beyond the scope of their authority as limited by the charter; but that the assent of the directors to the transfer of the shares by N. had been sufficiently shewn, and therefore his name must be removed from the list of contributories. *In re the Royal British Bank, ex parte Nichol*, 257

— S. took shares in a joint-stock company, and signed the deed, upon the representation made by one of the officers of the company that such deed contained a clause limiting the liability of the shareholders to the amount of their shares. This clause had been fraudulently inserted in the deed after complete registration, and was not contained in the registered deed. S. attended meetings of the company and received dividends for three years, when the company was ordered to be wound up. S. was held liable as a contributory. *In re the Athenæum Life Assur. So.; Sheffield's case*, 325

— The P. of W. Company effected a cross-insurance with the A. Society on the life of J, and the latter society was ordered to be wound up. The life dropped, and the P. of W. Company having paid the amount assured claimed to prove the amount as a debt against the A. Society, and moved that the official manager might be directed to make a call upon the contributories for payment of the same. The policy of the A. Society contained a proviso that the capital and other property of the company remaining at the time of any demand unapplied and inapplicable to any prior claim or demand should alone be liable to answer and make good the claims and demands against the company by virtue of the policy, and that no director or shareholder should be in anywise individually or personally liable or subject to any claim or demand beyond the amount unpaid of his shares in the capital stock of the company. It was held, the liability of the shareholders was expressly limited by the contract in the policy, to which the P. of W. company were parties, to the amount unpaid on their shares, and that no call could be made for satisfying a claim on the policy on a shareholder who had already paid up the full nominal value of his shares, or upon any other shareholder to an amount exceeding the sum due from him upon the shares held by him. *Ex parte the Prince of Wales Life and Educational Assur. Co., in re the Athenicum Assur. So.*, 335

— Directors of a company, with the sanction of a general meeting of shareholders, issued preference shares at 6l. per cent. interest, which they had no power to do under their deed of settlement. Some of these shares were taken by a director, who sold a part to W, representing them to be preference shares. W. signed the deed of settlement. It was held, there was no fraud or misrepresentation on the part of the company which would exempt W. from the liability incurred as a shareholder, and that W.'s name must be placed on the list of contributories. *In re the National Patent Steam Fuel Co., ex parte Worth*, 589

— A holder of 100 shares in a company, transferable by delivery, knowing that the company was in difficulties and likely to be wound up, handed his shares to a workman in his employ for 2s. 6d. the lot. Five days afterwards a resolution was passed to obtain an order to wind up the company. It was held, that the transfer

could not be supported to the prejudice of other shareholders, and that the vendor, and not the purchaser, must be placed on the list of contributories. *In re the Mexican and South American Co., ex parte Lund*, 628

— B. applied for shares in a company, and having had 100 shares allotted to him, sold them without having signed the deed of settlement, or attended any meeting of the company. The directors, with the sanction of the shareholders, at a general meeting, declared all the shares to be forfeited where the shareholders had not signed the deed, but no power was given them under the deed to take this course. It was held, that B. was not discharged from his liability in respect of such shares, and his name was placed on the list of contributories; and, on appeal, this was affirmed, the directors having no power to declare a forfeiture. *Ex parte Barton, in re the National Steam Fuel Co.*, 637

— W. was induced, on the representation of the secretary of a joint-stock company that there were to be two medical referees, and that he might be appointed one, to take 200 shares, whereupon he was appointed to the office. Soon afterwards W. discovered that there were four instead of two medical referees, on which he resigned his office, and demanded back the money he had paid for the shares. By the deed of settlement it was provided that if any shareholder did not pay his calls the secretary might send notice requiring payment within twenty-one days, and if the calls were not paid the directors might declare the shares forfeited. W. (under the foregoing circumstances) refused to pay his calls, and the secretary sent him the required notice, and added that if the calls were not paid within twenty-one days his shares would be forfeited. W. made default, and took no further notice of the matter, and the directors within the twenty-one days declared a forfeiture, but allowed W.'s name to remain on the share register for more than two years, when the company was wound up. One of the Vice Chancellors decided that there had been no such misrepresentation by the company as absolved W. from liability as a shareholder, and that upon the construction of the deed of settlement the forfeiture of the shares had not been completed, and that W.'s name must be placed upon the list of contributories. On appeal, it was held (affirming his Honour's decision) that there was no such misrepresentation or breach of faith as would exonerate W; but (reversing the same decision) that there had been an absolute forfeiture submitted to by W, whose name must therefore be removed from the list. Their Lordships also held, that whether the directors declared the forfeiture before or after the twenty-one days was a matter of form and not of substance. *Ex parte Wollaston, in re the Home Counties Assurance Co.*, 721

— A company was established for working mines in a foreign country, without a deed of settlement, but according to the prospec-

tus, and by the custom of the company, the shares passed by mere delivery of the certificates, and the affairs of the company were wholly managed by the board of directors. After several years the company was ordered to be wound up, by an order dated the 24th of November 1857. Messrs. G. and S. purchased shares a few days before the date of the winding-up order, and the scrip certificates of some of them were thereupon delivered to them, and the remaining scrip certificates after the date of the order. Messrs. De P. being the holders of shares, and being aware of the failing state of the company, and desiring to get rid of the responsibility, sold the scrip certificates absolutely and unconditionally, for a nominal price, to one of their clerks a few days before the order for winding up was made. The names of Messrs. G. and S. and of Messrs. De P. were placed upon the list of contributories, and it was held, that Messrs. G. and S. were liable in respect of all their shares, whether the certificates were delivered before or after the date of the order for winding up, but that Messrs. De P. were not, for that the sale by them was valid; wherefore the former would remain upon, but the latter would be removed from, the list of contributories. The holders of shares, bought in open market, although they may have been fraudulently issued by the directors, cannot on that ground claim relief against the other shareholders, whatever may be their rights and remedies against the directors. Every person purchasing shares in such a company as that described above, takes them subject to the liabilities of the company at the time of the purchase. A number of partners trading as a company, on the terms that their shares shall pass by delivery, does not necessarily shew that they are assuming to exercise the powers of a corporation, or render the company illegal. If a company not otherwise illegal was rendered so by the 4th section of the statute 19 & 20 Vict. c. 47, the acts done and debts incurred by it in the interval of time between the passing of that act and the passing of the statute 20 & 21 Vict. c. 14. (repealing the 4th section of the former act) are valid and binding on the company, and are not the mere acts and debts of individual shareholders. *Ex parte Grisewood, in re the Mexican and South American Co.*, and *Ex parte De Pass*, 769

— The trustees of a freehold land society instituted a suit against defendant, and pending the proceedings the society became insolvent, and a winding-up order having been obtained, the official manager was substituted as plaintiff by an order of Court; but he was refused leave, by the Court making the winding-up order, to prosecute the suit. Upon a motion by the official manager to the Court, which had substituted him as plaintiff, asking that the suit might be stayed on terms, or that some order might be made for its future prosecution, it was held, that insolvency was no ground for staying a suit or preventing its being dismissed, and that the official manager must pay the costs of the motion personally. *Caldwell v. Frost*, 810

— An official manager appointed under an order made to wind up a company was by an order of course substituted as plaintiff in a suit instituted by the trustees of the company. He applied to the Court asking either that the suit might be stayed or that direction might be given for its prosecution. The application was refused, and he was ordered to pay the costs personally. Upon motion by defendant, which was served on the original plaintiffs and on the official manager, it was held that the bill must be dismissed, with costs. Also, that the application made by the official manager was not an adoption of the suit, and that he was not personally liable to pay the costs, but that they must be paid by the original plaintiffs. *Caldwell v. Ernest*, 811

— A shareholder in a joint-stock company presented a petition (against the approval of the majority of the shareholders) for winding up the company, alleging the loss of three-fourths of the capital (under section 67. of 19 & 20 Vict. c. 47); but the Court, being satisfied of the bad faith of the petitioner, and not being satisfied of the loss of capital as alleged, dismissed the petition. Under section 72. the order to be made upon a petition to wind up is entirely in the discretion of the Court. *Ex parte Hawkins, in re the Metropolitan Saloon Omnibus Co.*, 830

— Upon winding up a company, carried on upon the cost-book principle, it appeared, by their deed, that shares in the company would pass by delivery of certificates; but no shareholder was entitled to a dividend unless his name was entered in the share register-book. A shareholder, who had transferred his shares, but whose transferee had not been registered, was held to be liable as a contributory of the company. *In re Wrysgan Slate Quarrying Co., ex parte Humby*, 875

— Under a supplemental charter a banking company, being empowered to issue new shares, a fraudulent report of the company's affairs was made by the directors, and adopted at a general meeting of the shareholders. In June 1856 M., a customer of the bank, took twelve of these new shares, executed the deed, and received the share certificates. In the next return to the Stamp Office his name was not inserted as a shareholder, and in the monthly balance-sheet the sum paid by him for the shares was treated as a debt from the bank. In his pass-book he was credited with interest at 4l. per cent. upon the sum he had paid on account of the shares. M. also attended two meetings of shareholders. In September 1856 the bank stopped payment, all the new shares not having been issued, and the affairs of the company were afterwards ordered to be wound up. M. a contributory in respect of the twelve shares, and not entitled to claim as a creditor in respect of deposit paid for his shares. *In re the Royal British Bank. ex parte Mixer*, 879

— A shareholder in a company, carried on upon

the cost-book principle, relinquished his shares upon paying his *pro rata* portion of the liabilities of the company. All the formalities required for the relinquishment of such shares were regularly carried out and entered in the books of the company, and the correspondence was conducted with the purser, who fixed the amount to be paid by the shareholder without the sanction of the managing committee. The purser, being the authorized officer of the company to conduct such transactions, the shareholder was exempted from liability in respect of any excess of power on the part of the purser; and upon the winding up of the company it was ordered that such shareholder should not be placed upon the list of contributories. *In re the Wrysgan Slate Quarrying Co., ex parte Birch*, 894

— W, the partner of a firm, applied for shares in a joint-stock company, on condition that the firm should be employed to supply chains and other things manufactured by them, which the company would require in their business. The company was ordered to be wound up in bankruptcy, under the provisions of 19 & 20 Vict. c. 47, and one of the Commissioners placed the name of W. on the list of contributories; but, upon appeal, the order was reversed. *Ex parte Wood, in re the Sunken Vessels Recovery Co.*, 899

WITNESS—In the case of a scrip company established previous to the 7 & 8 Vict. c. 110, transfer of the scrip certificates to new purchasers does not create new members or vary the company, or bring the holders within the provisions of the statute or render parties dealing in the scrip certificates of the company liable to penalties; therefore, a stockbroker, who had as a matter of business bought and sold shares in the company, is liable to answer questions respecting his dealings. *In re the Mexican and South American Company, ex parte Aston*, 631

— See Evidence. Privileged Communications.

WORDS—"Children," "Issue," 81

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BANKRUPTCY.

ADJUDICATION—Traders petitioned, under section 20. of 17 & 18 Vict. c. 119, for adjudication against themselves, and satisfied the Commissioner that their available assets exceeded in value the sum of 150*l.* They were accordingly adjudicated bankrupt; but it appearing at the certificate meeting that the assignees had not at that time actually realized that sum in cash out of the estate, the Commissioner postponed the grant of the certificate, adjourning the meeting for six months, with liberty for the bankrupts to apply when 150*l.* should be realized. Upon appeal, it was held, that if it should appear, as alleged, that the assets were sufficient to satisfy the requisitions of the statute, but that the realization was only postponed for the benefit of the creditors, the bankrupts were entitled to an immediate certificate of the first class. *Ex parte Slater, in re Slater, 7*

— A person, before leaving this country, gave a general authority (but it was not proved whether verbal or written) to his uncle to act for him in the arrangement and settlement of his affairs. Soon after his departure he was adjudicated bankrupt, and the uncle instructed a solicitor to dispute the adjudication. One of the Commissioners refused to hear the solicitor, on the ground that, under the 104th section of the above statute (12 & 13 Vict. c. 106), express agency was necessary. On appeal, the Lords Justices reversed the decision, and ordered “that the uncle should be allowed to appear before the Commissioner to dispute the adjudication by such solicitor as he should think fit.” “Such person,” mentioned in the section, does not apply only to the bankrupt himself. *Ex parte Frampton, in re Frampton, 21*

AFFIDAVIT—of admission of debt. See Trader-Debtor Summons.

ARRANGEMENT—A proposal for a composition was filed by a petitioning debtor under the arrangement clauses of the Bankrupt Law Consolidation Act, 1849, and in this proposal was inserted, at the suggestion of the Court, a clause providing that the debtor's estate should be vested in the

official assignee until payment of the composition. The debtor continued in possession of the estate, and at the time appointed paid the composition. It was held, the per-centage required by the 54th section to be paid to the chief registrar's fund was, under these circumstances, payable by the debtor. *Ex parte Vero, in re Vero, 1*

— A creditor on a bill of exchange accepted by traders issued a writ for recovery of the amount on the 21st of October. On the 28th of October the debtor served him with notice that a petition for private arrangement had been filed on the 26th. The creditor then discontinued his action, but on the 30th he caused notice to be served requiring immediate payment and proceeded on a trader-debtor summons for the same amount. The traders admitted the debt, but as they failed to pay at the expiration of the time limited, they were adjudicated bankrupt. One of the Commissioners confirmed the adjudication; but, upon appeal, his decision was reversed. Costs, under the particular circumstances, were not given against the petitioning creditor. *Ex parte Arnold, in re Arnold, 11*

CERTIFICATE—A trader who had made an equitable mortgage of ships to his brother was pressed by his bankers to give them security for his overdrawn account with them. The bankers produced an agreement, already drawn, to mortgage the ships, which he executed without informing them of the equitable charge. In less than six weeks he was adjudicated bankrupt. One of the Commissioners held, that he had been guilty of “obtaining the forbearance of a debt by fraud or false pretence,” within the meaning of the above-mentioned clause, and suspended his certificate for three years without protection, and then to be of the third class. On appeal, the Lords Justices ordered the certificate to be of the second class; but as there had been a departure from truth on the bankrupt's part, the decision was otherwise confirmed. *Ex parte Holderness, in re Holderness, 20*

— A timber measurer in a dockyard carried on

the business of an eating-house keeper, which was managed by his wife. The latter business not thriving, he petitioned for an adjudication, which he obtained. He then sold the business, and handed the proceeds to the official assignee. One of the Commissioners granted him a second-class certificate, with the condition that he paid a certain part of his salary while he continued timber measurer until he had paid 7s. 6d. in the pound on the debts proved. On appeal, the Lords Justices granted an immediate unconditional certificate of the third class. It is against public policy that the salary of a public servant should be reduced by the application of any part for the payment of debts. *Ex parte Harnden, in re Harnden*, 18

COMPANY. See Winding-up Act.

COMPOSITION. See Arrangement.

COSTS. See Arrangement.

JURISDICTION—Authority of registrar to make order after death of Commissioner. *Ex parte Corles, in re Palmer*, 15

PRACTICE—One of the Commissioners having refused to order office copies of proceedings in an adjudication which had been annulled to be furnished, in aid of a defence to an action in a foreign court, the Lords Justices, without deciding whether the Commissioner was wrong or right in his refusal, ordered the office copies to be furnished on the usual terms. *Ex parte Sybrandt, in re Nevins*, 14

PROOF OF DEBT—Two traders, partners, assigned the partnership property to trustees for the benefit of their creditors, after full payment to whom, the trustees were to hold the residue, upon trust to divide the same between the partners according to the deed of partnership. The partners had previously given their joint and several promissory note to their bankers for 1,500*l.* The bankers, by their public officer, executed the assignment for 2,755*l.*, which included the 1,500*l.* One of the partners afterwards became bankrupt. A suit was instituted in the Court of Chancery to carry into effect the trusts of the deed of assignment, and a decree for that purpose was pronounced. The bankers were admitted, under the bankruptcy, to prove against

the separate estate of the bankrupt for the 1,500*l.* due on the promissory note; and the same was affirmed, on appeal. The technical rule against double proof does not apply where, as here, the partnership estate is not being administered in bankruptcy. *Ex parte Thornton, in re Jobson*, 4

PUBLIC POLICY. See Certificate.

TRADER-DEBTOR SUMMONS—A creditor, after assigning his debt, filed an affidavit of such debt (under 12 & 13 Vict. c. 106. s. 18), and caused the alleged debtor to be served with a demand of immediate payment, and summoned him before the Court of Bankruptcy to state whether or not he admitted the demand of the creditor. The registrar (before whom the summons was heard) declined to enter into the question whether the debt had been assigned, and requiring the alleged debtor to state whether he admitted the debt or any part thereof, the debtor filed an admission as to part of the debt and a deposition that he had a good answer to the residue of the creditor's demand. Upon appeal, it was held, the creditor was not justified in making an affidavit of debt after assignment without the concurrence of the assignor, and that the alleged debtor was entitled to have his admission and deposition taken off the file. *Sem-ble*—that a proceeding by summons of a trader-debtor, if taken by the assignor and assignee of a debt jointly, would not be objectionable. *In re Taylor*, 9

— See Arrangement.

WINDING-UP ACT—A. B, the assignee of a debt from a joint-stock company to an amount under 50*l.*, upon which judgment had been obtained and execution issued, petitioned in his own name, and as attorney of the original creditor, for a winding-up order under the Joint-Stock Companies Acts, 1856, 1857. The Commissioner dismissed the petition as the debt was under 50*l.*, and the petition was not presented by the legal creditor; but, upon appeal, this was reversed, the Lord Chancellor considering that there having been execution, the amount of the debt was unimportant, and that the petition was regular, it being presented in the name of the original creditor. *Re the London and Birmingham Flint Glass and Alkali Co.*, 17

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